

**This volume was donated to LLMC
to enrich its on-line offerings and
for purposes of long-term preservation by**

Northwestern University School of Law

National Reporter System—United States Series

THE
FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 208
PERMANENT EDITION

CASES ARGUED AND DETERMINED IN THE
CIRCUIT COURTS OF APPEALS, DISTRICT
COURTS, AND COMMERCE COURT
OF THE UNITED STATES

DECEMBER, 1913—JANUARY, 1914

ST. PAUL
WEST PUBLISHING CO.

1914

COPYRIGHT, 1913
BY
WEST PUBLISHING COMPANY

COPYRIGHT, 1914
BY
WEST PUBLISHING COMPANY

(208 Fed.)

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS THE DISTRICT COURTS, AND THE COMMERCE COURT

FIRST CIRCUIT

Hon. OLIVER WENDELL HOLMES, Circuit Justice..... Washington, D. C.
Hon. WILLIAM L. PUTNAM, Circuit Judge..... Portland, Me.
Hon. FREDERIC DODGE, Circuit Judge..... Boston, Mass.
Hon. GEO. H. BINGHAM, Circuit Judge..... Concord, N. H.
Hon. CLARENCE HALE, District Judge, Maine..... Portland, Me.
Hon. JAS. M. MORTON, Jr., District Judge, Massachusetts..... Boston, Mass.
Hon. EDGAR ALDRICH, District Judge, New Hampshire..... Littleton, N. H.
Hon. ARTHUR L. BROWN, District Judge, Rhode Island..... Providence, R. I.

SECOND CIRCUIT

Hon. CHARLES E. HUGHES, Circuit Justice..... Washington, D. C.
Hon. E. HENRY LACOMBE, Circuit Judge..... New York, N. Y.
Hon. ALFRED C. COXE, Circuit Judge..... New York, N. Y.
Hon. HENRY G. WARD, Circuit Judge..... New York, N. Y.
Hon. HENRY WADE ROGERS, Circuit Judge..... New Haven, Conn.
Hon. EDWIN S. THOMAS, District Judge, Connecticut..... New Haven, Conn.
Hon. THOMAS I. CHATFIELD, District Judge, E. D. New York..... Brooklyn, N. Y.
Hon. VAN VECHTEN VEEDER, District Judge, E. D. New York..... Brooklyn, N. Y.
Hon. GEORGE W. RAY, District Judge, N. D. New York..... Norwich, N. Y.
Hon. GEORGE C. HOLT, District Judge, S. D. New York²..... New York, N. Y.
Hon. CHARLES M. HOUGH, District Judge, S. D. New York..... New York, N. Y.
Hon. LEARNED HAND, District Judge, S. D. New York..... New York, N. Y.
Hon. JULIUS M. MAYER, District Judge, S. D. New York..... New York, N. Y.
Hon. JOHN R. HAZEL, District Judge, W. D. New York..... Buffalo, N. Y.
Hon. JAMES L. MARTIN, District Judge, Vermont..... Brattleboro, Vt.

THIRD CIRCUIT

Hon. MAHLON PITNEY, Circuit Justice..... Washington, D. C.
Hon. GEORGE GRAY, Circuit Judge..... Wilmington, Del.
Hon. JOSEPH BUFFINGTON, Circuit Judge..... Pittsburg, Pa.
Hon. JOHN B. McPHERSON, Circuit Judge..... Philadelphia, Pa.
Hon. EDWARD G. BRADFORD, District Judge, Delaware..... Wilmington, Del.
Hon. JOHN RELSTAB, District Judge, New Jersey..... Trenton, N. J.
Hon. JOSEPH CROSS, District Judge, New Jersey³..... Elizabeth, N. J.
Hon. JAMES B. HOLLAND, District Judge, E. D. Pennsylvania..... Philadelphia, Pa.
Hon. J. WHITAKER THOMPSON, District Judge, E. D. Pennsylvania..... Philadelphia, Pa.
Hon. CHAS. B. WITMER, District Judge, M. D. Pennsylvania..... Sunbury, Pa.
Hon. JAMES S. YOUNG, District Judge, W. D. Pennsylvania..... Pittsburg, Pa.
Hon. CHARLES P. ORR, District Judge, W. D. Pennsylvania..... Pittsburg, Pa.

¹ Appointed November 17, 1913.

² Resigned January 15, 1914.

³ Died October 29, 1913.

FOURTH CIRCUIT

Hon. EDWARD D. WHITE, Circuit Justice.....	Washington, D. C.
Hon. JETER C. PRITCHARD, Circuit Judge.....	Asheville, N. C.
Hon. CHAS. A. WOODS, Circuit Judge.....	Marion, S. C.
Hon. JOHN C. ROSE, District Judge, Maryland.....	Baltimore, Md.
Hon. HENRY G. CONNOR, District Judge, E. D. North Carolina.....	Wilson, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....	Greensboro, N. C.
Hon. HENRY A. MIDDLETON SMITH, District Judge, E. and W. D. S. C.....	Charleston, S. C.
Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.....	Richmond, Va.
Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....	Lynchburg, Va.
Hon. ALSTON G. DAYTON, District Judge, N. D. West Virginia.....	Philippi, W. Va.
Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia.....	Charleston, W. Va.

FIFTH CIRCUIT

Hon. JOSEPH R. LAMAR, Circuit Justice.....	Washington, D. C.
Hon. DON A. PARDEE, Circuit Judge.....	Atlanta, Ga.
Hon. A. P. McCORMICK, Circuit Judge.....	Waco, Tex.
Hon. DAVID D. SHELBY, Circuit Judge.....	Huntsville, Ala.
Hon. THOMAS G. JONES, District Judge, N. and M. D. Alabama.....	Montgomery, Ala.
Hon. WM. I. GRUBB, District Judge, N. D. Alabama.....	Birmingham, Ala.
Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama.....	Mobile, Ala.
Hon. WM. B. SHEPPARD, District Judge, N. D. Florida.....	Pensacola, Fla.
Hon. RHYDON M. CALL, District Judge, S. D. Florida.....	Jacksonville, Fla.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.....	Atlanta, Ga.
Hon. EMORY SPEER, District Judge, S. D. Georgia.....	Macon, Ga.
Hon. RUFUS E. FOSTER, District Judge, E. D. Louisiana.....	New Orleans, La.
Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.....	Shreveport, La.
Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.....	Kosciusko, Miss.
Hon. GORDON RUSSELL, District Judge, E. D. Texas.....	Sherman, Tex.
Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....	Dallas, Tex.
Hon. WALLER T. BURNS, District Judge, S. D. Texas.....	Houston, Tex.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.....	Austin, Tex.

SIXTH CIRCUIT

Hon. WILLIAM R. DAY, Circuit Justice.....	Washington, D. C.
Hon. JOHN W. WARRINGTON, Circuit Judge.....	Cincinnati, Ohio.
Hon. LOYAL E. KNAPPEN, Circuit Judge.....	Grand Rapids, Mich.
Hon. ARTHUR C. DENISON, Circuit Judge.....	Grand Rapids, Mich.
Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....	Maysville, Ky.
Hon. WALTER EVANS, District Judge, W. D. Kentucky.....	Louisville, Ky.
Hon. ARTHUR J. TUTTLE, District Judge, E. D. Michigan.....	Detroit, Mich.
Hon. CLARENCE W. SESSIONS, District Judge, W. D. Michigan.....	Muskegon, Mich.
Hon. JOHN M. KILLITS, District Judge, N. D. Ohio.....	Toledo, Ohio.
Hon. WM. L. DAY, District Judge, N. D. Ohio.....	Cleveland, Ohio.
Hon. HOWARD C. HOLLISTER, District Judge, S. D. Ohio.....	Cincinnati, Ohio.
Hon. JOHN E. SATER, District Judge, S. D. Ohio.....	Columbus, Ohio.
Hon. EDWARD T. SANFORD, District Judge, E. and M. D. Tennessee.....	Knoxville, Tenn.
Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....	Memphis, Tenn.

SEVENTH CIRCUIT

Hon. HORACE H. LURTON, Circuit Justice.....	Washington, D. C.
Hon. FRANCIS E. BAKER, Circuit Judge.....	Goshen, Ind.
Hon. WILLIAM H. SEAMAN, Circuit Judge.....	Sheboygan, Wis.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....	Chicago, Ill.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois.....	Chicago, Ill.

Hon. GEORGE A. CARPENTER, District Judge, N. D. Illinois.....	Chicago, Ill.
Hon. FRANCIS M. WRIGHT, District Judge, E. D. Illinois.....	Urbana, Ill.
Hon. J. OTIS HUMPRHEY, District Judge, S. D. Illinois.....	Springfield, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana.....	Indianapolis, Ind.
Hon. FERDINAND A. GEIGER, District Judge, E. D. Wisconsin	Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin	Madison, Wis.

EIGHTH CIRCUIT

Hon. WILLIS VAN DEVANTER, Circuit Justice.....	Washington, D. C.
Hon. WALTER H. SANBORN, Circuit Judge.....	St. Paul, Minn.
Hon. WILLIAM C. HOOK, Circuit Judge.....	Leavenworth, Kan.
Hon. ELMER B. ADAMS, Circuit Judge.....	St. Louis, Mo.
Hon. WALTER I. SMITH, Circuit Judge.....	Council Bluffs, Iowa.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....	Little Rock, Ark.
Hon. F. A. YOUMANS, District Judge, W. D. Arkansas.....	Ft. Smith, Ark.
Hon. ROBERT E. LEWIS, District Judge, Colorado.....	Denver, Colo.
Hon. HENRY THOMAS REED, District Judge, N. D. Iowa.....	Cresco, Iowa.
Hon. SMITH McPHERSON, District Judge, S. D. Iowa.....	Red Oak, Iowa.
Hon. JOHN C. POLLOCK, District Judge, Kansas.....	Kansas City, Kan.
Hon. CHAS. A. WILLARD, District Judge, Minnesota.....	Minneapolis, Minn.
Hon. PAGE MORRIS, District Judge, Minnesota.....	Duluth, Minn.
Hon. DAVID P. DYER, District Judge, E. D. Missouri.....	St. Louis, Mo.
Hon. ARBA S. VAN VALKENBURGH, District Judge, W. D. Missouri.....	Kansas City, Mo.
Hon. W. H. MUNGER, District Judge, Nebraska.....	Omaha, Neb.
Hon. THOMAS C. MUNGER, District Judge, Nebraska.....	Lincoln, Neb.
Hon. WM. H. POPE, District Judge, New Mexico.....	Santa Fé, N. M.
Hon. CHARLES F. AMIDON, District Judge, North Dakota.....	Fargo, N. D.
Hon. RALPH E. CAMPBELL, District Judge, E. D. Oklahoma.....	Muskogee, Okl.
Hon. JOHN H. COTTERAL, District Judge, W. D. Oklahoma.....	Guthrie, Okl.
Hon. JAMES D. ELLIOTT, District Judge, South Dakota.....	Sioux Falls, S. D.
Hon. JOHN A. MARSHALL, District Judge, Utah.....	Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....	Cheyenne, Wyo.

NINTH CIRCUIT

Hon. JOSEPH McKENNA, Circuit Justice.....	Washington, D. C.
Hon. WILLIAM B. GILBERT, Circuit Judge.....	Portland, Or.
Hon. ERSKINE M. ROSS, Circuit Judge.....	Los Angeles, Cal.
Hon. WM. W. MORROW, Circuit Judge.....	San Francisco, Cal.
Hon. WM. H. SAWTELLE, District Judge, Arizona.....	Tucson, Ariz.
Hon. OLIN WELLBORN, District Judge, S. D. California.....	Los Angeles, Cal.
Hon. WM. C. VAN FLEET, District Judge, N. D. California.....	San Francisco, Cal.
Hon. MAURICE T. DOOLING, District Judge, N. D. California.....	San Francisco, Cal.
Hon. FRANK S. DIETRICH, District Judge, Idaho.....	Boise, Idaho.
Hon. GEO. M. BOURQUIN, District Judge, Montana.....	Butte, Mont.
Hon. EDWARD S. FARRINGTON, District Judge, Nevada.....	Carson City, Nev.
Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....	Portland, Or.
Hon. ROBERT S. BEAN, District Judge, Oregon.....	Portland, Or.
Hon. FRANK H. RUDKIN, District Judge, E. D. Washington.....	Spokane, Wash.
Hon. EDWARD E. CUSHMAN, District Judge, W. D. Washington.....	Seattle, Wash.
Hon. JEREMIAH NETERER, District Judge, W. D. Washington.....	Seattle, Wash.

COMMERCE COURT

Hon. MARTIN A. KNAPP, Presiding Judge.....	Washington, D. C.
Hon. WILLIAM H. HUNT, Associate Judge.....	Washington, D. C.
Hon. JOHN E. CARLAND, Associate Judge.....	Washington, D. C.
Hon. JULIAN W. MACK, Associate Judge.....	Washington, D. C.

CASES REPORTED

	Page		Page
Acme Harvesting Co. v. Atkinson (C. C. A.)	244	Brown & Sharpe Mfg. Co., L. S. Starrett	
Adamson v. Shaler (D. C.)	556	Co. v. (C. C. A.)	887
A. D. Baker Co., Miller v. (D. C.)	190	Buck v. Felder (D. C.)	474
A. G. Lehman Co. v. Island City Pickle Co.		Buck, Keflogg Toasted Corn Flake Co. v.	
(D. C.)	1014	(D. C.)	383
Allen & Wheeler Co., Hanover Star Mill.		Butler & Co., Isaac McLean Sons Co. v.	
Co. v. (C. C. A.)	513	(D. C.)	730
Alsen's American Portland Cement Works,		Butterworth v. Degnon Const. Co. (D. C.)	381
Edison v. (D. C.)	20		
Amalgamated Ass'n of Iron, Steel & Tin		Cady v. Barnes (D. C.)	359
Workers, Phillips Sheet & Tin Plate Co.		Cady v. Barnes (D. C.)	361
v. (D. C.)	335	Cabill, In re (D. C.)	193
Ambursen Hydraulic Const. Co. v. Hy-		Carbon Coal & Coke Co., Pennsylvania R.	
draulic Properties Co. (D. C.)	27	Co. v. (C. C. A.)	145
American Rotary Valve Co., Vacuum Clean-		Carstens Packing Co. v. Godo (C. C. A.)	8
er Co. v. (D. C.)	419	Cary Brick Co. v. Tilton (C. C. A.)	497
American Tobacco Co., Springer v. (D. C.)	199	Caswell-Massey Co., In re (D. C.)	571
American Trading Co., Hansen v. (C. C. A.)	884	Central Park, N. & E. R. R. Co., In re	
Anderson v. J. O. & N. B. Chenault (C.		(D. C.)	777
C. A.)	400	Certain Lands, United States v. (D. C.)	429
Anderson v. Messenger (D. C.)	75	Chenault, Anderson v. (C. C. A.)	400
Appostolis, Duckworth v. (D. C.)	936	Chicago Title & Trust Co. v. National Hol-	
Arbeter Felling Mach. Co., Lewis Blind-		low Brake Beam Co. (D. C.)	486
stitch Mach. Co. v. (D. C.)	992	Cincinnati, N. O. & T. P. Ry., Patton v.	
Arnold, Schwinn & Co., Pope Mfg. Co. v.		(D. C.)	29
(C. C. A.)	406	City of Des Moines v. Barber Asphalt Co.	
Associated Merchants' Stamp Co., Sperry		(D. C.)	828
& Hutchinson Co. v. (D. C.)	205	City of Harrisburg, New York Continental	
Atkinson, Acme Harvesting Co. v. (C. C.		Jewell Filtration Co. v. (D. C.)	10
A.)	244	City of Pittsburgh v. South Side Trust Co.	
Atlantic Coast Line R. Co. v. Reaves (C. C.		(C. C. A.)	984
A.)	141	City of Tacoma, Salander v. (D. C.)	427
Avalon, The (D. C.)	654	Clutts, Big Hill Coal Co. v. (C. C. A.)	524
		Coal & Coke By-Products Co., Roessing-	
Babin Chevaye, The (C. C. A.)	966	Ernst Co. v. (C. C. A.)	990
Baker Co., Miller v. (D. C.)	190	Cobban v. Conklin (C. C. A.)	231
Baltimore & O. R. Co., Hagar v. (D. C.)	167	Columbia Contract Co., Shaver Transp. Co.	
Baltimore & O. R. Co., Mason v. (D. C.)	167	v. (D. C.)	347
Barber Asphalt Co., City of Des Moines v.		Computing Scale Co., Toledo Computing	
(D. C.)	828	Scale Co. v. (C. C. A.)	410
Barkley v. Hayes (D. C.)	319	Conklin, Cobban v. (C. C. A.)	231
Barnes, Cady v. (D. C.)	359	Continental & Commercial Trust & Savings	
Barnes, Cady v. (D. C.)	361	Bank v. Corey Bros. Const. Co. (C. C.	
Barnett v. Beggs (C. C. A.)	255	A.)	976
Becharias v. United States (C. C. A.)	143	Corey Bros. Const. Co., Continental & Com-	
Beggs, Barnett v. (C. C. A.)	255	mercial Trust & Savings Bank v. (C. C.	
Beiermeister Bros. Co., In re (D. C.)	945	A.)	976
B. F. Sturtevant Co., Sirocco Engineering		Corrigan, Young v. (D. C.)	431
Co. v. (D. C.)	147	Cory v. Lake Shore & M. S. R. Co. (D. C.)	847
Big Hill Coal Co. v. Clutts (C. C. A.)	524	Coxe v. Peck-Williamson Heating & Venti-	
Blake v. Moyer (C. C. A.)	678	lating Co. (C. C. A.)	409
Bliss, Muentzer v. (C. C. A.)	140	Curtis v. Phelps (D. C.)	577
Boise Artesian Hot & Cold Water Co.,		C. W. Hull Co. v. Marquette Cement Mfg.	
Boise, City, Idaho, v. (C. C. A.)	546	Co. (C. C. A.)	260
Boise City, Idaho, v. Boise Artesian Hot &			
Cold Water Co. (C. C. A.)	546	Dain Mfg. Co. of Iowa, Superior Hay	
Brandt v. Day (D. C.)	495	Stacker Mfg. Co. v. (C. C. A.)	549
Breinholm, United States v. (D. C.)	492	Daniel Green Felt Shoe Co. v. Dolgeville	
Bressi, United States v. (D. C.)	369	Felt Shoe Co. (D. C.)	289

	Page		Page
Davey v. United States (C. C. A.).....	237	Grand Manan, The, four cases (D. C.)...	583
Day, Brandt v. (D. C.).....	495	Grand Trunk Western R. Co. v. Gilpin (C. C. A.).....	126
Deans, In re (D. C.).....	1018	Granger & Lewis v. Stewart & Co. (C. C. A.).....	410
Defender, The (D. C.).....	836	Gray, In re (D. C.).....	959
Degnon Const. Co., Butterworth v. (D. C.)	381	Grays Harbor & P. S. R. Co., Northwest- ern Lumber Co. v. (D. C.).....	624
Detroit, M. & T. S. L. R. Co. v. Ely (C. C. A.).....	873	Great Lakes Towing Co., United States v. (D. C.).....	733
D. Levy & Sons Co., In re (D. C.).....	479	Great Northern R. Co., Taggart v. (D. C.)	455
Dolgeville Felt Shoe Co., Daniel Green Felt Shoe Co. v. (D. C.).....	289	Green Felt Shoe Co. v. Dolgeville Felt Shoe Co. (D. C.).....	289
Donaldson v. United States (C. C. A.)....	4	Greenleaf-Johnson Lumber Co. v. Garrison (D. C.).....	1022
Dower, Roberts, Johnson & Rand Shoe Co. v. (C. C. A.).....	270	Griffin v. Morgan (D. C.).....	660
Duckworth v. Appostolis (D. C.).....	936	Guaranty Trust Co. of New York v. Metro- politan St. R. Co. (D. C.).....	168
Duff, Rhode v. (C. C. A.).....	115		
Du Perow, United States v. (D. C.).....	895	Hagar v. Baltimore & O. R. Co. (D. C.)..	167
		Hall & Sons, In re (D. C.).....	578
Eastfield S. S. Co. v. McKeon (D. C.).....	580	Halligan v. Marcell (C. C. A.).....	403
E. A. Whitehouse Mfg. Co., Rose Mfg. Co. v. (C. C. A.).....	564	Hanover Star Mill, Co. v. Allen & Wheeler Co. (C. C. A.).....	513
Eclair Film Co., Motion Picture Patents Co. v. (D. C.).....	416	Hansen v. American Trading Co. (C. C. A.)	884
Edison v. Alsen's American Portland Cem- ent Works (D. C.).....	20	Hatch, Gaumont Co. v. (D. C.).....	378
Electron Chemical Co., In re (D. C.).....	954	Hayes, Barkley v. (D. C.).....	319
Ely, Detroit, M. & T. S. L. R. Co. v. (C. C. A.).....	873	H. A. & L. D. Holland Co. v. Northern Pac. R. Co. (D. C.).....	598
		Hendricks, Mottinger v. (D. C.).....	824
Falls City Const. Co. v. Monroe County (D. C.).....	482	Herron Co. v. Moore (C. C. A.).....	134
Farmers' Loan & Trust Co. v. Metropolitan St. R. Co., two cases (D. C.).....	168	Hershberger, In re (D. C.).....	94
Favorite Mfg. Co. v. Portland Mfg. Co. (C. C. A.).....	542	Hickman, Town of Fletcher v. (C. C. A.)..	118
Fearless, The (D. C.).....	836	Hildreth v. Lauer & Suter Co. (D. C.)....	1005
Felder, Buck v. (D. C.).....	474	Hoffman, Pacific Telephone & Telegraph Co. v. (C. C. A.).....	221
First Nat. Bank v. United States (C. C. A.).....	988	Holcomb Co., 20th Century Motor Car & Supply Co. v. (D. C.).....	155
Forrest City Box Co. v. Sims (C. C. A.)..	109	Holland Co. v. Northern Pac. R. Co. (D. C.)	598
Fred E. Sander, The (D. C.).....	724	Hull Co. v. Marquette Cement Mfg. Co. (C. C. A.).....	260
F. W. Hall & Sons, In re (D. C.).....	578	Hydraulic Properties Co., Ambursen Hy- draulic Const. Co., v. (D. C.).....	27
Garrison, Greenleaf-Johnson Lumber Co. v. (D. C.).....	1022	Illinois Cent. R. Co., Law v. (C. C. A.)....	869
Gates, Town of Aurora v. (C. C. A.).....	101	Isaac McLean Sons Co. v. William S. But- ler & Co. (D. C.).....	730
Gaumont Co. v. Hatch (D. C.).....	378	Island City Pickle Co., A. G. Lehman Co. v. (D. C.).....	1014
General Electric Co. v. Steinberger (D. C.)	699		
General Electric Co. v. Yost Electric Mfg. Co. (D. C.).....	719	Jarvis v. Johnson (D. C.).....	353
Georgia, The (D. C.).....	635	Jersey City, Leary v. (C. C. A.).....	854
Georgia Cotton Oil Co., M. C. Kiser Co. v. (C. C. A.).....	548	Johnson, In re (D. C.).....	164
Gibson v. United States (C. C. A.).....	534	Johnson, Jarvis v. (D. C.).....	353
Gilbreth, Medical Soc. of South Carolina v. (D. C.).....	899	Johnston v. Southern Well Works Co. (C. C. A.).....	145
Gilchrist Co., In re (D. C.).....	730	Jordan Marsh Co., Milton Chemical Co. v. (D. C.).....	569
Gilmore & P. R. Co. v. United States Fidelity & Guaranty Co. (C. C. A.).....	277	J. O. & N. B. Chenault, Anderson v. (C. C. A.).....	400
Gilpin, Grand Trunk Western R. Co. v. (C. C. A.).....	126		
Ginsburg, In re (D. C.).....	160	Kellogg Toasted Corn Flake Co. v. Buck (D. C.).....	383
Glinn, Pittsburgh, C., C. & St. L. R. Co. v. (C. C. A.).....	989	Kendrick, Ridgeway v. (C. C. A.).....	849
Godo, Carstens Packing Co. v. (C. C. A.)..	8	Kettenbach, United States v., three cases (C. C. A.).....	209
Goldberger, Goldman v. (C. C. A.).....	877	Kidwell v. Oregon Short Line R. Co. (C. C. A.).....	1
Golden Rod, The (C. C. A.).....	24	Kiser Co. v. Georgia Cotton Oil Co. (C. C. A.).....	548
Goldman v. Goldberger (C. C. A.).....	877		
Goughnour, Pennsylvania R. Co. v. (C. C. A.).....	961		

	Page		Page
Knosco, In re (D. C.).....	201	Monash Younker Co. v. National Steam	
Kronberg, In re (D. C.).....	203	Specialty Co. (C. C. A.).....	559
La Crosse Plow Co., Van Brunt v. (D. C.)	281	Monroe County, Falls City Const. Co. v.	
Lake Shore & M. S. R. Co., Cory v. (D. C.)	847	(D. C.).....	482
Lamson Co., In re (D. C.).....	573	Moore, R. H. Herron Co. v. (C. C. A.)....	134
Lamson Consol. Store Service Co., In re		Morgan, Griffin v. (D. C.).....	660
(D. C.).....	571	Motion Picture Patents Co. v. Eclair Film	
Lauer & Suter Co., Hildreth v. (D. C.)....	1005	Co. (D. C.).....	416
Law v. Illinois Cent. R. Co. (C. C. A.)....	869	Mottinger v. Hendricks (D. C.).....	824
Lawrence & Son v. P. E. Sharpless Co.		Mounday, United States v. (D. C.).....	186
(C. C. A.).....	886	Moyer, Blake v. (C. C. A.).....	678
Leary v. Jersey City (C. C. A.).....	854	Muentner v. Bliss (C. C. A.).....	140
Lee You Wing, United States v. (D. C.)..	166	Myers, In re (C. C. A.).....	407
Lehman Co. v. Island City Pickle Co. (D.			
C.).....	1014	National Bank of Athens v. Shackelford	
Leigh, In re (D. C.).....	486	(C. C. A.).....	677
Lemen, In re (D. C.).....	80	National Electric Signaling Co. v. Tele-	
Levy & Sons Co., In re (D. C.).....	479	funkun Wireless Tel. Co. of United States	
Lewis Blind-Stitch Mach. Co. v. Arbetter		(C. C. A.).....	679
Felling Mach. Co. (D. C.).....	992	National Hollow Brake Beam Co., Chicago	
Light v. Toledo, St. L. & W. R. Co. (D.		Title & Trust Co. v. (D. C.).....	486
C.).....	158	National Steam Specialty Co., Monash	
Little v. Tanner (D. C.).....	605	Younker Co. v. (C. C. A.).....	559
Louisville & N. R. Co. v. Railroad Com-		New York City R. Co., Pennsylvania Steel	
mission of Alabama (D. C.).....	35	Co. v. (D. C.).....	168
Louisville & N. R. Co., Western Union Tel.		New York City R. Co., Pennsylvania Steel	
Co. v. (D. C.).....	581	Co. v. (D. C.).....	747
L. S. Starrett Co. v. Brown & Sharpe Mfg.		New York City R. Co., Pennsylvania Steel	
Co. (C. C. A.).....	887	Co. v. (D. C.).....	757
Lucille, The (D. C.).....	424	New York City R. Co., Pennsylvania Steel	
		Co. v. (D. C.).....	777
		New York Continental Jewell Filtration	
McClelland v. Rose (C. C. A.).....	503	Co. v. Harrisburg (D. C.).....	10
McCreery Engineering Co. v. Massachu-		New York Life Insurance & Trust Co.,	
setts Fan Co. (D. C.).....	894	Pottstown Hospital v. (D. C.).....	196
McKeon, Eastfield S. S. Co. v. (D. C.)....	580	Nichols-Chisolm Lumber Co. v. United	
McLean Sons Co. v. William S. Butler &		States (C. C. A.).....	988
Co. (D. C.).....	730	Nooney v. Pacific Exp. Co. (C. C. A.)....	274
McNally Co., In re (D. C.).....	291	Northern Pac. R. Co., H. A. & L. D. Hol-	
Marcell, Halligan v. (C. C. A.).....	403	land Co. v. (D. C.).....	598
Marquette Cement Mfg. Co., C. W. Hull		Northern Pac. R. Co. v. Mitchell (D. C.)..	469
Co. v. (C. C. A.).....	260	Northwestern Lumber Co. v. Grays Harbor	
Mason v. Baltimore & O. R. Co. (D. C.)..	167	& P. S. R. Co. (D. C.).....	624
Massachusetts Fan Co., McCreery Engi-		Nunemaker, In re (D. C.).....	491
neering Co. v. (D. C.).....	894		
Mayes v. Palmer (C. C. A.).....	97	Oregon Short Line R. Co., Kidwell v. (C.	
M. C. Kiser Co. v. Georgia Cotton Oil Co.		C. A.).....	1
(C. C. A.).....	548	Oregon-Washington R. & Nav. Co., Palmer	
Medical Soc. of South Carolina v. Gil-		v. (D. C.).....	666
breth (D. C.).....	899	Ottewess & Huxoll, In re (C. C. A.).....	881
Merwin & Willoughby Co., In re (D. C.)	293		
Messenger, Anderson v. (D. C.).....	75	Pacific Exp. Co., Nooney v. (C. C. A.)....	274
Metropolitan Exp. Co., In re (D. C.).....	747	Pacific Telephone & Telegraph Co. v. Hoff-	
Metropolitan St. R. Co., Farmers' Loan &		man (C. C. A.).....	221
Trust Co. v., two cases (D. C.).....	168	Palmer, Mayes v. (C. C. A.).....	97
Metropolitan St. R. Co., Guaranty Trust		Palmer v. Oregon-Washington R. & Nav.	
Co. of New York v. (D. C.).....	168	Co. (D. C.).....	666
Miller v. A. D. Baker Co. (D. C.).....	190	Patton v. Cincinnati, N. O. & T. P. Ry.	
Miller Bros. Grocery Co., In re (D. C.)....	573	(D. C.).....	29
Milton Chemical Co. v. Jordan Marsh Co.		Peck-Williamson Heating & Ventilating	
(D. C.).....	569	Co., Cox v. (C. C. A.).....	409
Minneapolis, St. P., R. & D. Electric Traction		Pennsylvania R. Co. v. Carbon Coal & Coke	
Co. v. Searle (C. C. A.).....	122	Co. (C. C. A.).....	145
Missouri, K. & T. R. Co., United States v.		Pennsylvania R. Co. v. Goughnour (C. C.	
(D. C.).....	957	A.).....	961
Missouri Valley College, Synod of Kansas of		Pennsylvania R. Co., Zilbersher v. (C.	
Presbyterian Church in United States of		C. A.).....	280
America v. (D. C.).....	319	Pennsylvania Steel Co. v. New York City	
Mitchell, Northern Pac. R. Co. v. (D. C.)..	469	R. Co. (D. C.).....	168

	Page		Page
Pennsylvania Steel Co. v. New York City R. Co. (D. C.)	747	Shaler, Adamson v. (D. C.)	566
Pennsylvania Steel Co. v. New York City R. Co. (D. C.)	757	Sharp, T. E. Wells & Co. v. (C. C. A.)	393
Pennsylvania Steel Co. v. New York City R. Co. (D. C.)	777	Sharp, T. E. Wells & Co. v. (C. C. A.)	399
P. E. Sharpless Co. v. William A. Lawrence & Son (C. C. A.)	886	Sharpless Co. v. William A. Lawrence & Son (C. C. A.)	886
Phelps, Curtis v. (D. C.)	577	Shaver Transp. Co. v. Columbia Contract Co. (D. C.)	347
Phillips Sheet & Tin Plate Co. v. Amalgamated Ass'n of Iron, Steel & Tin Workers (D. C.)	335	Silver, In re (D. C.)	797
Pike County, Pa., Spencer v. (C. C. A.)	544	Sims, Forrest City Box Co. v. (C. C. A.)	109
Pinnix, Richmond Cedar Works v. (D. C.)	785	Sirocco Engineering Co. v. B. F. Sturtevant Co. (D. C.)	147
Pittsburgh, C., C. & St. L. R. Co. v. Glinn (C. C. A.)	989	Smith v. United States (C. C. A.)	131
Plymouth Elevator Co., In re (C. C. A.)	393	Southeast & St. L. R. Co., Western Union Tel. Co. of Illinois v. (C. C. A.)	266
Plymouth Elevator Co., In re (C. C. A.)	399	Southern Pac. Co. v. Railroad Commission of Oregon (D. C.)	926
Pommer, Sperry & Hutchinson Co. v. (D. C.)	804	Southern Pac. Co. v. Ward (C. C. A.)	385
Pope Mfg. Co. v. Arnold, Schwinn & Co. (C. C. A.)	406	Southern Well Works Co., Johnston v. (C. C. A.)	145
Portland Mfg. Co., Favorite Mfg. Co. v. (C. C. A.)	542	Southern Woodland Co., Rexford v. (D. C.)	295
Pottstown Hospital v. New York Life Insurance & Trust Co. (D. C.)	196	South Side Trust Co., City of Pittsburgh v. (C. C. A.)	984
Power Launches, C. F. Co. Nos. 2, 3, & 4, The (D. C.)	654	Spencer v. Pike County, Pa. (C. C. A.)	544
Predmore, Riverside Nat. Bank v. (C. C. A.)	673	Sperry & Hutchinson Co. v. Associated Merchants' Stamp Co. (D. C.)	205
Publishers' Paper Co., Saunders v. (D. C.)	441	Sperry & Hutchinson Co. v. Pommer (D. C.)	804
		Sprague, United States v. (D. C.)	419
Railroad Commission of Alabama, Louisville & N. R. Co. v. (D. C.)	35	Springer v. American Tobacco Co. (D. C.)	199
Railroad Commission of Oregon, Southern Pac. Co. v. (D. C.)	926	Standard American Dredging Co., Richmond Dredging Co. v. (C. C. A.)	862
Reaves, Atlantic Coast Line R. Co. v. (C. C. A.)	141	Starrett Co. v. Brown & Sharpe Mfg. Co. (C. C. A.)	887
Rexford v. Southern Woodland Co. (D. C.)	295	Steinberger, General Electric Co. v. (D. C.)	699
R. H. Herron Co. v. Moore (C. C. A.)	134	Stern, In re (D. C.)	488
Rhode v. Duff (C. C. A.)	115	Stewart & Co., Granger & Lewis v. (C. C. A.)	410
Richmond Cedar Works v. Pinnix (D. C.)	785	Strauch, In re (D. C.)	842
Richmond Dredging Co. v. Standard American Dredging Co. (C. C. A.)	862	Strout v. United Shoe Machinery Co. (D. C.)	646
Ridgeway v. Kendrick (C. C. A.)	849	Sturtevant Co., Sirocco Engineering Co. v. (D. C.)	147
Rindge, United States v. (D. C.)	611	Superior Drop Forge & Mfg. Co., In re (D. C.)	813
Riverside, The (D. C.)	832	Superior Hay Stacker Mfg. Co. v. Dain Mfg. Co. of Iowa (C. C. A.)	549
Riverside Nat. Bank v. Predmore (C. C. A.)	673	Sweet Valley Wine Co., United States v. (D. C.)	85
Roberts, Johnson & Rand Shoe Co. v. Dower (C. C. A.)	270	Synod of Kansas of Presbyterian Church in United States of America v. Missouri Valley College (D. C.)	319
Rockteschell, United States v. (C. C. A.)	530	Synnott v. Tombstone Consol. Mines Co. (C. C. A.)	251
Roessing-Ernst Co. v. Coal & Coke By-Products Co. (C. C. A.)	990		
Rose, McClelland v. (C. C. A.)	503	Taggart v. Great Northern R. Co. (D. C.)	455
Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co. (C. C. A.)	564	Talbott v. United States (C. C. A.)	144
Rouse, Petition of (C. C. A.)	881	Tanner, Little v. (D. C.)	605
		Telefunken Wireless Tel. Co. of United States, National Electric Signaling Co. v. (C. C. A.)	679
Salander v. Tacoma (D. C.)	427	Terry, In re (D. C.)	162
Salt's Textile Mfg. Co. v. Tingle Mfg. Co. (D. C.)	156	T. E. Wells & Co. v. Sharp (C. C. A.)	393
Sander, The Fred E. (D. C.)	724	T. E. Wells & Co. v. Sharp (C. C. A.)	399
Saunders v. Publishers' Paper Co. (D. C.)	441	Thirteen Crates of Frozen Eggs, United States v. (D. C.)	950
Schuykill-Heim Brewing Co., In re (D. C.)	70	Thomas McNally Co., In re (D. C.)	291
Searle, Minneapolis, St. P., R. & D. Electric Traction Co. v. (C. C. A.)	122	Thompson, In re (D. C.)	207
Second Ave. R. Co., In re (D. C.)	757	Ticeline, The (D. C.)	670
Selman Heating & Plumbing Co., In re (C. C. A.)	409	Tilton, Cary Brick Co. v. (C. C. A.)	497
Shackelford, National Bank of Athens v. (C. C. A.)	677	Tingle Mfg. Co., Salt's Textile Mfg. Co. v. (D. C.)	156

	Page		Page
Toledo Computing Scale Co. v. Computing Scale Co. (C. C. A.).....	410	United States v. Thirteen Crates of Frozen Eggs (D. C.).....	950
Toledo, St. L. & W. R. Co., Light v. (D. C.)	158	United States v. Twenty Chests of Tea (D. C.)	89
Tombstone Consol. Mines Co., Synnot v. (C. C. A.).....	251	United States v. Utah Power & Light Co. (D. C.).....	821
Toscano, Ex parte (D. C.).....	938	United States, Willingham v. (C. C. A.)....	137
Town of Aurora v. Gates (C. C. A.).....	101	United States Fidelity & Guaranty Co., Gilmore & P. R. Co. v. (C. C. A.).....	277
Town of Aurora v. Wilder (C. C. A.).....	101	Utah Power & Light Co., United States v. (D. C.)	821
Town of Fletcher v. Hickman (C. C. A.)....	118	Vacuum Cleaner Co. v. American Rotary Valve Co. (D. C.).....	419
Transfer No. 12. The (D. C.).....	670	Van Brunt v. La Crosse Plow Co. (D. C.)	281
20th Century Motor Car & Supply Co. v. Holcomb Co. (D. C.).....	155	Walters v. Zimmerman (D. C.).....	62
Twenty Chests of Tea, United States v. (D. C.)	89	Ward, Southern Pac. Co. v. (C. C. A.)....	385
Ulmer, In re (D. C.).....	461	Wells & Co. v. Sharp (C. C. A.).....	393
United Shoe Machinery Co., Strout v. (D. C.).....	646	Wells & Co. v. Sharp (C. C. A.).....	399
United States, Becharias v. (C. C. A.).....	143	West Lumber Co., Wilkes-Barre Light Co. v. (C. C. A.).....	539
United States v. Breinholm (D. C.).....	492	Western Union Tel. Co. v. Louisville & N. R. Co. (D. C.).....	581
United States v. Bressi (D. C.).....	369	Western Union Tel. Co. of Illinois v. Southeast & St. L. R. Co. (C. C. A.).....	266
United States v. Certain Lands (D. C.)....	429	Whitehouse Mfg. Co., Rose Mfg. Co. v. (C. C. A.)	564
United States, Davey v. (C. C. A.).....	237	Wilder, Town of Aurora v. (C. C. A.)....	101
United States, Donaldson v. (C. C. A.)....	4	Wilkes-Barre Light Co., In re (C. C. A.)..	539
United States v. Du Perow (D. C.).....	895	Wilkes-Barre Light Co. v. West Lumber Co. (C. C. A.).....	539
United States, First Nat. Bank v. (C. C. A.)	988	William A. Lawrence & Son v. P. E. Sharpless Co. (C. C. A.).....	886
United States, Gibson v. (C. C. A.).....	534	William S. Butler & Co., Isaac McLean Sons Co. v. (D. C.).....	730
United States v. Great Lakes Towing Co. (D. C.).....	733	Willingham v. United States (C. C. A.)..	137
United States v. Kettenbach, three cases (C. C. A.).....	209	Yost Electric Mfg. Co., General Electric Co. v. (D. C.).....	719
United States v. Lee You Wing (D. C.)....	166	Young, In re (D. C.).....	373
United States v. Missouri, K. & T. R. Co. (D. C.).....	957	Young v. Corrigan (D. C.).....	431
United States v. Mounday (D. C.).....	186	Zilbersher v. Pennsylvania R. Co. (C. C. A.)	280
United States v. Nichols-Chisolm Lumber Co. (C. C. A.).....	988	Zimmerman, Walters v. (D. C.).....	62
United States v. Rindge (D. C.).....	611		
United States v. Rockteschell (C. C. A.)..	530		
United States, Smith v. (C. C. A.).....	131		
United States v. Sprague (D. C.).....	419		
United States v. Sweet Valley Wine Co. (D. C.)	85		
United States, Talbott v. (C. C. A.).....	144		

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS THE DISTRICT COURTS, AND THE COMMERCE COURT

KIDWELL v. OREGON SHORT LINE R. CO.

(Circuit Court of Appeals, Ninth Circuit. October 26, 1913.)

No. 2,247.

1. CARRIERS (§ 218*)—TRANSPORTATION OF LIVE STOCK—INJURIES—NOTICE AT DESTINATION.

A provision in a contract for the transportation of live stock, declaring that claims for loss or damage thereto must be presented within 10 days from the date of unloading the stock at destination and before it has been mingled with other stock, was not complied with by a remark of the owner to a freight agent of the carrier along the route or at destination that he was going to put in a claim for damages, since to impart information that a claim will be presented is not to present a claim for loss, damage, or detention.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.*]

2. CARRIERS (§ 218*)—TRANSPORTATION OF LIVE STOCK—CLAIM FOR DAMAGES—NOTICE—TIME—STIPULATION—VALIDITY.

A stipulation in a live stock transportation contract, requiring notice of a claim for damages within 10 days from the date of unloading the stock at destination and before it has been mingled with other stock, is reasonable and valid, and a failure to comply therewith is a complete defense to an action for injuries to the stock.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. § 218.*]

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Action by James G. Kidwell against the Oregon Short Line Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff in error brings under review a judgment of nonsuit rendered against him in an action which he brought against the defendant in error to recover damages for injury to cattle. The parties will be designated plaintiff and defendant as in the court below. The complaint alleged in substance that the defendant, a common carrier operating a line of railroad from Huntington, Or., to American Falls, Idaho, and the Union Pacific Railroad Company, a carrier operating a railroad from Granger, Wyo., to Omaha,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
208 F.—1

Neb., form a connecting line of railroad between Huntington and Omaha; that on December 4th the defendant received of the plaintiff at Huntington 398 head of fat cattle, in good condition and of average weight, for transportation over said railroads to South Omaha, through such intermediate point upon said railroads as the plaintiff might thereafter designate, the stock to be consigned to the plaintiff at such point so designated; that the cattle were received under regular tariffs and were billed to the plaintiff as consignee at Minidoka, Idaho, on the line of defendant's railroad, it being the plaintiff's intention, as defendant knew, to continue the transportation from Minidoka to South Omaha, and that thence the goods were carried over the Union Pacific Railroad from American Falls to South Omaha; that both said railroad companies failed and neglected to perform their duties as such common carriers; that on divers occasions, while the cattle were in transit, they were allowed to remain in the cars for longer periods than 28 consecutive hours without unloading or permitting them to be unloaded or to receive rest, water, or food and were allowed to remain for unreasonably long periods of time upon side tracks; that the cattle were so carelessly, negligently, and roughly handled that they were thrown down, bruised, and maimed; and that their transportation was unreasonably delayed. And the complaint alleged that the loss in weight of said cattle was 72 pounds each more than they would have sustained if they had been properly handled and alleged damages in the sum of \$4,627. The answer, after denying the allegations of negligence, alleged that, after the cattle had been carried to Minidoka, the plaintiff refused to unload the same at that point, and that at his request they were transported to American Falls, at which place they were unloaded for feed, water, and rest, and 96 hours later the plaintiff reloaded the same and shipped them to South Omaha. The answer further alleged that, in consideration of a reduced freight rate, the plaintiff signed a live stock contract limiting the defendant's liability for injury to the stock from any cause not directly the result of gross negligence on the part of the carriers, their agents and servants, and that one of the provisions of the contract of shipment was that unless claim for loss, damage, or detention were presented "within ten days from the date of unloading of stock at destination, and before the said stock has been mingled with other stock, such claim shall be deemed to be waived and the carriers and each thereof shall be discharged from liability." And the answer alleged that the notice was not given.

The plaintiff's reply alleged that the live stock contract was void for the reason that it was in violation of section 7 of the act of Congress known as the Hepburn Act, passed June 29, 1906 (Act June 29, 1906, c. 3591, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]). At the close of the plaintiff's case, the defendant moved for a nonsuit on various grounds, one of which was that there was no evidence tending to show that the stock was injured through the defendant's negligence. Another was that there was failure of proof that the plaintiff gave notice to the defendant of his claim for damages within ten days after the unloading of the stock at destination, and before the stock had been intermingled with other stock, as required by the contract of shipment. On the ground last mentioned, the court granted the motion and entered a judgment of nonsuit.

Sharpstein & Sharpstein, of Walla Walla, Wash., and King & Saxton, of Portland, Or., for plaintiff in error.

P. L. Williams, of Salt Lake City, Utah, and W. W. Cotton, A. C. Spencer, and W. A. Robbins, all of Portland, Or., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The contract provided that unless "claims for loss, damage, or detention are presented within ten days from the date of the unloading

of said stock at destination, and before said stock have been mingled with other stock, such claim shall be deemed to be waived, and the carriers and each thereof shall be discharged from liability." The evidence as to the plaintiff's compliance with this provision is that at Shoshone he told the agent there that he was going to put in a claim for side-tracking the cattle and "handling them bad" from Huntington on; that when he got to American Falls he told the local agent there would be a claim against the company for damages sustained and injury to the cattle; that when he got to Laramie City he told the agent there that there would be a claim for damages on the Short Line, and possibly some of it on the Union Pacific going to South Omaha; and that after the cattle were sold at South Omaha he talked with the agent there and told him the same thing, and that the agent advised him to put in the claim at Portland. The claim was put in at Portland, but it was after the expiration of ten days from the unloading of the stock at destination and after the stock had been mingled with other stock.

If, on arrival of live stock at destination, the shipper who, as in this case, accompanies them finds that they have been injured by the negligence of the carrier, it is a reasonable provision of the shipping contract that he give notice to the carrier of the extent, nature, and amount of his claim for damages, and that this shall be done before the stock are mingled with other stock in order that the carrier may have the opportunity to make timely investigation and protect itself against fictitious or imaginary claims. It is no compliance with such a provision to remark to a freight agent of the carrier along the line of the route that the shipper is going to put in a claim for damages. Nor is it a compliance to inform the agent at the place of destination that there will be a claim against the company for damages. To impart the information that a claim will be presented is not to present "a claim for loss, damage, or detention." It does not inform the carrier of the nature, extent, amount, or cause of damage. It gives no definite statement of facts upon which an investigation may be had, or which shows that an investigation is required.

[2] A stipulation that notice of a claim for damages be given before the stock is removed or intermingled with other stock, as a condition precedent to recovery, is a reasonable one, and it has been so held by the Supreme Court of the state in which the contract in this case was made. *Smith Meat Co. v. Oregon, R. & N. Co.*, 59 Or. 206, 117 Pac. 303. And such is the uniform ruling of other courts on the same question. *Clegg v. St. Louis & S. F. R. Co.* (C. C. A.) 203 Fed. 971; *Metropolitan Trust Co. v. Toledo, St. L. & K. C. R. Co.* (C. C.) 107 Fed. 628; *Parrill v. Cleveland, C., C. & St. L. Ry. Co.*, 23 Ind. App. 638, 55 N. E. 1026; *Austin v. Railroad*, 151 N. C. 137, 65 S. E. 757; *Wichita & Western Ry. v. Koch*, 47 Kan. 753, 28 Pac. 1013; *Atlantic Coast Line R. Co. v. Bryan*, 109 Va. 523, 65 S. E. 30; *Southern Ry. Co. v. Adams*, 115 Ga. 705, 42 S. E. 35; *St. Louis & S. F. R. Co. v. Ladd*, 33 Okl. 160, 124 Pac. 461. There was nothing in the circumstances, as disclosed by the record in the case at bar, to render

the requirement of the notice negligible or impracticable, as in the case of *Chicago, R. I. & P. Ry. Co. v. Spears*, 31 Okl. 469, 122 Pac. 228. Nor was there any waiver of the notice on the part of the defendant. There was no error, therefore, in granting the nonsuit.

The judgment is affirmed.

DONALDSON v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1913.)

No. 2,248.

1. WITNESSES (§ 286*)—EXAMINATION—REDIRECT—SCOPE.

In a prosecution for conspiracy for unlawfully facilitating the transportation and concealment, after importation, of opium into the United States, P., who had been convicted of complicity in removing the opium from a vessel in San Francisco harbor, testified that he had been approached by accused and induced to aid in disposing of the opium; that he and two others removed the same as directed; and that F., who was one of them, had been sentenced to imprisonment for such offense. On cross-examination P. was asked when he first spoke to any one concerning defendant's complicity in the matter and answered that it was after he had gotten out of jail, when he told a special agent of the Treasury Department the story he had told in court, and that such agent had recommended his appointment as a special customs' agent and had gotten him employment as such. *Held*, that the government on redirect examination was properly permitted to ask him whether such special agent ever spoke to witness about the matter until he sent for him after he seized certain letters which disclosed defendant's connection with the matter, and whether it was only after such agent had positive information from such letters relating to defendant that he sent for witness, in order to rebut the inference that witness had told the government's agent his story in order to gain favor and get employment.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 930, 994-999; Dec. Dig. § 286.*]

2. CRIMINAL LAW (§ 1037*)—REVIEW—REMARKS OF DISTRICT ATTORNEY—NECESSITY OF EXCEPTION.

Alleged prejudicial remarks of the district attorney to the jury cannot be reviewed where no objection was taken thereto, no ruling demanded, and no assignment of error predicated thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.*]

3. CONSPIRACY (§ 27*)—IMPORTATION OF OPIUM—OVERT ACTS.

An indictment for conspiracy to aid the transportation and concealment, after importation, of certain opium imported contrary to law charged that accused approached P. and requested him to aid in landing the opium; that he introduced P. to the boatswain and engineer's cabin boy on the steamship where the opium was; and, in furtherance of the conspiracy and to effect and accomplish the object thereof, two of the conspirators other than defendant went from San Francisco to Oakland. *Held*, that such acts were not mere parts of the formation of the conspiracy but were overt acts tending to effect the object thereof, and it was therefore sufficient if any one of them were proven.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39; Dec. Dig. § 27.*]

4. CRIMINAL LAW (§ 1059*)—TRIAL—INSTRUCTIONS—EXCEPTIONS—EFFECT.

A general exception to the whole charge, many portions of which are unquestionably correct, does not authorize a review of any particular error therein and will not avail the party taking it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. § 1059.*]

In Error to the District Court of the United States for the First Division of the Northern District of California; John J. De Haven, Judge.

Robert Donaldson was convicted of conspiracy and participation in unlawfully receiving and facilitating the transportation and concealment, after importation, of certain opium imported into the United States contrary to law, and he brings error. Affirmed.

Frank R. Sweasey, of San Francisco, Cal., for plaintiff in error.

John L. McNab, U. S. Atty., and Benjamin L. McKinley, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was convicted on two counts of an indictment charging him and one Henry Gallagher with a conspiracy, as well as with the actual participation in the act of unlawfully receiving, concealing, and facilitating the transportation and concealment, after importation, of certain opium known by them to have been imported into the United States contrary to law.

It is assigned as error that the trial court overruled the objection of the plaintiff in error to questions propounded to the witness Powers by the district attorney as follows:

"Q. Mr. Tidwell never spoke to you about this matter until he sent for you after he seized these letters that had gone out from the jail which disclosed Mr. Donaldson's connection, did he? (Question objected to on the grounds that it is immaterial and irrelevant, not redirect, is leading, and is based on something that is not in evidence; there is nothing here about letters being seized. Objection overruled and exception.) A. No, sir. Q. And it was only after he had this positive information in these letters relating to Mr. Donaldson and Mr. Gallagher that he ever sent for you at all? (Question objected to on the same grounds. Objection overruled and exception.) A. Yes, sir."

To understand the relevancy of this testimony, it is necessary to review briefly the evidence in the case. Powers, who was testifying at the time, had been indicted and convicted and had served his sentence in jail for his complicity in removing the opium which it was charged that the plaintiff in error had conspired with Gallagher to import unlawfully. He testified that the plaintiff in error approached him and finally induced him to lend his aid in disposing of opium which was then on board the steamship *Siberia* in the San Francisco harbor, and that thereafter the plaintiff in error took him to the *Siberia* and introduced him to Yung Tai, a Chinaman, the chief boatswain of the *Siberia*. He testified to conversations between the parties on that occasion in regard to getting the opium off the vessel; that the plaintiff in error told him where the opium was to go; that he (the witness), and Gallagher and one Fiedler, who was also in the scheme, thereafter

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

removed the opium as directed; and that for that offense he and Fiedler were sentenced to imprisonment in the county jail. Fiedler testified substantially to the same effect, except that he had no acquaintance or conversation with Donaldson, and that his only knowledge of Donaldson's participation in the conspiracy was through information which he received from Powers and information received from Yung Tai, who asked, "Is Donaldson all right?" Yung Tai testified that Donaldson came to the ship with Powers; that Donaldson told him that Powers was a good man and told him to give him the opium. It is true that Yung Tai testified that he had no opium at that time to give him, and that, when Powers and Fiedler came back afterwards for opium, he told them he had no opium to give them. His reticence as to his possession of opium was probably induced by the fact that at the time when he testified he was under indictment for his participation in the transaction. Now, Mr. Powers, when called to the stand on behalf of the government, gave the following testimony:

"Q. I understand certain letters were written by Mr. Fiedler in jail? A. Yes, sir. Q. That is the way in which your connection with these people was learned? A. Yes, sir."

[1] It seems that certain letters were written by Fiedler in which Powers and the plaintiff in error were mentioned in connection with the transaction in opium, which letters had been intercepted by the authorities. On cross-examination Powers was asked when he first spoke to any one about Donaldson's complicity in this matter. His answer was that after he had got out of jail he had told Mr. Tidwell, special agent of the Treasury Department; that he had told him the same story which he told in court. He further testified on cross-examination that Mr. Tidwell had recommended his appointment as special customs agent and had given him employment as such. The inference evidently sought to be drawn from such testimony so elicited on the cross-examination was that Powers had told Mr. Tidwell his story in order to gain favor and get employment from the government. It was to explain the matter and to rebut this inference that the questions were propounded which form the basis of the assignment of error. The purpose was to show on redirect examination that Powers' story of the transaction had been elicited only after he had discovered that Mr. Tidwell, through the letters of Fiedler, had already obtained the information that he and Donaldson were both implicated. There was no error, therefore, in bringing out the fact that Mr. Tidwell did not offer employment to Powers until after he had seized the letters and read the contents thereof. The contents of the letters were not proven, and, if Fiedler had not testified in the case as to the full extent of his knowledge of the participation of the plaintiff in error in the conspiracy, it might justly be claimed that there was error in admitting testimony that letters had been written by Fiedler containing positive information relating to the plaintiff in error in connection with the offense charged. But in his testimony Fiedler disclosed the full extent of his knowledge of Donaldson's complicity in the conspiracy, and it will not be presumed that the jury could have inferred that the letters contained anything more or different.

[2] It is argued that the plaintiff in error was prejudiced by certain remarks of the district attorney to the jury concerning the letters, and the purport of them, but no exception was taken to the remarks, and no ruling of the court demanded thereon, and no assignment of error is predicated upon the same.

[3] Error is assigned to the refusal of the court to give to the jury certain instructions requested by the plaintiff in error. It was requested that the jury be instructed that they could not convict unless, to carry out the conspiracy charged, one of the overt acts charged was committed as therein stated, and further in that connection that no overt act charged or proven could be held sufficient to establish the offense charged, unless the jury should first have found that the act was committed subsequent to the complete formation of the conspiracy, and that it was in furtherance of a fully completed conspiracy, not a part of it. The overt acts charged in the indictment were in substance: First, that the plaintiff in error approached Powers and requested him to aid and assist in unlawfully landing from the steamship *Siberia* 600 cans of opium. Second, that the plaintiff in error introduced Powers to the boatswain and the engineer's cabin boy on the steamship *Siberia*. Third, that in furtherance of the conspiracy and combination, and to effect and accomplish the object thereof, Gallagher on December 13, 1911, went with Powers from San Francisco to Oakland. It is urged that these acts were but part and parcel of the formation of the conspiracy. We think they were more. Before any of them were performed, the general conspiracy had been entered into, and Powers had agreed to carry out his part thereof. Thereafter the plaintiff in error performed the overt act of requesting Powers to aid in unloading certain specified opium then in the harbor on the steamship *Siberia*, and he took him to the steamer and introduced him to the Chinaman who had the opium in charge. Thereafter Gallagher went with Powers from San Francisco to Oakland to accomplish the object of the conspiracy. These were acts which tended to effect the object of the conspiracy, and it was enough if one of the acts charged was proven to have been done.

[4] The court fully and at length instructed the jury on all questions of law applicable to the case. At the close of the charge, counsel for the plaintiff in error reserved a general exception to the instructions so given. Upon consideration of the whole charge, we find no error therein. But, even if there were error, we would not be justified in considering it in view of the nature of the exception which was taken. A general exception to the whole charge, many portions of which are unquestionably correct, does not direct the attention of the court to any particular error therein and will not avail the party who takes it.

We find no error. The judgment is affirmed.

CARSTENS PACKING CO. v. GODO.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1913.)

No. 2,253.

MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff, a carpenter employed in defendant's meat establishment, built on pilings over tide flats, was ordered to go underneath the glue house to take certain measurements. He proceeded to remove a plank from the flooring above the place where the measurements were to be made, but was directed by the foreman to go underneath the wharf. He did so taking a route between two elevator guides, which extended below the floor into the mud, and while there was struck by the descent of the counterweights and injured. The way between the guides was marked by planks laid underneath the wharf, and if he had gone any other way it would have been necessary to wade through mud and filth, which was from ankle to hip deep, to arrive at the point where the measurements were to be taken. For five years prior to the week before the accident the counterweights had stopped above the first floor, but the week prior to the accident the cable holding the counterweights had broken, and in repairing the same the coil had been unwound from the drum so that thereafter the weights went below the first floor and almost to the mud, but plaintiff was not shown to have had knowledge of this. *Held*, that he was not negligent as a matter of law in traveling the route between the weight guides.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092–1132; Dec. Dig. § 289.*]

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; E. E. Cushman, Judge.

Action by Louis Godo against the Carstens Packing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error was a carpenter and millwright, and he had been working for the plaintiff in error in and about its meat-packing establishment for about seven years. The packing house was built upon piling on the tide flats at Tacoma. Underneath the lowest floor of that portion of the establishment, which was known as the glue house, was an inclosed space in which the floor stood about four feet from the mud. In the northwest corner of that building was an elevator running from the lowest floor to the fifth. The counterweights by which the elevator was operated traveled in guides which extended from the fifth floor down through the lowest floor and into the mud. But from the time when the elevator was installed five years before, and up to six or eight days prior to the accident to the defendant in error, the length of the cable was such that the counterweights had never passed below the lowest floor. The defendant in error was well aware of that fact. About a month before the accident, he had been working beneath the lowest floor, assisting in building a concrete foundation for a wringer. On the day when he was injured, he was directed by the foreman to take a measurement from the outer wall of the glue house to a pile beyond. He testified that he was proceeding to remove a plank from the flooring above the place where the measurement was to be made, when the foreman directed him to desist, and told him to go beneath the wharf. There was no way by which he could get beneath the wharf, and no other way by which he could take the measurement, than by going through the inclosed space beneath the glue house. He took a measuring pole, a hammer, a chisel, and a candle, and went into that inclosed space, and in crossing it he took his route between the two elevator

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

guides. The evidence indicates two reasons why he went that way: One was that some planks had been placed in that track, and had been used a short time before when the elevator cable had broken, and the counterweights had been precipitated to the bottom. Another was that, in order to avoid passing between the guides, it would have been necessary to deviate a distance of 15 or 20 feet to get around an obstruction, and to wade through mud and filth from the glue factory, which stood from ankle deep to hip deep, in order to arrive at the point where the measurement was to be taken. About a week before that date, the cable holding the counterweights had broken near the weights, and in repairing the same, one coil of the cable had been unwound from the drum, so that thereafter the counterweights, instead of stopping above the lowest floor, as they had done for five years, now went through and below the same, and almost to the mud. As the defendant in error was passing on his way between the guides, where he paused crouching to light a candle, the counterweights descended and struck him, and seriously injured him. For that injury he recovered a judgment in the court below.

John D. Fletcher and Robt. E. Evans, both of Tacoma, Wash. (C. F. Wilt, of Tacoma, Wash., of counsel), for plaintiff in error.

Govnor Teats, Hugo Metzler, Leo Teats, and Ralph Teats, all of Tacoma, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The contention of the plaintiff in error is that the court below erred in denying, at the close of the testimony, its motion for an instructed verdict in its favor. The assignment raises the question whether or not there is any evidence in the record to sustain the verdict, and not the question which is discussed in the brief of the plaintiff in error, whether the evidence is sufficient to justify the verdict. It is urged, and it may be said that there is force in the argument, that the defendant in error was not directed to go to the particular place where he went, and that in passing between the elevator guides he unnecessarily exposed himself to danger. But, on the other hand, it is to be considered that the foreman knew, or should have known, that having refused to permit the defendant in error to remove the plank above the place where the measurement was to be made, the only other way to approach it was to go underneath the glue house, and that an employé in passing underneath would probably take the route which the defendant in error took. It was the direct way. It is fairly inferable from the testimony that it was a way marked by planks upon which to walk, planks which had been used there for that purpose, and left there at the time when the elevator cable was repaired. To have gone any other way would have required the defendant in error to wade through mud and filth. The defendant in error did not know that the cable had been lengthened, and he had no reason to apprehend danger from the counterweights, unless he was put upon notice of danger from his knowledge of the fact that shortly before the accident the elevator cable had been broken and had been repaired. We do not think that it should be held that the breaking and the repairing of the elevator shaft imported notice to him that the cable was lengthened, or that thereafter the counterweights would extend below the place where they had halted during the operation of the elevator for the

prior five years. The most that can be said is that the question so presented is one upon which the minds of reasonable men might differ. If so, it was a proper question to be submitted to the jury. It is not established by the evidence that the danger was obvious, or known, or ought to have been known, by the defendant in error. His employer had taken the precaution to box in the space between the guides in which the elevator weights ran in the rooms above the lowest floor. Probably there was no occasion to observe a similar precaution in the space beneath the floors, but all the employés who had occasion to go there for any purpose connected with their duties were entitled to notice that the condition which had existed for so many years was now changed, and that the counterweights in their travel now went below the lowest floor.

We find no error. The judgment is affirmed.

NEW YORK CONTINENTAL JEWELL FILTRATION CO. v. CITY OF HARRISBURG.

(District Court, M. D. Pennsylvania. August 25, 1913.)

No. 43.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FILTRATION PROCESS AND APPARATUS.

The Jewell Patents No. 644,137, and reissue No. 11,672, respectively, for a process and apparatus for filtration of water, consisting of the use of a new type of sand filter known as the down draft or negative head filter, which by creating a vacuum through the use of a vertical discharge pipe in the bottom utilizes the whole sand bed as a filtering agency, whereas the sediment layer forming on its surface had previously been the only effective agency, were not anticipated and disclose a useful and novel invention; also *held* infringing.

In Equity. Suit by the New York Continental Jewell Filtration Company against the City of Harrisburg, for infringement of letters patent No. 644,137, for a method of purifying water, granted to Omar H. Jewell, February 27, 1900, and reissue No. 11,672, for improvement in filters, granted to the same patentee June 28, 1898. On final hearing. Decree for complainant.

James I. Kay, and Kay & Totten, all of Pittsburgh, Pa., and W. B. Anderson, of New York City, for plaintiff.

Daniel S. Seitz and M. W. Jacobs, both of Harrisburg, Pa., for defendant.

BUFFINGTON, Circuit Judge. In this case the New York Continental Jewell Filtration Company charges the city of Harrisburg with infringing two of its patents in the operation of that city's municipal water filtration plant. As the patents concern such public uses, the case is one of widespread municipal importance. The large sand bed through which the confined water seeps or percolates gives to such plants the name of "sand-filtration." At the base of such bed the purified water passes into draining channels, and is carried to the filter

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

outlet. Over these channels are graded layers, beginning with those of large stone and followed by those of gravel or coarse sand. On top of these lies the fine sand bed which gives the plant its name. The usual practice is to run the raw or unfiltered water into a sediment basin, where the coarser suspended matter settles. The partially clarified water then goes to a filter basin and lies, to the depth of several feet, on the sand bed. The constant head of water, weighing as it does many tons to the acre area, which is the usual size of the basins, exerts a forcing, percolating pressure, and gives to such filters the name of "positive head" or "gravity" filters. In them the effective filtering or purifying agent is a sediment layer or mud crust, which gradually gathers on top of the sand and forms a complete and unbroken scum or cover. This layer, well recognized everywhere as the vital factor in filtration, is usually known as the "Schmutz-Decke," German words, meaning, literally, "the dirty covering." The formation thereof and the general operation of filtering are thus described in the respective briefs. That of the plaintiff says:

"When a slow-sand filter is first started, the outlet valves are so set as to allow the water to percolate slowly through the bed, say at about one-tenth the normal rate of filtration, and each day thereafter the rate is progressively increased so that at the end of a few days it is running at the normal rate of speed and so maintained, this being necessary to insure proper building up of the sediment layer or Schmutz-Decke. In a month or so this sediment layer accumulates on the surface of the filter, and becomes so thick as to practically prevent the passage of water through it, and then the filter has to be shut down and drained; and it is cleaned by manually scraping off, with shovels, from half an inch to an inch or more of the surface material. The filter is then again filled with filtered water, applied from below the bed, the raw water turned on, and filtration resumed, at slow rate at first and gradually increasing this rate as before."

From these workings it will be seen the process requires the maintenance of a deep head; it involves the gradual building up of the surface layer; it necessitates frequent stoppages of filtration, washing, and subsequent upbuilding of the layer; such washings require the use of filtered water. The account in defendant's brief reads:

"In slow-sand filters, after they have been in operation a little time, there is an accumulation upon the surface, including certain helpful bacteria, the growth of which form gelatinous sticky coatings on the sand grains and tend to reduce the pore spaces between the grains and thus intercept the impurities suspended in the water, and further bring about the oxidation and nitrification of the organic matter dissolved in the water, to a large extent, and thus purify the water to a high degree without the addition of chemicals.

"In the operation of mechanical filters the water is passed through the filter bed so rapidly that there is not sufficient time for the bacterial growths to develop in the top layers of the sand, as above described for slow-sand filters, and it is necessary to produce an artificial gelatinous clogging of the top of the filter to take the place of the bacterial jelly formed in slow filters. This is done by adding to the water certain chemicals, like sulphate of alumina or sulphate of iron, which have the property of becoming insoluble in the presence of alkaline constituents like the carbonates of lime and magnesia, which are found in most natural waters, or can be cheaply added if the water be naturally deficient thereof. When solutions of iron or aluminum sulphate are added to waters having an alkaline reaction, therefore, the soluble sulphates of iron or alumina are chemically changed into the insoluble hydrate, or hydrated oxide, which gradually appears in the water in the form of a floccu-

lence, scattered throughout the entire mass to which the chemicals may have been added, and catches in its flakes many of the particles of impurities suspended in the water. When water which has been treated in this way is passed upon filters and goes down through the sand bed, the flocculent particles produced by the chemical reactions are caught in the filter bed and retained there, the clarified water passing on down through the bed and issuing through the outlet pipe and controller. The flocculent matter, or coagulum, which has been retained in the filter bed is like the bacterial jelly in the slow filters, gelatinous and sticky in its nature, and serves to reduce the pore-space between the sand and thus intercept and hold back the suspended matters in the water being filtered. After about 12 to 20 hours (on the average) of operation, rapid filters generally become clogged so that they will not yield their rated quota of water, and then it becomes necessary to clean them."

It would thus seem that in slow-filtration plants, the efficient agent of filtration is the surface sediment layer. Where more rapid or mechanical filtration was necessary, coagulants were used, and what corresponded to the Schmutz-Decke was by them formed in a few minutes, the coagulants forcing the impurities together like curd in milk. The proofs, as will be seen in extracts quoted below, show that this surface sediment layer usually is found in a stratified zone, distinct from the sand bed beneath, and that there is little, if any, penetration of the gelatinous sediment matter into the latter. It also appears from such proofs that as the surface sediment layer thickened, it was so compacted by the water head pressing on it that little water passed through it. But not only did such surface layer tend to eventually prevent percolation, but its compact shell tended to create a vacuum beneath, which latter, by liberating the air in the passing water, still further impeded percolation. This arose from the fact that water, under high pressure, retains very considerable air, which, as a vacuum is formed and the water is subjected to less pressure, is released. But this released air tends to fill and clog the interstices between the sand grains and thereby clogs the water flow. In that regard, the Fuller report, made prior to this suit, in the Cincinnati filtration tests, is illuminative. There Mr. Fuller, who was subsequently accredited by the defendant in making him its witness, in speaking of slow-sand, or English, filters, then said:

"In English filters the section of maximum frictional resistance is always at and just below the surface of the sand layer. Accordingly, when the active head exceeds the depth of the water above the sand, there is a *united clogging action at this portion of the filter*, due both to suspended matter removed from the water and the air evolved from it. As a result of this confined action, the yield of water after this time is very small."

The views of Mr. Hazen, who had wide experience in filtration and was in charge of the experimental plant maintained by the commonwealth of Massachusetts at Lawrence, agree with Mr. Fuller's. In Hazen's book, *Filtration of Public Water Supplies*, 1895, referred to by him when called as a witness by defendant, speaking of the Lawrence experimental plants, it is said:

"It is also customary to have a depth of water on the filter in excess of the maximum loss of head, so that there never can be a suction in the sand below the sediment layer. * * * The suction only commences to exist as the increasing head becomes greater than depth of the water, and there is no way in which air from the outside can get in to relieve it. In these ex-

perimental filters in winter, when the water is completely saturated with air, a small part of the air comes out of the water just as it passes the sediment layer and gets into the reduced pressure, and this air prevents the satisfactory operation of the filters."

It will therefore appear that in the gravity or positive head plants of the slow-sand filtration art the sediment surface layer of "Schmutz-Decke" was the effective agent and the substantially sole place where filtration occurred; that it so compacted that there was little gelatinous penetration below it; that the vacuum caused by the compacted surface layer, by releasing the water-carried air, clogged the sand interstice passages and further retarded flow of the water. Without entering into details we here further note that the proofs also show that this vacuum-liberated air, owing to the slow and retarded passage of the water, was not carried off, but at times bubbled upward and ruptured the Schmutz-Decke. This rupture allowed unfiltered water to pass into the sand bed until by its impurities such passing fluid gradually closed up the ruptured layer and restored the Schmutz-Decke to a state of filtering efficiency.

In this state of the art; with the slow formation of the surface sediment layer; with that layer constituting virtually the sole potent factor of filtration; with the sand bed's being practically confined to forming the surface sediment shell; with vacuum regarded as a retarder of filtration, and tending to lessen plant output—the patents here in question entered the art. In that art, as we have seen, the only water-impelling force utilized came from gravity, as stated by one of defendant's witnesses, who said:

"In case of positive filters the water passes through the filter by virtue of its own weight and the pressure of the superincumbent water above the sand surface."

To that art, which regarded vacuum as an evil, Jewell in his process disclosed the radical and revolutionary suggestion that this vacuum, if of such relative completeness as to utilize its efficiency, could be made, not only to avoid all troubles incident to air-releasing, but to utilize the whole sand bed as an active efficient filtering agency. In other words, he claimed by the proper use of vacuum, to virtually convert the entire sand body into a quasi Schmutz-Decke. The process, means, and object disclosed are aptly set forth in his specifications, as follows:

"My invention relates to purifying waters for potable purposes by filtering such waters through granular filters. As is well known, the principal object of filtering the water supply of towns and cities is to remove the suspended impurities, which in many instances are in a finely divided state, and experience has proven that granular filters—that is to say, filters in which the water is caused to percolate through a filter bed composed of loose sand or other granular material—furnish a filtering medium which is best adapted for removing the suspended impurities, while permitting the water to flow at a rapid rate, as is necessary where the water supply of a town or city is being filtered. In using granular filters heretofore, however, it has been found that in most instances a granular filter bed will not intercept and retain the suspended matter in its normal condition, and it has therefore been found necessary, in almost all instances, to introduce a coagulant, such as alum, into the water before filtration, the coagulant serving to coagulate the sus-

pended matter into masses which are larger and more susceptible to interception and retention by the granular particles composing the filter bed, in some instances it being necessary to use such a large quantity of alum as to affect the taste of the filtered water.

"My present invention consists of an improved process of purifying water by filtration through a granular filter bed, by which the necessity of the use of alum or other coagulant is in many cases entirely avoided, and in other instances, where the impurities are in an exceptionally finely divided state, the quantity of alum which under former processes would be necessary is very greatly reduced.

"To this end my invention consists in effecting what may be termed the 'Coagulation' of the suspended impurities of the water by suction while passing through the filter bed; the particles of suspended matter being thereby caused to come together into masses of sufficient size and of such character as to be readily intercepted and retained by the granules composing the filter bed.

"My invention further consists in applying the suction principally at the lower portion of the filter bed, so that it acts more strongly upon the finer particles of suspended matter which have passed through the upper portion of the filter bed,

"My invention further includes the compacting of the filter bed in such manner that the lower portion thereof will be of the greatest density, the density gradually decreasing towards its upper surface, as by this means, while the larger masses of impurities will be retained by the more widely separated granules at the upper portion of the bed, the lower portion of the bed will be sufficiently dense and compact to intercept the smaller particles of suspended matter, especially after they have been coagulated, as above stated.

"In the accompanying drawings I have shown apparatus designed to utilize my improved process, such apparatus in general consisting of a filter bed of loose granular material contained in a suitable receptacle and a pure-water pipe in the bottom of said receptacle, said pipe being provided with suitable strainers to prevent the granular material from entering such pipe and with an off-carrying pipe vertically arranged and of such length that as the filtered water is carried off by said pipe, a partial vacuum will be created within the filter bed, the vacuum being greatest in the lower portion of the bed and gradually diminishing toward the upper surface thereof. By this means a continuous suction is exerted which is greatest in the lower portion of the bed, compacting it so that its density will be greatest at the bottom, and will gradually diminish toward the upper surface thereof. Furthermore, the suction causes the air contained in the water in the filter to separate and concentrates it, the minute bubbles coming together, forming larger bodies of air, which are, to a great extent retained within the filter bed. As the fine air-bubbles converge they act to concentrate and coagulate the particles of suspended matter, so that finally the suspended matter is formed into larger bodies, which may easily be intercepted and retained by the filtering material. As the process of filtration continues, the air extracted from the water gradually accumulates in the bed, still further compacting it and increasing the efficiency of the filter to such an extent that, even though the bed contain large quantities of impure matter extracted from the water, the filter may nevertheless be continued in use with satisfactory results, thus making it unnecessary to wash the bed as frequently as has been necessary with other forms of filters employing granular filter beds."

The practical outcome of Jewell's process has been to create in sand filtration, a new, distinctly recognized and differential type of plant known as the down-draft or negative head filter. It is bottomed on a designedly created vacuum, which in the words of the extracts quoted results from "an off-carrying pipe vertically arranged and of such length that as the filtered water is carried off by said pipe, a partial vacuum will be created within the filter bed." And "it extends

downward a sufficient distance to provide the necessary down-draft, usually several feet." Its action as stated, is that "the entire body of filtering material is utilized instead of substantially the upper surface only, as in prior construction." These extracts clearly show that from the patentee's viewpoint, the gist of his invention was the utilization of the whole sand bed as a filtering agency, and this he meant to secure by the designated creation of an impelling vacuum. While there are views and contentions to the contrary in this voluminous record, every part of which has had our thoughtful examination, we are constrained by the fair weight of the evidence to find, as we do, that the process and apparatus disclosed by Jewell in his patent here involved do in practical use, by the creation of a vacuum, utilize the whole sand body as a filtering agency as it was never used before. Indeed, that the workings of a down-draft or negative head filter must, in the nature of things, be different from a gravity or positive head filter is self-evident, from the fact of its calling into play the powerful agency of atmospheric pressure. From this we can readily understand that such atmospheric force, whether venting itself as a weight from above or a suction from below, must cause new results in a process, the basic element of which is the pressure passage of liquid through impeding matter. On the surface, Jewell's change seems slight; in fact the mere adding of a water-sealed, vertical off-take pipe. In substance and practical worth it has evidently added to the filtration art a factor, and proven so important as to warrant the expenditure, by the defendant and its associated cities, of the time, labor, and expense involved in this large record. Were the contention that this vertical off-take worked no substantial change from gravity filters, it would very likely have been abandoned. On the other hand, the continued use thereof tends to support the contention of plaintiff's witnesses that the change effected thereby is substantial and valuable. Just how the vacuum produces the results we shall see it does produce is by no means clear. Its workings are hidden from view in the sand mass, and there seems, at present, no way of observing, testing, or determining the phenomena incident thereto. It is a fact, as seen in the extracts quoted above from the specifications, that Jewell volunteered certain explanations, but it is evident that in the nature of things they were speculative, for the expert, who plaintiff's counsel say is an authority on water action, after discussing all the elements that might contribute thereto, frankly says:

"All the causes taken together would seem insufficient to give the advantageous result in the matter of the length of the run which has been shown. In other words, I don't see why the results are as advantageous as they are."

That in point of fact they are useful and novel is shown, as we have said, by the weight of the proofs. Referring to same, we may say that the witness Leopold, who is a practical filtration man and has taken part in the construction of sixty municipal and many other plants, says:

"The blanket of Schmutz-Decke of a positive head filter is usually more dense and more of a distinct separate coating supported on the surface of the sand than is the blanket of a negative head filter, and can be often completely

separated without displacing or taking up any appreciable amount of the sand grains. That of a negative head filter will be combined with the surface sand, and the evidence of it can be found penetrating the sand bed to a considerable depth. * * * I have found evidence of penetration, I would judge, apparently 18 inches in the sand bed, without affecting the efficiency or clarification of the water. * * * My conclusion is that the suction created by the velocity of the water in the negative head tube, exerting the pull first at the bottom of the bed, draws the sand grains and rearranges them at the bottom, drawing them tighter together, and this naturally rearranges them at a strata a little higher up, this gradually continuing upward in the bed. The penetration of the upper strata of the sand bed is conclusive evidence of this to my mind."

The witness Roberts who is also engaged in practical filtration work and has taken part in the construction of some forty plants, says:

"I found with a positive head filter that if we would run the water off the filter in a given direction and let the surface of the sand become dry, the accumulations would crack and curl up and find the sand immediately under this blanket, or mass of accumulation, practically clean. On the other hand, I found in the down-draft filters that we would have a decided penetration of the dirt or impurities into the sand. I have also found that increasing or decreasing would produce different results: By increasing the length of the tube we would get a longer flow. * * * In so far as the results of the tests relative to the two types of filters, we found that we could accumulate within the filtering material more of the matter taken out of the water in the negative head than we could in the positive head. In examining the beds we found that it penetrated deeper. We also found that at times it not only penetrated the bed, but would come through into the filtered water."

The witness Johnson, whose practice in filtration engineering has been extensive both here and abroad, testifies to the difference in results effected by the Jewell process:

"The suction acts upon the bed to draw water through the same, and as the sediment layer forms on the upper surface of the sand layer the suction acts to draw the impurities down into the bed, sloughing off or eating away the under portion of the sediment layer and carrying the impurities down into the bed, thereby preventing the sediment layer from becoming so thick as to choke the filter, and allowing of the extension of the 'run' between washings and increasing the yield of the filter bed. * * * The weight of the column of water descending in the suction or down-draft pipe causes the production of a larger output of properly filtered water, and the sediment separated from the water during filtration is carried further down into the bed by the weight and velocity of the descending column of water below the bed, which force acts, as the upper portion of the bed becomes choked with sediment, to draw portions of such sediment layer downwardly into the bed, the upper portion of the bed being maintained in looser condition than it is in a positive head filter, and so allowing the free entrance of the suspended matters, and the lower portion of the bed being more compacted than the upper portion, as before stated, and so tend to retain such impurities within the bed."

This witness gives a specific instance of such results with data based on observations made at the plant at Little Falls, N. J., which, when studied—but which we will not detail—to our mind warrant his conclusions. The testimony of plaintiff's witness Caird also carries conviction. He had charge for the city of the municipal filtration plant at Middletown, N. Y. Without entering into particulars, it suffices to say that it very clearly establishes the fact that the operation of

the plant was very materially changed to an increased output and lengthened runs by the addition of a vertical off-take outlet. The same witness, who also had charge of a like plant for the city of Bangor, Me., testifies that the efficiency of its gravity plant was strikingly increased, both in the amount and character of filtered water, by reason of the use of Jewell's process. The difference between the penetration observed in gravity and down-draft filters is also testified to by the witness Ryan, an experienced filtration engineer. When asked as to his observations in testing plants, in which branch his work was of very considerable extent, he says:

"In the case of positive head filters, the sediment layer is usually much thicker than in the case of a negative head filter. Also in the case of a negative head filter I have usually found that it usually penetrates into the bed, which is not the case with a positive head filter. * * * In some cases (of a positive head filter) I have seen this sediment of such a character that it could be scraped off the top, leaving the sand below practically clean. * * * The negative head filter has the layer on the surface of the sand much thinner, and if the sand is examined at considerable depth below the surface, say to 16 inches, usually there will be found some of the coagulated matter, not 24 inches under the surface, but actually coming through the effluent pipes of the negative head filter"

—a fact also observed, as we have quoted above, by the witness Roberts. Without referring further to the numerous witnesses called, or discussing the many other questions involved or raised by witnesses in general, we restrict ourselves to stating that our study of the case satisfies us that Jewell's process does, by the use of a down-draft, sealed, vertical outlet pipe, create and maintain an operative vacuum, which vacuum effects a deeper utilization of the sand body for filtration than in positive head filters; that the presence of released air incident to the use of a down-draft vacuum is helpful and not harmful by reason of the velocity imparted to the passing water by such vacuum; that the process makes the runs longer, and both structural and maintenance costs are lessened by its use. Indeed, that vacuum draft increases run lengths is, we understand, conceded by defendant, the only question being the amount. Thus Hazen, its witness says:

"I have studied the use of draft tubes; I have designed and built filters having draft tubes, and have noticed the results of filtering when the draft tube is operated and when it is not operated. I think I understand the condition fully. The effect of the draft tube is practically to increase the length of run by a percentage that is not very large, but is still worth securing."

So in defendant's brief the statement is made that:

"A review of the entire testimony shows that the only advantage derived from the addition of a trapped down-draft pipe to a filter is that it gives additional available head, and hence prolongs the run of the filter between washings."

We next turn to the question whether Jewell's disclosure involved invention. That it was an original conception as contrasted with an obvious expedient is clear, for even now that its working efficiency has been shown, no one can yet explain how it works, or why it should produce the results it does. His disclosure was not the mere material suggestion of the use of a down-draft tube to create a vacuum.

The originality and substance of his disclosure was in the utilization of a vacuum. His apparatus was simply the concrete means suggested to utilize the process. This disclosure was a marked departure from the previous ideas and practice. It gave to the whole of the large sand body of the art a compacted, sustained, functional, working capacity it did not previously have; it created a new type of filter in the art; the process has gone into widespread and extensive use. We are therefore of opinion that Jewell's disclosure involved invention, and that his general process claim, viz.:

"The method of purifying water which consists in passing the impure water through a granular filter bed having an exposed filtering surface, and at the same time applying suction from below substantially as described"

—and the modifications thereof embodied in his other claims, should be sustained. Nor do we think the merit of his disclosure, or the substantial reward of a patent, should be denied him by reason of anything that preceded him in filtration practice, theory, or patent. That the existence of a vacuum in filtration experiments was observed and commented upon prior to Jewell may, for present purposes, be assumed. His merit consisted in pointing out that an objectionable vacuum could, if properly used, be made to cause deeper penetration, with the substantial benefits incident thereto. For example, the presence of a vacuum from time to time in filtration was observed, and attention was directed thereto in the experiments at Lawrence. We assume for present purposes, but without so deciding, that the references thereto in Hazen's book were prior to Jewell's. But these facts only serve to emphasize the original and valuable character of Jewell's subsequent disclosure. For it is clear that with the attention of this scientific experimental staff drawn to the subject, with such information presumably imparted to the many engineers and scientists engaged in the subject of filtration, no one was led thereby to discover that a vacuum could be used to deepen penetration. Indeed, as showing the then total lack of appreciation of the dormant and undiscovered capacity of a down-draft vacuum to increase run lengths, and that vacuum was regarded as a mere negligible, occasional, undesigned, and objectionable feature, we may refer to the testimony of the witness Hazen, who says:

"I have already described how the negative head occurred in some of the experimental filters at Lawrence. The negative head occurred without any special design or intention, although its occurrence was noted, and its practical significance more or less thoroughly understood. * * * How frequently it occurred and how large an element it was in producing the results cannot be now determined."

That in point of fact such down-draft was then regarded as objectionable, and that means were taken, by increasing the gravity head, to avoid it is, we think, clearly shown in Hazen's work, *Filtration of Public Water Supplies*, already quoted:

"It is also customary to have a depth of water on the filter in excess of the maximum loss of head, so that there can never be a suction in the sand just below the sediment layer. * * * The suction only commences to exist as the increasing head becomes greater than the depth of the water, and

there is no way in which air from the outside can get in to reduce it. In these experimental filters in winter, when the water is completely saturated with air, a small part of the air comes out of the water just as it passes the sediment layer and gets into reduced pressure, and *this air prevents the satisfactory operation of the filters.*"

From this it is clear that regarding the Lawrence Experimental Station, as we are justified in doing, as evidencing the most progressive views of the filtration art, it would seem that vacuum was regarded as objectionable. The aim was to exclude, not to utilize, it. Had the art maintained its then attitude toward vacuum—filtration's most valuable and most misunderstood servant—there would have been no evolution of down-draft filtration. Indeed, to our mind, these Lawrence observations of vacuum are strong proofs of originality in Jewell's work. When it is borne in mind that filtration was then a subject of general study and vital interest; that an earnest body of sanitary engineers, scientists, and municipal officers were devoting themselves to its problems; when its processes were being made the specialized study of a state experimental plant—for a patentee to take up a feature, which while known, was deemed objectionable, and show that such feature could be made a serviceable and important element of filtration, justifies a court in sustaining the patent the office gave him. For assuredly a court, in the light of the practical results in the working of the process, has a much stronger case before it than the Patent Office had when Jewell's process was comparatively theoretical. We have therefore reached the conclusion that Jewell's process was useful, novel, and inventive, and that the claims thereof should be sustained unless anticipated. As usual in such cases, a large number of publications, uses, and patents are cited which it is alleged should establish anticipation. That they did not is clear. All of such data were within the range of knowledge of acute men who were working to improve the art. The public demand was for effective and sufficient filtration. Manifestly, men of presumably much deeper and broader scientific ability than Jewell were studying the subject, yet none of these men were led by this wealth of alleged anticipation to utilize vacuum.

At the argument, and in reply to an inquiry by the court, counsel for defendant cited the British Patent of Neville, No. 6,160, of 1831, as the nearest approach to Jewell. This patent was considered by the office in the progress of Jewell's application. By his disclaimer and the limitation of his claims, Jewell recognizes Neville's patent, but beyond that the office gave it no effect as an anticipation. In our view this was right. While the two patents concern the general subject of filtration, and while, as Professor Langley, one of the defendant's witnesses aptly expresses it, Neville clearly apprehended "the use of a down-draft tube and the physics of its operation," it is also clear that the problems before the two men were not the same. They were using the vacuum for wholly different purposes in filtration, and the device of Neville threw no light on Jewell's work. As we have seen, the latter's problem concerned the loose, uncovered, sand beds of modern filtration, with their Schmutz-Decke

or sediment layer. That art and its difficulties and problems only came into existence long after Neville's time and the necessity for filtration, rapid and on a large scale, within the last few years. Jewell's problem was how to vitalize and utilize the whole sand bed in filtration. The gist of his problem was how to do this, and his solution of the problem was the use of a vacuum to so vitalize and utilize the whole sand body. Neville had no such problem before him. His patent did not disclose either the fact that a loose sand bed could be vitalized and utilized, nor did it show how it could be done. Neville was dealing with filtration not through an automatically formed sediment layer which he wished to deepen, but with an already formed, artificial layer of felt, cleansed as the sediment formed, and which was the efficient and active factor in filtering. His felt blanket in and of itself served the double functional purpose of being an already formed surface filtration layer, as well as a further gathering agency. The mass of powdered or ground charcoal below the felt was rammed as tight as possible, was protected from displacement, and to all functional intent was a porous solid body. The question of deeper penetration was not involved in the object he had in view. Indeed, the success of his device, if, in fact, it was successful, evidently centered on substantially the whole of the filtering being done by the felt cover, for he made no provision for cleansing the rammed substratum. It would seem, therefore, that deeper gelatinous penetration was to be avoided. It is therefore clear that Neville threw no helpful light on the problem of deeper penetration, which Jewell solved more than half a century later. It should be borne in mind, also, that Jewell's device was not only scientifically meritorious, and a patent therefore a just and earned reward to an inventor of more than an ordinary desert, but that in the field of altruistic and humane work he made a substantial contribution to the advancement of public health and welfare. The reasoning applicable to his process patent warrants a decree in the apparatus patent in which he discovered how his process could be utilized. On the subject of infringement little need be said. That defendant's plant has a down-draft, sealed suction apparatus, a loose, granular, exposed surface filter bed, and that it operates by the patented process is established by the weight of the evidence. Indeed, the plant is seemingly based on and patterned after the Little Falls one, to which we have referred.

A decree may be prepared in accordance with these views.

EDISON et al. v. ALSEN'S AMERICAN PORTLAND CEMENT WORKS.

(District Court, S. D. New York. May 7, 1913.)

PATENTS (§ 328*)—INVENTION—APPARATUS FOR MAKING PORTLAND CEMENT.

The Edison patent No. 802,631 for an apparatus for burning Portland cement clinker is void for lack of patentable invention, being merely for a longer kiln than those in common use when it was applied for.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by Thomas A. Edison and another against the Alsen's American Portland Cement Works. On final hearing. Decree for defendant.

Louis Hicks, of New York City, for complainants.

Gifford & Bull, of New York City (Thomas F. Sheridan, of Chicago, Ill., J. Edgar Bull, of New York City, and Carl A. Richmond, of Chicago, Ill., of counsel), for defendant.

HOLT, District Judge. This suit was brought to restrain the alleged infringement of a patent, No. 802,631, issued to Thomas A. Edison for an apparatus for burning Portland cement clinker. The patent states that:

"At the present time Portland or hydraulic cement is produced by burning a mixture of cement rock and limestone in long rotary kilns lined with fire-brick and maintained at a slight angle, the heat obtained being produced by the combustion of pulverized coal, and a stack being connected at the upper end to permit of the escape of products of combustion and chemical decomposition."

The claims of the patent sued on are claims 1, 2, 5, 6, 7, 8, and 11. Claim 1 is as follows:

"A cement-burning apparatus for dry material, comprising a tubular kiln, upward of 100 feet in length, means for rotating the same, means for creating a combustion zone within the kiln near its lower end, and means for introducing cement material into the kiln at its upper end, substantially as set forth."

There is obviously nothing new in this claim except the claim that the kiln should be upwards of 100 feet in length. The second claim is similar except that it claims a kiln the length of which is more than 12 times the internal diameter thereof. The fifth claim is for a kiln the length of which is approximately 25 times its internal diameter. The sixth claim is for a kiln the length of which beyond the combustion zone is sufficient to permit substantially all carbon dioxide to be evolved from the cement material before reaching the combustion zone. The seventh claim is for a kiln upwards of 100 feet in length, with a damper in a stack. The eighth claim is for a kiln upwards of 100 feet in length, with means for creating within the kiln near its lower end a combustion zone extending longitudinally of the kiln upwards of 30 feet. The eleventh claim is for a kiln upwards of 100 feet in length, made of sections supported on rollers. All of these claims amount substantially to a claim for a rotary kiln, used in burning cement, more than 100 feet in length. The usual length of the kiln in common use at the time this patent was applied for was about 60 feet, although some had been constructed longer, and the evidence tends to show that one was constructed by the Sandusky Company at Syracuse 110 feet in length, which was in operation as early as August, 1901. The essential claim in the patent, however, is to make a kiln substantially similar to those already in use which should be very much longer and with a little larger diameter. The proof shows that such a large kiln turns out a much larger product, and that, although the amount of coal used in the blast at the lower end of a large kiln is larger than

in a 60-foot kiln, the proportion of the amount of coal burned to the product of cement is much smaller than in the 60-foot kiln, making the use of these long kilns commercially profitable.

There has been a great and rapid development in recent years in the use of Portland cement. Originally such cement was made in small quantities in stationary kilns. Rotary kilns had long been used for roasting ore. When the rotary kilns were introduced for making cement, they were at first comparatively short, being about 15 feet in length; then they were increased to 30 and 40 feet; and at the time this patent was applied for they were usually about 60 feet in length. The tendency, obviously, with the growth of the business, was to continue increasing the length, but the increase had been made by gradual steps. Mr. Edison undoubtedly, in this patent, made a very large increase at one step. It was undoubtedly an expensive and hazardous experiment. There was some doubt felt whether so long a kiln could be successfully operated, and at first it was found to be difficult to do so. But the difficulties were overcome, and since the introduction of the Edison long kiln they have been largely introduced into practice, and now kilns are made of great length, some as long as 240 feet.

Obviously, as a general proposition, there is nothing patentable in making a machine or apparatus larger or smaller, if it produces the same result in the same manner. The fact that it produces a larger output is simply the natural result of using a larger apparatus. Undoubtedly, however, if, by changing the size of the apparatus, a different result is obtained by an essentially different process, such process is patentable. In the original application in this case, the first five claims were for a process, and the subsequent claims for the apparatus. The Patent Office at the outset required a division between the claims for the process and the apparatus, and thereupon the applicant canceled the claims for the process, stating that "an application for the method carried out in this case will be filed before the patent on the present application issued." It does not appear whether such application for a process patent has been filed, but the present patent is exclusively a patent for an apparatus. The complainants claim that the great increase in the length of the kiln resulted in a change in the method or process by which the cement material was calcined. It seems to me questionable whether, if such a change of method occurred, it was protected by a patent for the larger apparatus. It would seem necessary to patent the new process. Assuming, however, that a patent for an apparatus which is simply larger than a previous apparatus used for the same purpose is valid, provided it be shown that it causes a method of action which is essentially different from that of the smaller apparatus, the question arises in this case whether that claim is correct. In the operation of all these rotary kilns, the material, consisting of a pulverized mixture of limestone and clay, is introduced in the upper end of the kiln and by the revolution of the kiln is worked down the interior of the kiln a certain distance until it reaches the region in the lower portion of the kiln where the combustion of the blast of powdered coal is proceeding. While the material is coming down from the upper part of the kiln, through what

is called the calcining zone, until it reaches what is called the combustion zone, it is subjected to intense heat, and carbon dioxide, or, what was formerly sometimes called, carbonic acid, is thrown off and carried up the stack by the draft. After this process has proceeded to a certain point, and the carbon dioxide is substantially eliminated, the matter in the stack becomes calcined and turns into a black and vitreous mass, which is later ground up and makes the cement. The complainants claim that, in the operation of the short kilns of 60 feet or less, the length of the calcining zone was so short that the calcining process was not thoroughly completed and the carbon dioxide not completely eliminated, but that a portion of that elimination took place in the combustion zone, and that such carbon dioxide thrown out had a tendency to smother the fire and in that way to prevent efficient combustion. It is claimed that in Edison's long kiln, from 100 to 150 feet in length, the long distance from the upper end of the kiln down to the point of the combustion zone enabled the matter in the calcining zone to be subjected to a longer and more thorough amount of heat, with the result of a complete elimination of the carbon dioxide before the matter under treatment reached the combustion zone. In other words, it was claimed that in the shorter kiln the calcination process and the combustion process overlapped, while in the long kiln they did not. The evidence satisfies me that in kilns of all sizes whether the action in the calcining zone overlaps the action in the combustion zone depends very largely upon the operation of the kiln. The operator can introduce at will a longer or shorter blast; he can revolve the kiln more slowly or more rapidly; he can feed into the kiln a larger or smaller amount of cement material; and it depends largely upon the manner in which the kiln is operated whether the calcining process is substantially completed before the material is subjected to the heat in the combustion zone, and the best results obtained generally.

The application for the patent in suit as originally made was repeatedly rejected in the Patent Office, but after a complete restatement of the specification, and an almost complete restatement of the claims, the patent was ultimately granted, apparently upon proof furnished by curve sheets, known as the Dinan drawings, which apparently showed that in the 150-foot kiln the carbon dioxide was almost completely eliminated before reaching the combustion zone, while in the 60-foot kiln a considerable portion of the elimination took place after it reached the combustion zone. But curve sheets put in evidence (complainants' Exhibits 7 and 8), showing the experiments made by Prof. Kiefer, apparently show that in those experiments a much larger proportion of the total carbon dioxide is driven off in the combustion zone of the long kiln than in the combustion zone of the short kiln. I think it would naturally be expected that in the long kiln a more perfect elimination of the carbon dioxide would take place before the material reached the combustion zone than in the short kiln. But the proof on the subject leaves the matter certainly in doubt, and in my opinion the fact is immaterial. The proof shows that the quality of the cement produced in the short kiln and in the long kiln is equally good, and that the process to which the material is subjected is sub-

stantially the same. There are some other claims suggested of essential differences in the process, such as the greater liability of clinker rings to form in the small kilns, choking the draft, the capacity of the long kilns for a larger load, and the greater utilization of the heat in the long kiln before passing up the stack; but in my opinion these are all simply advantages resulting from the larger size of the apparatus. Upon the whole, my conclusion is that there is nothing essentially novel in this alleged invention. It is in fact simply a claim for a patent for a larger kiln than was in common use when the patent was taken out. If this patent can be sustained, the man who first made a 60-foot kiln could have taken out a similar patent which would be infringed by the use of any longer kiln. The first claim is for a kiln 100 feet long. A kiln 99 feet long does not infringe, but a kiln 101 feet does infringe, if this claim is valid.

In my opinion, the patent is invalid as not disclosing any invention that is patentable, and the bill should be dismissed, with costs.

THE GOLDEN ROD.

(Circuit Court of Appeals, First Circuit. October 23, 1913.)

No. 1010.

1. WHARVES (§ 19*)—CLAIM FOR WHARFAGE—LACHES.

The rule of *Canada-Atlantic Co. v. Flanders*, 145 Fed. 875, 880, applied as against a corporation which slept on the question so long that it was hardly open.

[Ed. Note.—For other cases, see *Wharves*, Cent. Dig. §§ 30-34; Dec. Dig. § 19.*]

2. WHARVES (§ 19*)—WHARFAGE.

In this case the only real question was the reasonable amount due for wharfage where there was no specific rule applicable; and, being a mere question of fact, the court felt obliged to follow the decision of the District Court.

[Ed. Note.—For other cases, see *Wharves*, Cent. Dig. §§ 30-34; Dec. Dig. § 19.*]

Appeal from the District Court of the United States for the District of Maine.

Suit in admiralty by the Islesboro, Castine & Belfast Steamboat Company against the steamer *Golden Rod*; the Eastern Bay Steamboat Company, claimant. Decree for respondent, and libellant appeals. Affirmed.

For opinion below, see 197 Fed. 830.

Edward C. Plummer, of Bath, Me., for appellant.

John R. Dunton, of Belfast, Me., for appellee Eastern Bay Steamboat Co.

Before PUTNAM, DODGE and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. The appellant filed a libel in admiralty in the District Court for the District of Maine to collect wharfage from

*For other cases see same topic & § NUMBER in Dec. & Ann. Digs. 1907 to date, & Rep'r Indexes

the steamer Golden Rod, owned by the appellee. The Golden Rod for three summer seasons had been making use of a wharf at Brooksville, constructed and owned in part by one Tapley and in part by the libellant. The libellant had been using the wharf for its own steamer or steamers, and there is no basis for claiming that the wharf was one which any steamer was free to use irrespective of the consent of its owners; so that the Golden Rod must have been chargeable only in trespass, or on a formal or informal contract. The only part of the libel which we need specially refer to alleges that the libelee, as owner of the Golden Rod, while engaged in the prosecution of her trips, stopped her at this wharf—

“receiving and landing passengers and freight there, and made use of the libellant's building and storehouse on said wharf for the accommodation of freight and for other purposes, for which use of said wharf the said steamer agreed to pay a reasonable compensation, and for said use the libellant is entitled to recover wharfage at the rate of \$30 per month.”

It is not necessary to discuss many questions discussed by the parties or by the District Court, because the libel is based directly on the alleged agreement to which we have referred. The facts are explained at full length in the opinion of the learned judge of the District Court, and we need not refer to them further, except as we herein state.

The wharf was built under an arrangement between the libellant and one Tapley, who owned the upland and the flats over which a part of the wharf extended. He testified that “they,” meaning the libellant, “built the head thirty feet square, I think, to join my part.” He had already said that his part was about 300 feet long and 12 feet wide, and that it extended from the upland to low-water mark. Without previous consultation with the libellant, so far as we find in the record, Tapley made an arrangement with the captain of the Golden Rod that the Golden Rod might land at the wharf, paying, as he testified, “\$5 a month for the outer part of the wharf that belonged to the steamboat company” and \$10 a month “for my part of the wharf, and acting as agent, making in all \$15 a month.” He also testified that the first subsequent month he received the \$5, and paid it to the purser of the Silver Star, which was the libellant's steamer; and the parties put in the record a receipt, as follows:

“May 14, 1906, received from Eastern Bay Steamboat Company five dollars for wharfage at W. Brooksville.
H. D. Pendleton.”

The Eastern Bay Steamboat Company was the owner of the Golden Rod, and H. D. Pendleton was the purser of the libellant's steamer, as already stated.

[1] The learned judge of the District Court says that the libellant knew of this arrangement. We are unable to find the proof thereof in its entirety; but the circumstances, including the fact that the Golden Rod used the wharf three summer seasons, covering a period of two years and a half, or what, so far as these parties are concerned, was three years, before this libel or any other proceeding was taken, justify us in holding that it is apparent that the libellant “slept on this question so long that it is hardly open,” a now well-recognized rule of the fed-

eral courts, stated by us briefly in *Canada-Atlantic Co. v. Flanders*, 145 Fed. 875, 880, 76 C. C. A. 1.

At any rate, the libel proceeds on the hypothesis, with the direct allegation, that there was a contract for the use of the wharf by the *Golden Rod*. This is supplemented by the testimony of Fields S. Pendleton, acting in behalf of the libelant, to the effect that, shortly after the *Golden Rod* commenced using the wharf, he called on her representatives in reference thereto; he then said he had been told that the *Golden Rod* had received permission from Tapley to use the wharf, paying wharfage at the rate of \$5 a month; and he then made a demand on those representatives, stating that the "price would be \$30 a month." Never at that time, or subsequently, was there any repudiation of Tapley's authority to make some arrangement. The only point open was the demand for \$30 a month instead of \$5. Even if the libelant had the right to refuse to let the *Golden Rod* come to the wharf, it never undertook so to refuse. In no event was it within the libelant's power to fix the rate per month in excess of that named by Tapley without the owner of the *Golden Rod* assenting thereto. In other words, this interview left the case precisely as stated in the libel.

There was therefore in effect an agreement between the parties that the *Golden Rod* might use the wharf, "paying therefor a reasonable compensation," without any conclusion between the parties as to the rate at \$30 a month, or at any other rate. Consequently the whole case was left closed except as to the rate per month. The action of Tapley in receiving rent was not objected to. This was paid to him for the three seasons.

[2] The only thing which remained open was for the *Golden Rod* or her owner to pay what might be regarded as reasonable compensation, to be settled by the court if not agreed on by the parties, with a deduction from the amount thus to be settled of \$5 a month. Rather than have the case go back, with the expense of further proceedings, we have carefully examined the record, and endeavored to ascertain a satisfactory result on this point. We have not been able to reach one in all respects thus satisfactory. The position of this wharf was peculiar for several reasons which are apparent, and which, therefore, it is not necessary to recite. Nevertheless, there were several witnesses who testified in substantially the language of Captain Gifford S. Pendleton, the president of the libelant corporation, who on direct examination fixed the rate of \$30 a month, but on cross-examination said that perhaps \$5 a month was about what was usually paid for wharfage in that locality. Certainly there is sufficient of this to sustain the finding of the learned judge of the District Court, that, in his opinion, this wharfage of \$5 a month was the customary wharfage in that locality; and there is nothing in the record which would justify us on appeal, according to the practical rules with reference to appeals, in setting that opinion aside.

The decree of the District Court is affirmed, and the appellee recovers its costs of appeal.

AMBURSEN HYDRAULIC CONST. CO. v. HYDRAULIC PROPERTIES CO.

(District Court, S. D. New York. May 27, 1913.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DAM CONSTRUCTION.

The Ambursen reissue patent, No. 12,246 (original No. 734,796), for improvement in dams, claims 2 and 3, are void for lack of invention, as being for a dam not differing essentially from former structures, except in the substitution of concrete for other materials.

In Equity. Suit by the Ambursen Hydraulic Construction Company against the Hydraulic Properties Company. On final hearing. Decree for defendant.

Edwards, Sager & Wooster, of New York City (Alex. P. Browne and Geo. K. Woodworth, both of Boston, Mass., of counsel), for complainant.

Messimer & Austin, of New York City (Hillary C. Messimer, of New York City, of counsel), for defendant.

HOLT, District Judge. This is a suit to enjoin the alleged infringement of a reissued patent, No. 12,246, granted July 26, 1904, to Nils Frederick Ambursen, for certain improvements in dams. Claims 2 and 3 of the patent are relied on. They are as follows:

"2. A dam comprising a base, an inclined concrete flooring overhanging the base, a plurality of spaced buttresses interposed between the base and flooring, and metallic reinforcing members embedded in the flooring and extending lengthwise thereof and across the buttresses.

"3. A dam comprising a base, spaced buttresses rising therefrom, and a relatively thin inclined concrete flooring supported by and overhanging the buttresses and base, said flooring having metallic reinforcing members extending lengthwise of the flooring and across the buttresses."

There is nothing novel in either of these claims, except the use of concrete in the construction of the flooring. Before the use of concrete dams were made of timber, iron, or steel, or of solid masonry. The complainant's concrete dam is substantially a reproduction in concrete of an old and familiar style of timber dam. The flooring is supported by buttresses with spaces between. The solid masonry dam had become, before the introduction of the concrete dam, the standard form of dam for the retention of large reservoirs of water. The complainant's concrete dam is claimed to have, and I am satisfied from the evidence that it has, various points of superiority over the solid masonry dam. The cost is low. The material is plastic. It forms a solid mass without joints. But that is a feature of all concrete construction. The great development of the use of concrete in recent years has made it a valuable building material for many purposes. Its use alone, or reinforced by iron or steel rods or wires, was well known in other forms of construction when the first concrete dam was built. It was natural that it should have been tried late in dam building because of the great danger arising from any insecurity

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in a dam; but it seems to me that it was certain, in the development of the use of concrete, to be ultimately used in dam building. The description and drawing in the original and reissued patent shows a dam with a curved flooring, and great stress is laid, in the descriptions and claims, on the importance of the curved flooring as causing the lines of pressure, perpendicular to the face of the flooring, to lie wholly within the limits of the base of the buttresses. No such dam has been built. All that have been built have a straight flooring. It is claimed that the patent applies to dams with a straight flooring, and, if it were valid in other respects, I think it would apply to them. The patent also describes and claims a method of fastening the buttresses to the base. But no claim is made in this case that the defendant threatens infringement of the curved flooring or of the method of fastening the buttresses described and claimed in the patent. The claim is that under this patent the complainant has a monopoly of dams made of concrete after an old style of wooden dams. The general rule is, of course, that the substitution of one material for another is not invention. Undoubtedly the complainant's form of concrete dam has many advantages; but they seem to me to result simply from the natural qualities of concrete, and not from any newly discovered qualities. The use of concrete for dams has the usual advantages that it has for houses and bridges, and for many other forms of construction. But that does not make its first adoption for a particular use patentable. If this patent is valid, the first maker of a concrete house or bridge or sidewalk was entitled to a patent for the thing made.

The bill is dismissed, with costs.

PATTON v. CINCINNATI, N. O. & T. P. RY.

(District Court, E. D. Tennessee, S. D. May 23, 1913.)

No. 1,201.

1. REMOVAL OF CAUSES (§ 3*)—EMPLOYERS' LIABILITY ACT—ACTIONS.

A case arising under Employers' Liability Act April 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act April 5, 1910, c. 143, § 1, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1324), brought in a state court of competent jurisdiction, is not removable to a federal court, even though the case would be otherwise removable, by reason of diversity of citizenship or other independent ground of removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. § 3.*]

2. REMOVAL OF CAUSES (§ 102*)—FEDERAL COURTS—JURISDICTION.

Employers' Liability Act April 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act April 5, 1910, c. 143, § 1, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1324), that no case arising thereunder shall be removed from any court of competent jurisdiction to any federal court, re-enacted in Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094 (U. S. Comp. St. Supp. 1911, p. 140) is not a mere personal privilege or exemption in favor of the plaintiff in respect to the jurisdiction of the particular District Court to which the case has been removed, which the plaintiff may waive after the removal or consent, but is a provision limiting the jurisdiction of federal courts as a class, and entirely withholding such jurisdiction, through removal proceedings of cases arising under the act which have been previously commenced in a state court of competent jurisdiction; and hence, where an action instituted in a state court was removed before the filing of the complaint, though the time therefor had expired without motion to dismiss, and the complaint when filed in the federal court stated a cause of action under the act, the court had no jurisdiction thereof, and was bound to remand it to the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218-220, 223, 224; Dec. Dig. § 102.*]

At Law. Action by Bessie Patton, administratrix, against the Cincinnati, New Orleans & Texas Pacific Railway. On motion to remand. Granted.

This is an action for \$25,000 damages commenced by the plaintiff by summons from the Circuit Court of Hamilton County, Tennessee, a county within the Southern Division of the Eastern District of Tennessee, which was issued and served on November 4, 1912, and was returnable on January 6, 1913. On January 9, 1913, the plaintiff's declaration not having been filed, the defendant filed its petition in the State court, with proper bond, for removal of the suit to this court, the sole ground of removal alleged being that the suit was of a civil nature in which the matter in controversy exceeded three thousand dollars, exclusive of interest and costs, and that the controversy was wholly between citizens of different States, the plaintiff being a citizen of Tennessee and the defendant a corporation created under the laws of Ohio and a citizen of that State. An order of removal was made by the State court, and a certified copy of the record filed in this court on February 6, 1913. On April 28, 1913, the plaintiff filed her declaration in this court, alleging a cause of action against the defendant arising under the Federal Employers' Liability Act, and subsequently, on the same date filed her motion to remand the cause to the State court, on the ground, in substance, that as shown by her declaration the cause was one arising under such act and hence not removable to this court.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Littleton, Littleton & Littleton, of Chattanooga, Tenn., for plaintiff.
Pritchard, Allison & Lynch, of Chattanooga, Tenn., for defendant.

On Motion to Remand.

SANFORD, District Judge (after stating the facts as above). Section 6 of the Employers' Liability Act of April 22, 1908, c. 149 (35 Stat. 66), as amended by section 1 of the Act of April 5, 1910, c. 143 (36 Stat. 291 [U. S. Comp. St. Supp. 1911, p. 1324]), provides as follows:

"Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

Section 28 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1094 [U. S. Comp. St. Supp. 1911, p. 140]), which went into effect January 1, 1912, provides, among other things, as follows:

"Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. * * * Provided, That no case arising under an Act entitled 'An act relating to the liability of common carriers by railroad to their employes in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

After careful consideration I have reached the following conclusions:

[1] 1. A case arising under the Employers' Liability Act and brought in a state court of competent jurisdiction is not removable to a Federal District Court even although the case would be otherwise removable by reason of diversity of citizenship or other independent ground of removal. *Teel v. Railway Co.* (U. S. Circ. Ct. App., 6th Circ., May 6, 1913) 204 Fed. 918; *Symonds v. Railway Co.* (C. C.) 192 Fed. 353; *Strauser v. Railroad Co.* (D. C.) 193 Fed. 293; *Lee v. Railway Co.* (D. C.) 193 Fed. 685; *Ullrich v. Railroad Co.* (D. C.) 193 Fed. 768; *Hulac v. Railway Co.* (D. C.) 194 Fed. 747; *McChesney v. Railroad Co.* (D. C.) 197 Fed. 85; *De Atley v. Railway Co.* (D. C.) 201 Fed. 591, 596; *Kelly v. Railway Co.* (D. C.) 201 Fed. 602, 605.

[2] 2. The provision in the amendatory Act of April 5, 1910, that no case arising under the Employers' Liability Act shall be removed from any State court of competent jurisdiction to any Federal court, and re-enacted in section 28 of the Judicial Code, is not merely a personal privilege or exemption in favor of the plaintiff in respect to the

jurisdiction of the particular District Court to which the case has been removed, which he may waive after the removal by appearance or consent (*In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164), but is a provision limiting the jurisdiction of the Federal Courts as a class, and entirely withholding from them jurisdiction, through removal proceedings, of cases arising under the Employers' Liability Act which have been previously commenced in State courts of competent jurisdiction. This distinction is emphasized by the contrast between the language of the first sentence in section 6 of the Employers' Liability Act, as amended by the Act of 1910, in reference to the particular district in which a suit "may" be brought under that Act, and that in the second sentence of the same section, which provides that "no case" arising under the Act and brought in any State court of competent jurisdiction "shall be removed to any court of the United States." It is also the necessary result of the proviso, framed in substantially the same language, contained in section 28 of the Judicial Code.

"The office of a proviso, generally, is, either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview." *Minis v. United States*, 15 Pet. 423, 445, 10 L. Ed. 791; *Strauser v. Railway Co.*, *supra*, at page 294.

Applying this rule of construction, I think it clear that the effect of the proviso in section 28 of the Code is to except cases arising under the Employers' Liability Act and pending in State courts from the classes of cases whose removal to the Federal courts is authorized under the preceding provisos of the section, and to so qualify the broad language used in the preceding portions of this section as to exclude from its provisions any and all cases of this character. In other words, in my opinion, the effect of this proviso is the same as if the preceding enacting provisions of the section had expressly excepted from each class of cases which might be removed to the Federal courts all cases arising under the Employers' Liability Act and pending in the State courts.

In *Strauser v. Railroad Co.*, *supra*, at page 294, Munger, District Judge, said:

"It is quite obvious that the Judicial Code, in its general purpose, seeks further to restrict the jurisdiction of the United States courts, and a special restriction of this kind, placed as it is at the close of the section granting the general right of removal, shows that Congress intended that no case should be removed from the State court, upon any ground, provided only that it arises under the Acts of Congress cited."

In *Lee v. Railway Co.*, *supra*, at page 686, Wright, District Judge, said:

"By adding this proviso to the general law, as was done by Congress, defining removable cases, and giving the right to a removal thereof, the general right of removal defined in the enacting part of the section was thus limited, generally throughout the section in each class of cases defined, and whenever a case arising under the liability Act falls in any class of cases subject to removal, it is by force of the provisions of the proviso excepted from such right of removal."

And in *Ullrich v. Railroad Co.*, supra, at page 770, Hand, District Judge, said:

"The words used prohibit absolutely any removal when the 'case' is of a given kind."

And see, inferentially, as to the effect of this proviso in entirely "withholding" jurisdiction from the Federal courts in cases of this kind, the opinion of the Circuit Court of Appeals in *Teel v. Railway Co.*, supra.

In *Ayres v. Watson*, 113 U. S. 594, 5 Sup. Ct. 641, 28 L. Ed. 1093, it was said, in construing the provisions of the Act of March 3, 1875, in reference to the removal of causes to the Federal courts, that the second section, defining the cases in which a removal might be made, was "jurisdictional"; that its conditions were "indispensable" and must be shown by the record; and that the jurisdictional facts which it prescribed were "absolutely essential" and could not be waived, and their want would be error "at any stage of the cause." And it is clear that while the plaintiff may, after removal of a cause, waive objection to the jurisdiction of the particular Federal court to which the case has been removed, he cannot waive an objection running to the jurisdiction of the Federal courts as a class, or confer jurisdiction, even by consent, in a cause not within the general jurisdiction of the Federal courts. In *re Moore*, supra, 209 U. S. at page 506, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, and cases therein cited.

It results that as Congress has expressly withheld from the Federal courts, as a class, jurisdiction in cases arising under the Employers' Liability Act previously brought in a State court, the plaintiff could not, under the rule laid down in the cases above cited, waive his objection to the want of jurisdiction in this court by filing his declaration in this court, or otherwise, and could not, even by express consent, confer jurisdiction upon this court under the removal proceedings in this cause; and it appearing that jurisdiction in a case of this character has been expressly withheld from the Federal courts by the Acts of Congress, it would clearly be the duty of the court, even in the absence of a motion to remand, upon its own motion, when such want of jurisdiction is brought to its attention, to remand the case to the State court, under the provisions of section 37 of the Judicial Code.

3. This result is not changed by the fact that the plaintiff's declaration had not been filed in the State court at the time the defendant's petition for removal was filed, and there was nothing in the record at that time to show that the case was one arising under the Employers' Liability Act. It is true that the plaintiff had then failed to file her declaration within the time required by the Tennessee Statutes; but no motion having been made to dismiss the suit for failure to file the declaration, the plaintiff was still entitled to file her declaration at any time. And since, under the rules of practice in Tennessee, the defendant was allowed two days after the declaration should be filed in which to plead thereto, the time had not then expired in which, under section 29 of the Judicial Code, it was required to file its petition for removal. *Lewis v. Railway Co.* (C. C., E. D. Tenn.) 192 Fed. 654. The defendant's petition for removal was based solely upon diversity of cit-

izenship, and the amount in controversy, and did not disclose the fact that the suit was one arising under the Employers' Liability Act, which fact first appeared in the record when the plaintiff subsequently filed her declaration in this court.

In this condition of the record the defendant relies upon the general rule stated in *Alabama Southern Ry. v. Thompson*, 200 U. S. 206, 216, 26 Sup. Ct. 161, 164 (50 L. Ed. 441, 4 Ann. Cas. 1147) that "the question of removability depends upon the state of the pleadings and the record at the time of the application for removal," and insists that as the record did not affirmatively show at the time the petition for removal was filed that the suit in the State court was one arising under the Employers' Liability Act, it hence cannot now be remanded to the State court upon that ground. It is to be observed, however, that the rule relied on by the defendant was stated in a case in which the plaintiff's declaration had been filed before the petition for removal had been filed, and in connection with the well settled doctrine that the case made by the plaintiff in his pleadings was to determine the alleged separable character of the controversy for the purpose of deciding the right of removal; and the rule relied on is in no wise authority for the contention that where the plaintiff had not filed any pleading at the time the petition for removal was filed which showed the cause of action, the defendant could obtain a right of removal to which it was otherwise not entitled, by filing a petition for removal which likewise did not state the cause of action, and when, if the nature of the cause of action had been stated in the petition for removal it would have affirmatively appeared that the suit was one which the defendant was not entitled to remove to the Federal court. The general rule relied on by the defendant that the question of removability depends upon the state of the pleadings and the record at the time of the application for removal, would, in fact, seem, when applied to the instant case, to lead to the conclusion that, as matter of law, the case was not shown to be a removable one at the time the petition for removal was filed. Construing the Acts of Congress as excepting from all otherwise removable cases those arising under the Employers' Liability Act and pending in a State court, it may well be that where a railway company seeks to remove to a Federal court an action for damages pending in a State court, and the exact nature of the cause of action has not yet appeared from any pleadings filed by the plaintiff, it is incumbent upon the defendant, in order to show a removable case upon the face of its petition for removal, to specifically aver that the case is not one excepted from removal by the proviso in section 28 of the Judicial Code, that is, that it is not a suit arising under the Employers' Liability Act. In *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, 604, 14 Sup. Ct. 458, 464 (38 L. Ed. 279), it is said:

"There is a general rule, applicable both to conveyances and statutes, that where there is an exception in the general granting or enacting clause, the party relying upon such general clause must in pleading state the general clause, together with the exception, and must also show by the testimony that he is not within the exception."

But without determining this question of pleading upon the face of the petition for removal itself, I am clearly of opinion that where the

plaintiff's cause of action has not been stated in any pleading filed by the plaintiff and the petition for removal is silent as to the nature of the cause of action, the case should be subsequently remanded to the State court, if at any time it affirmatively appears, either from the pleadings filed by the plaintiff or in any other appropriate manner, that the suit is in fact one coming within the excepting clause and hence withheld from the jurisdiction of the Federal courts through removal proceedings. This view finds direct support in *Barney v. Latham*, 103 U. S. 205, 216, 26 L. Ed. 514, in which it was said that if after removal of a case to the Federal court it should, upon a reformation of the pleadings, appear that the case did not really and substantially involve a dispute or controversy within the jurisdiction of the court, it could then under the 5th section of the Act of March 3, 1875, the provisions of which were carried into section 37 of the Judicial Code, be remanded to the State court. Certainly if the case be one in which jurisdiction is expressly withheld from this court through removal proceedings, and in which jurisdiction cannot be conferred either by waiver or express consent of the plaintiff after the removal, it follows, a fortiori, that jurisdiction cannot be conferred simply by the negligence or default of the plaintiff in failing to file his declaration in the State court within the proper time. And the defendant's argument, it is to be noted, would furthermore lead to the conclusion that even where the time had not elapsed in the State court within which the plaintiff was required to file his declaration, the defendant could, by filing its petition for removal before such time had elapsed and omitting from its petition for removal any statement of the real nature of the suit, prevent the plaintiff, although in no wise in default, from subsequently making the real nature of its case to appear, and continuing to proceed as he is entitled to do under the Acts of Congress, in the State court in a suit of this character.

4. For the foregoing reasons, it being now made to affirmatively appear that this suit is one arising under the Employers' Liability Act which was pending in a State court of competent jurisdiction at the time the petition for removal was filed, I am constrained to hold that no jurisdiction was acquired by this court under the petition for removal, and that the plaintiff's motion to remand the suit to the State court should accordingly be granted. I am furthermore strengthened in this conclusion by the well settled rule, growing in part out of the great practical hardship of protracted and fruitless litigation resulting to litigants from a ruling by a Federal trial court erroneously retaining jurisdiction of a removal cause, as contrasted with the finality of its judgment remanding the cause and restoring jurisdiction to the State court, that if there be any substantial doubt as to Federal jurisdiction the cause should be remanded, and jurisdiction retained only where it is clear. *Western Union Telegraph Co. v. Louisville & N. R. Co.* (D. C., E. D. Tenn.) 201 Fed. 932, 945, and cases cited.

5. An order will accordingly be entered granting the plaintiff's motion, remanding this cause to the State court from which it was removed, and adjudging all the costs incident to the removal against the defendant and the sureties on its removal bond.

LOUISVILLE & N. R. CO. v. RAILROAD COMMISSION OF ALABAMA et al.

(District Court, M. D. Alabama. July 24, 1913. On Application for Appeal, September 15, 1913.)

1. COURTS (§ 101*)—FEDERAL COURTS—INJUNCTIONS TO RESTRAIN ENFORCEMENT OF STATE STATUTES OR ORDERS—BY WHOM MAY BE GRANTED.

Judicial Code, § 266 (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 237]), as amended by Act March 4, 1913, c. 160, 37 Stat. 1013, requires the presence of three judges at the hearing of an application for an interlocutory injunction to restrain the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute "or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state" (the words quoted being added by the amendment) "upon the ground of the unconstitutionality of such statute." *Held*, that the amendment extends the procedure requiring three judges to applications to enjoin any order made by a state board or commission which is alleged in the application to be in violation of the federal Constitution, although the constitutionality of the statute under which the board or commission acts may not be questioned.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 344-350, 629; Dec. Dig. § 101.*]

2. CARRIERS (§ 18*)—STATE REGULATION OF RATES—INJUNCTION—CONSTRUCTION OF DECREE.

A decree of a federal court enjoining the enforcement of state statutes establishing a system of rates for freight and passengers on the ground that such system, taken as a whole, was confiscatory as applied to the complainant railroad company does not render the question of the validity of the passenger rates alone, or taken in connection with higher freight rates, *res judicata*, nor estop the State Railroad Commission, acting under another statute, from subsequently establishing the same passenger rates.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 18.*]

3. COMMERCE (§ 10*)—REGULATION OF RATES—POWERS OF STATE—NONEXERCISE OF POWER OF CONGRESS.

In the absence of any legislation on the subject by Congress, it is within the constitutional power of a state to regulate rates to be charged by railroads within the state, and such regulation is not an interference with interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 8; Dec. Dig. § 10.*]

4. CARRIERS (§ 12*)—STATE REGULATION OF RATES—REASONABLENESS OF RATES.

Where 80 per cent. of the mileage of a railroad company in a state consists of branch lines constructed with knowledge that they would not pay a fair return on intrastate business and over which it voluntarily transports coal and ore to iron and steel mills at cost, for the purpose of developing its interstate business, it cannot attack intrastate passenger rates fixed by the state as confiscatory because its entire intrastate business does not yield a fair return on the property invested therein.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

5. CARRIERS (§ 18*)—STATE REGULATION OF RATES—PRESUMPTION OF VALIDITY.

Railroad rates established by a state legislature or duly authorized commission are presumptively reasonable and not violative of constitu-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tional rights, and hence to authorize the courts to interfere with their enforcement their invalidity must be established clearly and beyond reasonable doubt.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16–18, 20, 24; Dec. Dig. § 18.*]

6. CARRIERS (§ 12*)—STATE REGULATION OF RATES—REASONABLENESS OF RATES—VALUATION OF PROPERTY.

In estimating the cost of reproduction of railroad property, for the purpose of determining the reasonableness of rates fixed by the state, it is not permissible to be governed by the value of adjoining lands enhanced by the existence and operation of the railroad and to add to such value an extra amount which it would probably cost to acquire the lands for railroad purposes.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7–11, 15–20; Dec. Dig. § 12.*]

7. CARRIERS (§ 12*)—STATE REGULATION OF RATES—REASONABLENESS OF RATES.

Evidence considered, and *held* insufficient to establish the unconstitutionality of an order of the Railroad Commission of Alabama fixing intrastate passenger rates at 2½ cents per mile on the ground that it was confiscatory as applied to complainant railroad company.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7–11, 15–20; Dec. Dig. § 12.*]

Pardee, Circuit Judge, dissenting.

On Application for Appeal.

8. FEDERAL COURTS—SUITS TO ENJOIN ENFORCEMENT OF STATE STATUTES OR ORDERS—PROCEDURE—APPEAL.

Where a majority of the three federal judges sitting together, as required by section 266 of the Judicial Code (Act March 3, 1911, c. 231, § 266, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]), on the hearing of a motion for a preliminary injunction to restrain the enforcement of a state statute or administrative order establishing intrastate railroad rates, have concurred in an order denying such injunction after a hearing on the merits, they should not, pending an appeal from such order, continue in force a temporary restraining order, granted on motion of plaintiff before the hearing, not only because said section 266 expressly provides that such temporary order "shall remain in force only until the hearing and determination of the application for an interlocutory injunction," but also because to continue it in force would be inconsistent with, and practically nullify, the order appealed from. (Per Shelby, Circuit Judge.)

In Equity. Suit by the Louisville & Nashville Railroad Company against the Railroad Commission of Alabama and others. On motion for preliminary injunction. Motion denied.

See, also, 196 Fed. 800.

Sydney J. Bowie, of Birmingham, Ala., and Henry L. Stone and W. A. Colston, both of Louisville, Ky., for plaintiff.

Robt. C. Brickell, Atty. Gen. of Alabama, and Samuel D. Weakley and Henry C. Selheimer, both of Birmingham, Ala., for defendants.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SHELBY, Circuit Judge. This is a supplemental bill seeking to enjoin an order of the Railroad Commission of Alabama fixing intrastate passenger rates.

[1] The application for an interlocutory injunction was made to the District Court on the ground that the order of the Alabama Railroad Commission is violative of the federal Constitution. The District Court (Hon. W. I. Grubb presiding), pursuant to the Act of March 4, 1913, c. 160, 37 Stat. 1013, amending section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 237]), called to his assistance, to hear and determine the application, Circuit Judges Pardee and Shelby. On the argument at the hearing of the application, no formal objection was made to such action of the district judge, but it was suggested by one of the solicitors for the plaintiff that the statute requiring the judge to whom the application was made to call other judges was not applicable because the prayer for injunction was not based on the ground of the unconstitutionality of a statute.

The suggestion raises a question as to the legality of the organization of the court with three judges and is the first thing to be considered.

The following are the parts of the statute most relevant; the addition made by amendment being placed in italics:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, *or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state,* shall be issued or granted by any justice of the Supreme Court, or by any District Court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application." Judicial Code, § 266; 36 Stat. 1162; 37 Stat. 1013.

The suggestion of counsel is that the amendment left the statute still requiring that the application should be made upon the ground of the "unconstitutionality of such statute," and does not in words make it apply to the unconstitutionality of an order made by a board or commission. The intention of Congress in enacting the statute must control in its interpretation if that intention can be ascertained by an examination of the amendment in connection with the section as it stood before the amendment. The section, before amendment, required a judge, when an application was made to him for an interlocutory injunction upon the ground of the "unconstitutionality" of a statute, to call to his assistance two other judges to sit with him on the hearing of the application. The intention of the amendment was to extend the original statute so as to have it include "an order made by an administrative board or commission" acting under and pursuant

to the statutes of a state. The title of the act strongly indicates that such was the intention:

"An act restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a state or of an order made by an administrative board or commission created by and acting under the statute of a state." 37 Stat. 1013.

When the application for the interlocutory injunction is to restrain the execution of a statute of a state, to make the statute requiring the three judges applicable, the application must be "upon the ground of the unconstitutionality of such statute." To make the words "upon the ground of the unconstitutionality of such statute" applicable literally to suits to enjoin the enforcement of an order of a board or commission would permit the amended statute to have application only when the statutes creating a commission were alleged to be unconstitutional. At the time of the passage of the amendment, the constitutionality of statutes creating such commissions was so well settled that it is clear that Congress did not have in view suits attacking such statutes. It had in mind, as the title and the act both show, the orders made by a board or commission. The amended statute, by its words, extends to an application to enjoin the enforcement of any order made by an administrative board or commission acting under and pursuant to the statutes of a state. If the words limiting the application of the amendment, when it is sought to enjoin the enforcement of a statute, to cases where it is alleged that the statute violates the Constitution, are to be applied also to cases where it is sought to enjoin an order of a commission, the word "unconstitutionality" must be made to apply to the order of the Commission and not to a statute. When the power to regulate rates is exercised by the Legislature directly, the statute, as originally enacted and as amended, is applicable when such legislation is attacked as violative of the Constitution; and when the Legislature delegates its power to regulate rates to a commission, and the order of the Commission is attacked because it is violative of the Constitution, the amendment was intended to make the procedure requiring three judges applicable. The Commission's order is the exercise of a legislative function and was thought by some to be within the meaning of section 266 as originally enacted. The amendment, at least, was clearly intended to include orders by a commission that are alleged to be violative of the Constitution. While not controlling, it may be mentioned that it appears from the discussion of the amendment in the House of Representatives, when it was on its passage, that such was there understood to be its purpose. Congressional Record (3d Session, 62d Congress, March 3, 1913) vol. 49, p. 4781. Whether the amendment extends the procedure requiring three judges to applications to enjoin every order that the Commission may make is not a question before us. It is sufficient for this case to hold that it extends to any order made which is alleged in the application for an interlocutory injunction to be violative of the federal Constitution. To hold otherwise would make the amendment practically ineffective and defeat the legislative intention.

The plaintiff, in argument, contends that it is entitled to an interlocutory injunction on four separate grounds, each of which will be briefly considered.

[2] 1. It is contended that the decree of this court (Hon. Thomas G. Jones, District Judge, presiding), rendered April 2, 1912, is res judicata and estops the Commission from making the order which is here sought to be enjoined.

The decree in question here is confined to fixing intrastate passenger rates. The decree which is pleaded as res judicata was one relating generally to the plaintiff's intrastate freight and passenger rates. It declared unconstitutional and confiscatory (so far as concerns the plaintiff's traffic) an act of the Legislature of Alabama of March 2, 1907, and eight acts of November 23, 1907, and parts of the Alabama Code of 1907, which re-enacts those acts. It was decreed that each of these acts was confiscatory when taken "in connection with the other rate acts" affected by the decree. The decree also specifically condemns as confiscatory the act of the Alabama Legislature fixing a maximum intrastate passenger rate of $2\frac{1}{2}$ cents per mile. The statute fixing this rate is so condemned "when taken in connection with the other rates covered by the decree." This decree is still in force; no appeal having been taken from it. The plaintiff, after the decree, re-established and now has in effect its higher freight rates, which it enforced before the enactment of the legislation which the decree declared confiscatory. The decree set up as res judicata only condemned the intrastate passenger rates when taken in connection with the other rates also condemned in the same decree. It was not adjudged that the intrastate passenger rates, taken in connection with the higher freight rates re-established by the decree, were confiscatory. To hold that the decree was res judicata of this controversy would be, in effect, to declare that it barred the Commission from ever afterward fixing rates; that it permanently deprived the Commission of authority to regulate rates. That the District Court had no authority to do this was decided without dissent (on this question) in *Railroad Commission v. Central of Georgia Railway Co.*, 170 Fed. 225, 240, 95 C. C. A. 117. The decree of the District Court invalidating the Alabama statutes fixing freight rates entirely changed the situation. Even if the $2\frac{1}{2}$ -cent passenger rate were confiscatory, taken in connection with those statutes, it might not be now, taken in connection with the higher freight rates and the changed conditions. The Commission, in fixing the rate in question here, was not acting under the statutes declared by the decree void as against the plaintiff, but it was acting under the Alabama statutes creating the Commission and conferring on it generally the authority to regulate intrastate rates. *Louisville & Nashville Railroad Co. v. Railroad Commission of Alabama* (by Hon. W. I. Grubb, District Judge, May 5, 1913) 205 Fed. 800. The former decree does not estop the Commission from making the order in suit here.

[3] 2. It is contended that the order of the Commission should be enjoined because it is a burden on or an interference with interstate commerce.

The Commission's order relates only to intrastate passenger rates, fixing the rates to be charged between points within the state. It seems well settled that the state, acting by its Legislature or by Commissions created by it, may, within constitutional limits, regulate rates to be charged within the state. Congress has not yet authorized the Interstate Commerce Commission to regulate intrastate rates on interstate roads. Unless the state has such authority, it does not exist at all under legislation now in force. The states have exercised such authority ever since the building of railroads was begun in the United States. The fact that the Commission's order may incidentally, but not materially, affect interstate commerce does not make it invalid or subject to be enjoined. *Simpson et al. v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511.

3. It is contended that the order should be enjoined because it was made without proper notice to the plaintiff; that it was not granted an opportunity to defend. The record refutes this contention because it shows that the procedure conformed to the Alabama statutes, which the Circuit Court of Appeals for this circuit, without dissent (on this point), has held to be valid and constitutional. *Railroad Commission v. Central of Georgia Railway Co.*, 170 Fed. 225, 240, 95 C. C. A. 117. Notice was given the plaintiff in conformity to the Alabama statutes, and a formal hearing was had, at which the plaintiff offered evidence bearing on the issues involved. There was no want of legal formalities in the procedure before the Commission.

[4] 4. The fourth and chief contention of the plaintiff is that the intrastate passenger rate fixed by the Commission is confiscatory, not allowing an adequate return on the plaintiff's property devoted to the public use, and that the Commission's order is therefore violative of the federal Constitution.

If the order made by the Commission had fixed a general schedule of rates covering the intrastate operations of the carrier taken as a whole, this contention would certainly present the controlling question. Such question was presented in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, and in *Simpson et al. v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511. The controlling question in such cases is whether or not the state has overstepped the constitutional limit and made the rate so low as to deprive the carrier of its property without due process of law. This case (the case made by the supplemental bill) is to be distinguished from cases which involve all or practically all of the intrastate passenger and freight rates charged by a railroad. The order sought to be enjoined, and which is the only subject of controversy before us, requires the plaintiff to put into effect in Alabama an intrastate passenger rate of 2½ cents a mile for adults and 1¼ cents a mile for children. The great volume of evidence submitted relates to the issue, necessarily involved in the main case, as to whether or not the railroad was earning under the general schedule of rates then in question a fair return on the value of its property devoted to intrastate public service. The solution of that question in favor of the plaintiff would not be conclusive against the defendants in the instant case, be-

cause it is limited to intrastate passenger rates. It might be true that the plaintiff would fail to secure an adequate return on all of its property devoted to the public intrastate service, and yet the failure might not be due to the passenger rate. If the return were insufficient on the whole property, the passenger rate would not be made invalid unless it materially contributed to cause the insufficiency. It follows that, to attack the order successfully, the insufficiency of the return must be shown and also that the order as to passenger rates is at fault in causing the insufficiency. If the insufficiency of the return were proved according to rules hereinafter stated, if it appears that such insufficiency is caused by the policy of the plaintiff in operation and investment and not by the rates attacked, the rule of adequate return would be inapplicable. The plaintiff cannot be permitted to cause the failure of return by its own acts and then complain of it. For the encouragement of the manufacture of iron and its products in the Birmingham district, the plaintiff carries coal, ore, and limestone at cost, or at a loss, so far as intrastate traffic is concerned. This traffic carried without profit constitutes more than 75 per cent. of all the plaintiff's intrastate tons in Alabama. Eighty per cent. of the plaintiff's mileage in Alabama consists of branch lines, constructed, it is shown, with knowledge that they would not pay from intrastate business a fair return upon their value. The policy of building them was commendable and liberal, and also wise, because they greatly contribute to the interstate traffic. The policy shown by this management and investment has been of vast value in the development of the state and probably to the great advantage of the plaintiff's stockholders, but the public cannot be burdened by an unreasonable intrastate passenger rate to make up for losses on intrastate traffic voluntarily incurred with a view to the future or to the development of interstate traffic. Under the circumstances, we would be reluctant to hold that the order fixing a passenger rate only is confiscatory because the plaintiff fails, if it does fail, to receive an adequate return on all of its property devoted to intrastate public service. *Minnesota & St. Louis R. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 412, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Covington, etc., Turnpike Co. v. Sandford*, 164 U. S. 578, 596, 17 Sup. Ct. 198, 41 L. Ed. 560; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 447, 23 Sup. Ct. 571, 47 L. Ed. 892. See 20 *Interst. Com. Com'n R.* 342.

[5] In deciding the question whether or not an order made by authority of the state, fixing rates, is confiscatory, the inferior courts, as to the measure of proof, are guided by well-settled rules, binding on them because announced by the Supreme Court. One of those rules is that the rate fixed by legislative authority is *prima facie* fair and just. The rate having been fixed by a commission vested with legal authority, the presumption must be indulged at the outset that it is reasonable and not violative of constitutional rights. The burden of proof is placed on the plaintiff to show that the case is one calling for judicial interference with the authorized action

of the local authorities. *Louisiana R. R. Commission v. Cumberland Tel. Co.*, 212 U. S. 414, 29 Sup. Ct. 357, 53 L. Ed. 577; *Minneapolis & St. Louis R. R. Co. v. Minnesota*, 186 U. S. 257, 264, 22 Sup. Ct. 900, 46 L. Ed. 1151. Another rule for our guidance is that the burden of proof is not only placed on the plaintiff but that the plaintiff is required to do more than offer a mere preponderance of evidence. The judiciary is not permitted to interfere with the rates established by legislative authority unless it is made to appear clearly and beyond reasonable doubt that they are unreasonable and that their enforcement would be equivalent to the taking of property for public use without just compensation. If the evidence offered leaves the court in doubt, if it is not clear, satisfactory, and convincing, the rate fixed by state authority should not be enjoined. *San Diego Land Co. v. National City*, 174 U. S. 739, 754, 19 Sup. Ct. 804, 43 L. Ed. 1154; *St. L. & San Francisco Ry. Co. v. Gill*, 156 U. S. 649, 666, 667, 15 Sup. Ct. 484, 39 L. Ed. 567. So stringent are these rules against the interference with the action of the local authorities in fixing rates that it has been said that the court should not enjoin a rate unless it can hold "that it was impossible for a fair-minded board to come to the result which was reached." *Knoxville v. Water Co.*, 212 U. S. 1, 17, 29 Sup. Ct. 148, 153 L. Ed. 371).

These rules are not mere cautionary phrases. They are intended to mark the limits of judicial interference. If the inferior courts will regard these principles, not as platitudes, but as rules prescribed for their guidance, it will greatly lessen legislation and litigation in relation to the regulation of the tariffs of public service corporations.

Conceding that this case should be considered as one controlled by the rule of adequate return on investment, the question arises as to the sufficiency of the evidence offered to show that the order is confiscatory.

The first step in the proof required of the plaintiff is to show the value of the property upon which a return is claimed. If such value is unduly inflated, all calculations based on it are misleading. The plaintiff estimates the total value of its property devoted to public use in Alabama at \$42,750,933.08. This value is stated in affidavits and is referred to as being the same found by the special master in the main case. It is not practicable to refer to all the items about which there is controversy included in this valuation, but the principle upon which the evidence as to value was received and upon which it is now offered is best shown by an excerpt from the special master's report:

"The first objection is that the estimate of the Chief Engineer was made in 1907, when the prices were higher than for previous years, and it is insisted that the prices should have been on the average prices for a series of years. But it appears that the law contemplates values at the time of the controversy, and the proof shows that prices have a general tendency to higher levels, and distinctly shows that the reconstruction would now cost as much as the estimates amount to.

"The next point is that in reproduction the enhanced value of property for 50 or a 100 years, caused, amongst other things, by the facilities furnished by the road, is not to be considered. But there is no known method of determining the share of development of a country assignable to the existence of

a particular market facility. And, besides, the road is entitled to all enhancement of values. If values decline, the road is the loser; if they advance, the road is entitled to the benefit. So it is declared, and, seemingly, with justice.

"The road as it exists has value from every incident of situation which affords opportunity to earn an income. And the right of way on reproduction for rate determination obviously must include every such surrounding. The new road is to be the 'forced heir' of the old road, vanishing in imagination as the new is constructed. And the enhancement of values includes and represents such advantages as time has given to the location.

"The present right of way is an artery and vein of commerce, receiving and imparting its current from and to the adjacent and connecting country, by and through infinite smaller connections. And the new road succeeds to the situs without losing a drop of blood (commerce). And all enhancement of prices is an inherent constituent of the situs."

The following is an excerpt from the opinion in the Minnesota Rate Cases, which deals with the same subject:

"And where the inquiry is as to the fair value of the property, in order to determine the reasonableness of the return allowed by the rate-making power, it is not admissible to attribute to the property owned by the carriers a speculative increment of value, over the amount invested in it and beyond the value of similar property owned by others, solely by reason of the fact that it is used in the public service. That would be to disregard the essential conditions of the public use and to make the public use destructive of the public right.

"The increase sought for 'railway value' in these cases is an increment over all outlays of the carrier and over the values of similar land in the vicinity. It is an increment which cannot be referred to any known criterion but must rest on a mere expression of judgment which finds no proper test or standard in the transactions of the business world. It is an increment which, in the last analysis, must rest on an estimate of the value of the railroad use as compared with other business uses; it involves an appreciation of the returns from rates (when rates themselves are in dispute) and a sweeping generalization embracing substantially all the activities of the community. For an allowance of this character there is no warrant.

"Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, still the increase so allowed, apart from any improvements it may make, cannot properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character. Otherwise we enter the realm of mere conjecture. We therefore hold that it was error to base the estimates of value of the right of way, yards, and terminals upon the so-called 'railway value' of the property. The company would certainly have no ground of complaint if it were allowed a value for these lands equal to the fair average market value of similar land in the vicinity, without additions by the use of multipliers, or otherwise, to cover hypothetical outlays. The allowances made below for a conjectural cost of acquisition and consequential damages must be disapproved; and, in this view, we also think it was error to add to the amount taken as the present value of the lands the further sums, calculated on that value, which were embraced in the items of 'engineering, superintendence, legal expenses,' 'contingencies,' and 'interest during construction.'

"By reason of the nature of the estimates and the points to which the testimony was addressed the amount of the fair value of the company's land cannot be satisfactorily determined from the evidence, but it sufficiently appears, for the reasons we have stated, that the amounts found were largely excessive." *Simpson et al. v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511.

The underlying principles upon which the plaintiff has proceeded to establish the values upon which it claims adequate return cannot be

reconciled with the quoted declarations of the Supreme Court. The aggregate value, as proved by the plaintiff, includes \$1,416,182.12 for interest during construction, about \$600,000 for engineering, superintendence, and general expenses, more than a million dollars for "seasoning" of roadbed, and other sums amounting in the aggregate to about \$6,000,000, which, it seems, would be of doubtful admissibility under the principles announced in the Minnesota Rate Cases.

[6] But it is a matter of more importance that the total valuation is greatly augmented by the course pursued in placing estimates on the real estate, including the right of way. While no direct reference is made to valuation for "railroad purposes," it appears that the lands were valued without regard to the "normal market value of the land in the vicinity having a similar character." In estimating the cost of reproduction, it does not seem to be permissible to be governed by the value of adjoining lands enhanced by the existence and operation of the railroad, and to add to such value an extra amount that it would probably cost to acquire the lands for railroad purposes. It cannot be ascertained from the record what the value is on the basis of the fair market value of similar lands in the vicinity.

In some way the value of the property must be proved. It would not be now claimed that the carrier had the unqualified right to make charges to produce a return on the face value of its stocks and bonds. It would seem equally unjust to permit the carrier to make charges to produce a return on the investment of a surplus acquired by unreasonable tariffs, for that would be to base the right to commit a second wrong upon the successful imposition of the first.

Proof of the value of the property devoted to public intrastate use is only one step, and not the most difficult one, in the case. To sustain its contention, the plaintiff must offer evidence to show the cost of the intrastate and interstate traffic. The cost of freight and passenger traffic must then be separated. Any desired result may be proved by figures if the one making them is permitted to arbitrarily select the predicate upon which to base his calculations. When the division of the expenses is based chiefly on opinion or on limited investigation made with the view of obtaining desired results to be used in pending litigation, we should hesitate to hold it convincing within the rules requiring strict proof of confiscation.

The extreme difficulty and intricacy of making the calculations and proof would indicate the necessity of a system of account keeping on which to base them (*Allen et al. v. St. Louis, Iron Mountain & Southern Ry. Co.*, 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. Ed. 1625, June 16, 1913); but the difficulties do not relieve the plaintiff of the burden. The method used by the plaintiff to ascertain the per cent. to be applied to freight haulage and passenger haulage expenses is the result of a test made during one week in September, 1907, to ascertain the relative train cost of an interstate ton mile and an intrastate ton mile, and the relative train cost of an interstate passenger mile and an intrastate passenger mile. Men rode on the plaintiff's trains in Alabama for that week and gathered data. From information so obtained and from conductor's reports, it was ascertained what busi-

ness was done, interstate and intrastate, during that week. With respect to passenger traffic during that week, the number of intrastate and interstate passengers were counted and the number of intrastate and interstate passenger miles ascertained, and the train cost of each calculated. The train cost during this week of an intrastate passenger mile was 5.68 mills, and the train cost of an interstate passenger mile was 3.15 mills; and the ratio was thus fixed that the train cost of an intrastate passenger mile was, for that week, 180.317 per cent. of the train cost of an interstate passenger mile. The plaintiff's subsequent calculations and estimates proceed upon the hypothesis that the same ratio exists with respect to the train cost in the total intrastate and interstate passenger miles for each of the entire fiscal years involved in the investigation. The effect of this method was to burden intrastate traffic with approximately 70 per cent. of the entire cost of operation.

The plaintiff attempted to do in one week what could only be done by "prolonged and minute investigation of particular facts with respect to the actual traffic as it was being carried over the line." The result of the calculations relating to adequate return depend on this ratio. Can a ratio thus obtained be accepted as sufficient to sustain a finding of confiscation? An answer to this question is at least indicated by the Supreme Court (*italics ours*):

"The statements of the complainants' witnesses *as to the extra cost of intrastate business*, while entitled to respect as expressions of opinion, manifestly involve wide and *difficult generalizations*. They embrace, without the aid of statistical information derived from appropriate tests and submitted to careful analysis, a general estimate of all the conditions of transportation, and an effort to express *in the terms of a definite relation, or ratio*, what clearly could be accurately arrived at *only by prolonged and minute investigation of particular facts with respect to the actual traffic as it was being carried over the line*. The extra cost, as estimated by these witnesses, is predicated not simply of haulage charges but of all the outlays of the freight service, including the share of the expenses for maintenance of way and equipment assigned to the freight department. And the ratio, to be accurately stated, must also express the results of a suitable discrimination between the interstate and intrastate traffic on through and local trains respectively, and of an attribution of the proper share of the extra cost of local train service to *the interstate traffic that uses it*. The wide range of the estimates of extra cost, from three to six or seven times that of the interstate business per ton mile, shows both the difficulty and the lack of certainty in passing judgment.

"We are of opinion that on an issue of this character, involving the constitutional validity of state action, *general estimates of the sort here submitted*, with respect to a subject so intricate and important, should not be accepted as adequate proof to sustain a finding of confiscation. While *accounts have not been kept so as to show the relative cost of interstate and intrastate business, giving particulars of the traffic handled on through and local trains, and presenting data from which such extra cost as there may be of intrastate business may be suitably determined*, it would appear to have been not impracticable to have had such accounts kept or statistics prepared, at least during test periods, properly selected. It may be said that this would have been a very difficult matter, but the company, having assailed the unconstitutionality of the state acts and orders, was bound to establish its case, and it was not entitled to rest on expressions of judgment when it had it in its power to present accurate data which would permit the court to draw the right conclusion." *Simpson et al. v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511.

In the Missouri Rate Cases brief tests were given no weight but were discarded with the single remark:

"There was also testimony on each side as to certain tests, but these covered only a few days." *Knott et al. v. Chicago, Burlington & Quincy R. Co.*, 230 U. S. 474, 33 Sup. Ct. 975, 983, 57 L. Ed. 1571, June 16, 1913.

The contention is that the plaintiff, at the rate in question, carried passengers at a great loss. If that be true, under the rule which shows such loss, what rate per mile for carrying a passenger would the carrier have to charge in order to earn 8 per cent. on that part of its investment devoted to intrastate service?

[7] The decision of this case should not be controlled by artificial rules and formulas, but there should be "a reasonable judgment having its basis in a proper consideration of all relevant facts." There are several facts shown by the record which, while not controlling, are worthy of mention. There are a number of railroads besides the plaintiff's in operation in Alabama, and it appears that 55 per cent. of the mileage in Alabama, including all of the railroads in the state, have had for the last five years, and now have, a regular passenger rate of $2\frac{1}{2}$ cents a mile, and that they issue a penny scrip book, and that passengers who use it pay only 2 cents a mile. And the plaintiff sells a penny scrip book for \$20 to be used in one year, by using which passengers pay only 2.40 cents a mile. It is true that to obtain the lower rate the purchaser must pay \$20 in advance. The fact that such low rates are given by the plaintiff on the conditions prescribed would not make valid the rates fixed by the commission if they were, in fact, confiscatory. *Lake Shore, etc., Railway Co. v. Smith*, 173 U. S. 684, 697, 19 Sup. Ct. 565, 43 L. Ed. 858. But it is difficult to believe that the plaintiff would make these contracts of carriage at less than $2\frac{1}{2}$ cents a mile, if, in fact, a rate of $2\frac{1}{2}$ cents a mile were confiscatory.

The record shows that the country is richer and more prosperous along the lines of the plaintiff's road than in other parts of the state. And yet the other roads have maintained the rates that are here contested for the last five years. It is true that some of these roads at first resisted the enforcement of these rates. The present conditions being the same, or at least not unfavorable to the plaintiff, it would seem not unfair, so far as the plaintiff is concerned, to make the rates uniform. *Seaboard Air Line v. Florida*, 203 U. S. 261, 269, 27 Sup. Ct. 109, 51 L. Ed. 175.

The record shows that passenger rates like those fixed by the order were in force on the plaintiff's road under a decision of the United States Circuit Court of Appeals in *Railroad Commission of Alabama v. Central of Georgia Railway Co.*, 170 Fed. 225, 95 C. C. A. 117, from June 1, 1909, to April 17, 1912, and that, during the period of the enforcement of the lower rate, there was a great increase in the number of intrastate passengers and in the number of intrastate passenger miles. Tables of figures are presented showing a great yearly increase apparently under the stimulus of the lower rate. The in-

crease, it is contended by the plaintiff, was caused by interstate passengers buying tickets at the lower rate when they would reach the state line; but the evidence to that effect is not convincing. The record shows that intrastate travel was greatly stimulated by the lower rates, and that the carrier, by the reduction, cannot be said to have lost the entire difference between the higher and lower price of the increased number of tickets sold. The increase of intrastate passengers and intrastate passenger miles increased the receipts of the carrier without materially increasing its expenses, for the trains are required to make the regular trips whether they carry few or many passengers. But, if it be conceded that there was some loss of income by the change of rate, that fact of itself does not make the regulation invalid.

The ultimate question here is whether or not the rate prescribed for intrastate passengers under all the circumstances is reasonable—reasonable for the carrier and the public. The question as to whether or not, on its entire intrastate business, the plaintiff is receiving an adequate return, say 6 per cent. or 8 per cent., on its entire investment for public use is not absolutely controlling. The case is taken out of that rule, because it does not involve a general schedule of rates, and by the other particular facts of the case which have been mentioned. The question of adequate return on the entire investment involves merely one element in the solution of the ultimate question of whether or not the rate prescribed for the subdivision of the traffic is reasonable. The solution of the ultimate question depends on the particular facts of each case. The public has a right to demand that no more be exacted from it than, in view of all the facts, the services are reasonably worth. And the carrier should be protected in the right to demand what they are reasonably worth. Rates that are too low are not only unfair to the carrier but worse for the public than those that are too high, for they would ultimately prevent the operation of existing railroads and forbid the building of new ones. The fact that only passenger rates are involved, and the circumstances, to which reference has been made, that the plaintiff, for reasons which are, perhaps, commendable, carries a large part of its freight at cost or at a loss, and has constructed many branch lines with the knowledge that they would not immediately be profitable, shows conclusively that the test of adequate return upon its whole intrastate business is not controlling in this case. Losses voluntarily incurred in one branch of its traffic cannot justly be recouped by unreasonable charges in another branch. Unreasonable intrastate passenger rates cannot be justly maintained to cover losses voluntarily incurred as a matter of policy, although the policy in itself may be wise and beneficial to the public.

The facts claimed by the plaintiff to be proved as to values and income, when taken in connection with other facts shown by the record, are not such as to call for the application of the rule that would invalidate an order fixing rates for failure to produce adequate return; and, if the case is considered as controlled by the rule relating to adequate return, the evidence is not sufficient to show the value of the plaintiff's property upon which it would be entitled to a return; nor

is it sufficient to show the separate cost of the intrastate passenger service.

The injunction should therefore be:

Denied.

GRUBB, District Judge (concurring). I desire to add a few words concerning the first and fourth grounds assigned by the plaintiff for the issuance of the temporary injunction.

First. As to *res adjudicata*. Upon this point the inquiry is whether the issues presented for determination under the present and second supplemental bill are identical with those determined by the final decree upon the first supplemental bill in this cause. To answer this inquiry it is necessary to ascertain what were the issues presented under the respective supplemental bills. An examination of the record in the original case convinces me that the master and the district judge found only that the system of statutory rates, comprised in the Eight Group or 110 Commodity Rate Acts, the Maximum Passenger Rate Act, and the Maximum Freight Act, was confiscatory in its operation upon the entire intrastate business of the plaintiff.

It is true that the pleadings were broad enough to present the same issue as to the operation of the 2½-cent passenger rate in and of itself, and possibly there is evidence in the record tending to establish its confiscatory nature without reference to the statutory freight rates. It is clear to me, however, that the master and the district judge did not attempt to determine the operation of the 2½-cent statutory passenger rate apart from its companion statutory freight rates. The finding of the master, approved by the court, was that the passenger rate, in connection with the freight rates, and *contra*, had the effect of making the entire intrastate business of the plaintiff unremunerative. This appears from the language of the master's report and of the opinion and decree of the district judge. The Supreme Court of the United States in the Minnesota Rate Cases have since determined that the problem ordinarily presented in state-made rate cases is the effect of the statutory or commission-made rates upon the intrastate business of the carrier in its entirety.

It is true that the district judge stated in the course of his opinion that the evidence showed that the passenger business of plaintiff in Alabama cost the plaintiff to earn a dollar as much or more than its freight business, from which the inference is sought to be drawn that, as the entire intrastate business was held to be unremunerative, both passenger and freight were separately so held. If the court had intended to find the effect of the statutory passenger rate, in its operation on plaintiff's intrastate business separately, it is not conceivable that it would have left this finding to be inferred. It is not contended that there was any express and explicit determination of the effect of the passenger rate as there was of the entire schedule of rates. The evidence submitted would not have enabled the master or the district judge to have made either an exact or approximate separate determination of that kind, and there had been no period of experiment of the effect of the statutory passenger rate in its operation, apart from the statutory freight rates, up to the date of the final decree. The only separation

of passenger and freight business shown by the record was merely incidental to the distribution of the plaintiff's entire business in Alabama as between intra and inter state business according to the method of plaintiff's expert accountant, whose method was adopted by the master and the district judge.

The data to enable the court to reach a correct approximate conclusion being absent from the record, and the report of the master and the opinion and decree of the district judge containing no express finding as to the separate effect of the passenger rate, it is fair to presume that none was made. The assertion in the opinion that the passenger business was not conducted more profitably than the freight business is not a finding that the $2\frac{1}{2}$ -cent passenger rate, apart from its connection with the statutory freight rates, so substantially contributed to a loss of revenue as to cause confiscation. It is true that the mandatory paragraph of the final decree separately enjoined the Commission from enforcing each of the rate statutes; but, upon the question of *res adjudicata*, this paragraph is to be controlled by the preceding paragraph which sets out explicitly the court's finding and which, properly construed, contains no such finding, but only a finding that the entire statutory system of rates, both passenger and freight when taken in connection with each other, was confiscatory.

Is the issue so found by the court the same in substance as that presented by the second supplemental bill on which the temporary injunction is now asked? It is clear that if the defendants had restored the entire statutory schedule of rates, freight and passenger, after the passing of the decree enjoining them, they could have overcome the defense of *res adjudicata* only by showing a change of conditions occurring since the decree, having the effect of making the plaintiff's intrastate business remunerative, at the time of such restoration, under the statutory rates. Conceding that such action could be taken under their general and independent rate-making power and without applying to the district court under the permissive terms of the decree, it could only prevail against the defense of the previous adjudication by a showing of that character. If all the rates were restored together, the one significant change of conditions (i. e., the operation of the $2\frac{1}{2}$ -cent passenger rate in connection with the plaintiff's voluntary and higher freight rates instead of the statutory ones) would not have occurred, and change of conditions could be predicated only upon reports of plaintiff's earnings and expenses for operations after the date of the decree, showing a different status from those considered by the court.

However, in this case the Commission restored, by the order complained of, only the passenger rate, and the final decree in the original cause, enjoining the enforcement of the statutory freight rates, left it open to the plaintiff to put in force voluntarily any freight rates that were reasonable and would prove remunerative, and it had at the time of the Commission's order availed itself of this right as to the rates affected by the Eight Group Acts. The situation which confronted the Commission when it made the order complained of was therefore a materially different situation from that which confronted

the district court when it entered the final decree in the original cause. The difference consisted in the fact that the plaintiff was then earning more on its intrastate business, by reason of the restoration of its voluntary freight rates, than it had been earning during the period of experiment from June 1, 1909, until the date of the final decree, when the statutory freight rates as well as the $2\frac{1}{2}$ -cent passenger rate were being enforced against it. The statutory passenger rate might well have been held to be confiscatory in its operation on plaintiff's intrastate business, when taken in connection with the reduced statutory freight rates, and yet may prove fully compensatory when taken in connection with the higher voluntary freight rates in force when the order restoring the statutory passenger rate was to take effect. This question, as well as the question as to whether the passenger rate, when considered without reference to changed conditions, contributed substantially, of itself, to reduce plaintiff's intrastate earnings below the remunerative point, have never been judicially determined as between the parties and both are open to contestation under the present bill.

Fourth. The confiscatory effect of the $2\frac{1}{2}$ -cent passenger rate. In order that the rate complained of be shown to be confiscatory, the plaintiff must establish: (1) That its entire intrastate business in Alabama, after the restoration of the voluntary freight rates affected by the Eight Group Acts, in connection with the enforcement of the $2\frac{1}{2}$ -cent passenger rate by the Commission, will prove unremunerative; and (2) that the $2\frac{1}{2}$ -cent passenger rate is so unreasonably low as to substantially contribute to this result.

The rate complained of is probably not entitled to the presumption of correctness which usually attends commission-made rates, in view of the fact that the opinion of the Commission shows that it reached its conclusion that the $2\frac{1}{2}$ -cent fare was reasonable, not by reliance upon changed conditions, shown either by the restoration by plaintiff of voluntary freight rates or by the consideration of earnings and expenses during the period between the final decree and its order, but by discarding the methods of apportionment adopted by the master and the district judge by which they arrived at the contrary conclusion, and by the adoption of different methods. While the methods of apportionment adopted by the master and the district judge on the final hearing are not conclusive on this hearing, they are entitled to as much or more weight than a finding of the Commission based on different methods of computation and apportionment, and avail to remove any presumption of reasonableness that would otherwise arise from the rate fixed by the Commission. The burden is nevertheless on the plaintiff to establish with reasonable certainty that the rate complained of is confiscatory, as is asserted in the new supplemental bill.

The plaintiff seeks to establish the proposition that, even with the higher voluntary freight rates in force, the entire intrastate business, under a $2\frac{1}{2}$ -cent passenger rate, would prove unremunerative by methods of computation and apportionment substantially like those used on the final hearing in the original cause, applied to statistics

of earnings and expenses reported under the operations since the final decree and since the restoration of the freight rates pursuant to its authority. On the other hand, the defendants assail the methods of the apportionment so used to ascertain the value of the property devoted to intrastate passenger business and the proportion of expense properly chargeable to it, on the grounds advanced before the district court upon the final hearing.

It cannot be true that we are concluded by the methods of apportionment adopted upon the former hearing in this cause. If it is our duty to decide the ultimate fact of the reasonableness of the 2½-cent rate as against the defense of *res adjudicata* interposed by plaintiff, it is clearly our duty to decide it according to what are now correct methods of apportionment, though they may differ from those adopted upon the former hearing. This is as true of methods of apportionment as it would be true of an erroneous arithmetical rule, if such an erroneous rule had entered into the previous calculation. Any other principle could serve only to perpetuate the error, if any existed, and to render any future hearing, for this reason, a futile one. It is our duty to follow the methods of apportionment used upon the former hearing so far, and only so far, as we believe they are calculated to produce correct results and to conform to the law as it now stands.

Without entering upon any detailed analysis, I think the plaintiff's methods of apportionment of values and expenses, both as between inter and intra state business and passenger and freight business, are subject to some of the criticisms presented by defendants' counsel. The reply contention of plaintiff is that, conceding the justice of the criticisms for the sake of the argument only, they are not of sufficient importance to change the result; that there were omitted items, now supplied, and to credit for which plaintiff is entitled, that more than offset the errors on the other side; and that the confiscation is so palpable that erroneous methods, if they exist, may be safely ignored, as was done by the Supreme Court in certain of the recently decided rate cases.

After a full study of the record and briefs, I am not reasonably satisfied that the plaintiff's methods of apportioning values and expenses as between passenger and freight and inter and intra state business are calculated to produce the certain results that are now exacted of a common carrier, seeking the aid of a court to restrain the enforcement of statutory or commission-made rates, by the decisions of the Supreme Court in the Minnesota, Missouri, and Arkansas rate cases, recently decided. The difficulty, if not the impossibility, of reaching the requisite certainty, as intimated in these decisions, in the absence of accounts currently kept by the carrier, showing the result of operations properly distributed, is emphasized by the necessity for the double distribution between freight and passenger and between inter and intra state business which the exigencies of this case require and by the fact that the proof on which the ascertainment rests on this application consists of *ex parte* affidavits, not contradictorily taken.

Upon the values used upon the former hearing, without correction and upon the defendants' computation and division of expense between passenger and freight traffic, the entire passenger traffic of plaintiff in Alabama would yield a return slightly in excess of 8 per cent., and upon the defendants' corrected values a return of 7.22 per cent. On the other hand, the plaintiff, by its values and methods of division, reaches the conclusion that it receives no substantial return upon its passenger business, inter and intra state, in Alabama. This is not a case, therefore, where methods of division can be ignored, since the question of confiscation depends upon which of the values and methods is to be adopted by the court as the correct one.

The plaintiff must also reasonably satisfy the court of the second proposition that any deficiency in intrastate earnings below the point of remuneration, that may exist, is substantially contributed to by the enforcement of the reduced passenger rate. That rate cannot be said to be so unreasonably low as to be confiscatory, unless its operation is attended with that result. Even though the intrastate earnings have reached the unremunerative point, it does not follow that every rate reduction thereafter is an act of confiscation. It is conceivable that the reduction of a specific rate may be inconsequential in its effect on the entire intrastate business, or at least of not sufficient consequence to constitute confiscation, or that, by increasing the amount of business done at the lower rate, it may be attended with no loss of earnings or even with an increase. In such a case the fact that the entire intrastate earnings of a carrier did not, either before or after the reduction, yield a fair return would not condemn the reduced rate.

If the record in this case shows no substantial loss in plaintiff's passenger earnings attending the reduction of the passenger rate, while it was enforced, as compared with the periods when the 3-cent rate was effective, it will satisfactorily appear that there was no confiscation. A conclusion upon this question may be reached upon admitted facts and figures without resort to complicated and disputed methods of apportionment. A comparison of the annual gross passenger earnings of the plaintiff's railroad in Alabama from the fiscal year ending June 30, 1907, up to February 28, 1913, the last month available, as reported by the plaintiff, will serve to show the effect of the operation of the two rates. Of this period the 3-cent fare was in force from July 1, 1907, to June 1, 1909, and from April 17, 1912, to February 28, 1913, and the 2½-cent fare was in force from June 1, 1909, to April 17, 1912. A tabulated statement of reported gross passenger earnings for the fiscal years 1907, 1908, 1909, 1910, 1911, and 1912, showing intrastate, interstate, and total separately is appended.

Passenger Revenue.

	Interstate.	Intrastate.	Total.
Fiscal year ending June 30, 1907.....	\$764,300.78	\$1,119,583.93	\$1,883,884.71
Fiscal year ending June 30, 1908.....	797,315.56	1,087,558.44	1,884,874.00
Fiscal year ending June 30, 1909.....	785,028.30	918,117.59	1,703,145.72
Fiscal year ending June 30, 1910.....	823,171.86	972,717.42	1,795,889.28
Fiscal year ending June 30, 1911.....	854,563.34	1,072,605.07	1,927,168.41
Fiscal year ending June 30, 1912.....	929,023.20	1,167,697.77	2,096,720.97

The fiscal years 1907, 1908, and 1909 (except one month) are years during which the 3-cent fare was operative. The fiscal years 1910, 1911, and 1912 (except 2½ months) are years in which the 2½-cent fare was operative.

Inspection of the table shows that the interstate gross passenger earnings of plaintiff have increased each fiscal year during the series, without exception; that intrastate passenger earnings decreased from the year 1907 progressively until the year 1910 and from that year progressively increased each year, until for the year 1912 they had passed the high-water mark of the year 1907. Total passenger earnings of plaintiff in Alabama decreased for the years 1909 and 1910 over the years 1907 and 1908, which were substantially alike, and beginning with the year 1910 progressively increased, until for the year 1912 the total earnings in Alabama exceeded those for the year 1907 by \$212,826.26. In the same year (1912) the interstate passenger earnings in Alabama exceeded interstate passenger earnings for the year 1907 by \$164,722.42, and the intrastate passenger earnings for 1912 exceeded those for 1907 by \$48,113.84. The 2½-cent rate was in effect the fiscal year ending June 30, 1909, up to April 17, 1912. The year ending June 30, 1907 was the most prosperous year the railroads of the country have experienced. It was followed by the panic of October, 1907, and the panic years of 1908 and 1909. Earnings during the panic years were naturally abnormally small, and a comparison of the year 1907 with those years would be misleading. The year 1912 was a typical year of prosperity and affords a fair year of comparison with the last preceding year of prosperity, which was 1907. Such a comparison shows that passenger earnings under the 2½-cent rate for both inter and intra state traffic were materially in excess of those for this most prosperous previous year. It is true that, if a normal increase had been added each year to the previous year from 1907 to 1912, the excess of 1912 over 1907 would have been much greater, but the intervening panic years account for the absence of continuous normal increases during the period of comparison. It does not seem that confiscation can be predicated upon a rate which, during the last year it was effective, produced an increase in intrastate earnings over the intrastate earnings of the preceding most prosperous year, and which did this, not only without causing a reduction in interstate passenger earnings for the same year, but when these earnings were also greatly in excess of those of the same prosperous year of comparison. Whether this result was obtained by a stimulation of passenger business due to the reduced fare or to the normal growth of the tributary country during the intervening years, or to the increase of travel always attendant upon the return of good times, it remains true that for some reason the conditions in 1912 were such that plaintiff could conduct its passenger business in Alabama, under the reduced rate, with results that compared favorably with its passenger earnings for the most prosperous year in the history of our railroads, and hence without confiscation.

The same rate produced the following increases in intrastate gross passenger earnings during each of the three years of the period of its operation over the preceding year:

1910 over 1909.....	\$54,599.83
1911 over 1910.....	99,887.65
1912 over 1911.....	95,092.70

—as compared with decreases for the years 1909 over 1908 and 1908 over 1907 when the 3-cent fare was effective. However, these, as stated, were panic years and not fair standards of comparison.

The aggregate increase on plaintiff's intrastate gross passenger earnings for the three years when the $2\frac{1}{2}$ -cent fare was effective was \$249,488.18. During the same period the interstate gross passenger earnings increased \$143,994. The total passenger returns for the plaintiff in Alabama increased \$393,575.08. Percentages of increase were respectively 27.2 per cent., 18 per cent., and 23.1 per cent for intra, inter, and total passenger receipts.

It may be true that the increase in intrastate earnings for the first year during which the $2\frac{1}{2}$ -cent rate was effective over the last year the 3-cent fare was effective was partly at the expense of the interstate earnings through the custom of the interstate passengers rebuying tickets at stations near the Alabama state line to get the benefit of the reduced Alabama rate, as is shown by the reduced comparative increase in interstate earnings for that year. However, the increase of the second year in which the reduced rate was effective over the first and of the third year over the second (which were each in greater amount) cannot be so accounted for, since the same fare was in effect during each of those years. The motive that induced interstate passengers to avoid paying the 3-cent fare by rebuying their tickets at state line stations, with the incident trouble of rechecking baggage when they had any, would also tend to induce intrastate passengers to travel as infrequently and as few miles as possible and so tend to restrict intrastate passenger travel under the 3-cent fare, and for a like reason the reduced $2\frac{1}{2}$ -cent rate would to some extent stimulate such travel. However, it is not necessary to attribute the admitted increase in passenger travel to the reduced rate. It concededly exists, and, whatever may be its cause, it avails to show that a rate under which such returns are possible cannot be now confiscatory, whatever might have been said of it under previous conditions of traffic. Otherwise reductions of passenger rates would never be justified because of increased earnings due to increased population and denser traffic conditions, such as appear from the affidavits of plaintiff's witnesses to have obtained on its line in Alabama. So the percentages of increase might or might not have been greater under a 3-cent fare, dependent upon how much or how little the increase was due to stimulation caused by the lower rate; but in view of the very substantial absolute increase in each class of passenger earnings over each preceding year, bringing them finally above all previous records, confiscation cannot be predicated merely on diminished percentages of increase over what might have obtained under the 3-cent fare.

It is contended that the 3-cent fare itself did not yield a fair return on the property devoted to intrastate passenger business, and so affords an improper basis for comparison. It is, however, voluntarily maintained in other states by the plaintiff and was voluntarily fixed by it as the uniform rate for its branch and main lines in Alabama and is the maximum passenger rate in all parts of the United States with few and restricted exceptions. If the plaintiff's methods of apportionment show the 3-cent fare to be unremunerative, it argues that such methods may prove too much. Increased gross earnings under the lower rate might be handled at so great an increased expense as to make the returns unremunerative on the increased business. The record shows, however, that the intrastate passenger trains of plaintiff were never filled to their capacity before the time of the final hearing and so could accommodate the increased travel with little additional expense. It shows also that but two new trains were added during the period of comparison; that they were both interstate trains, not essential for the accommodation of intrastate passengers; and that the additional train cost, outside of these two trains, was small. The expense, other than the train cost, including terminal expense, of the increased travel is obviously small. So that the increases in gross earnings under the reduced rate would not be consumed to any appreciable extent by increased expenses caused by its handling.

A comparison of results of operation after the 3-cent fare was restored on April 17, 1912, and until February 28, 1913, the last available month, with the earnings for the corresponding periods while the 2½-cent rate was in force, shows no such differences as would indicate confiscation. They are as follows:

Intrastate Passenger Revenue.

May, 1909, to February, 1910.....	\$ 791,108.84
May, 1910, to February, 1911.....	886,106.05
May, 1911, to February, 1912.....	967,672.15
May, 1912, to February, 1913.....	1,056,682.99

Increases in Intrastate Passenger Revenue.

	In Dollars.	In Percentage.
1910-11 over 1909-10.....	\$94,997.21	12.08
1911-12 over 1910-11.....	81,566.10	9.20
1912-13 over 1911-12.....	88,610.84	9.16

The increase in revenue since May 1, 1912, with the added ½-cent due to the increase in rate, is below the normal in percentage and not substantially above the average of increase for the two years next preceding, in amount. If the restoration of the 3-cent fare has worked no greater differences than these in plaintiff's intrastate earnings, it is difficult to understand how the 2½-cent fare can be held to be confiscatory.

For the reasons assigned in the opinion of Circuit Judge Shelby and those herein expressed, whatever conclusion may be reached upon the final hearing after fuller presentation and by witnesses subjected to cross-examination, I am of the opinion that the plaintiff, at this stage of the cause, has not shown with the degree of certainty

now exacted of it in this class of cases that the rate complained of would be confiscatory if put in present operation.

NOTE.—See, also, *Seaboard Air Line Ry. v. R. R. Commission of Alabama* (C. C.) 155 Fed. 792; *Louisville & N. R. Co. v. Railroad Commission of Ala.* (C. C.) 157 Fed. 944; *Central of Ga. Ry. Co. v. Railroad Commission of Ala.* (C. C.) 161 Fed. 925; *Louisville & Nashville R. R. Co. v. Railroad Commission of Alabama*, 170 Fed. 225, 95 C. C. A. 117; *South & N. A. R. Co. v. Railroad Commission of Ala.* (C. C.) 171 Fed. 225; *Louisville & Nashville R. R. Co. v. R. R. Commission of Alabama* (D. C.) 196 Fed. 800; *Louisville & N. R. Co. v. R. R. Commission of Ala.* (D. C.) 205 Fed. 800.

PARDEE, Circuit Judge (dissenting). The act of Congress providing for the calling in of two judges in certain applications for temporary injunctions is a restrictive statute, not at all flattering to the intelligence and impartiality of the District Judges of the country, and it does not in my judgment call for a liberal construction, and so I am not inclined to broaden the statute to cover a supposed intention of the lawmaker, but rather disposed to leave the matter to the Supreme Court, and in the meantime hold that the eminent lawyers in the judiciary committee of Congress who framed the same meant exactly what they said and said exactly what they meant.

I appreciate the force of Judge SHELBY'S reasoning in regard to the proper construction to be given to the statute, and under the peculiar circumstances of this case I am not disposed to make any further point in the matter.

Whether, in view of the previous and just concluded litigation between the same parties, the Railroad Commission of Alabama had a right to disregard the final decree rendered in the case and pay no attention to the seventh paragraph thereof (a paragraph, by the way, that the Supreme Court in former decisions and in the lately decided railroad cases seems to think of some force, and a necessary part of a like degree), has, I understand, been substantially passed upon by Judge GRUBB, and therefore I am disposed to accept Judge SHELBY'S conclusions in that respect, and make no point against the same, although fully satisfied that it would have been more respectful and seemly if the Railroad Commission had made application to the court under the seventh paragraph of the final decree, alleging changed conditions and asking proper relief.

The supplemental bill brings before us at this hearing the entire litigation between the parties, and it seems to me that at this time, and acting on this application for an interlocutory order, all the matters in contest in the main case and settled by the decree rendered are for the present inquiry *res adjudicata*; and no presumption in favor of the action of the Railroad Commission, and no presumption generally in favor of statutory boards, can now be interposed to reopen any of the issues that were passed upon and decided in the aforesaid final decree. And if there were any presumptions to be indulged on this hearing, they preponderate on the side of the complainant, who is en-

titled to all the results coming from adjudicated issues in the main case. If anything was settled in the main case, it was the value of the property of the complainant in the state of Alabama employed in intrastate traffic, and following that, and incidental to the determination of the issues in the case, the apportionment of the use of the property as between freight and passenger traffic.

As I read the final decree, which is a part of the law of the case we are now considering, the court decided that the statute requiring a maximum $2\frac{1}{2}$ -cent passenger rate on the complainant's railway and branch lines in Alabama was *void*, as confiscatory, and necessarily in and of itself *void*. It is not to be presumed that the court could or would declare a statute of the state void which was not tainted with unconstitutionality. I paid attention to the argument (not, however, based on facts as found by the master and approved by the court) that the $2\frac{1}{2}$ -cent statute was only decreed void as a part of a system, and I think the same without force. Every statute of a state is part of a system of all the laws of the state, and there is nothing in the act which, as one dealing with one only subject, shows it was to stand or fall with other statutes passed by the same Legislature.

With this preliminary the question before us is whether, on the record and showing made by the parties, a case has been made which entitles the complainant to an injunction maintaining the status quo pending a final hearing upon the issues presented by the bill. Certainty that the complainant will recover on final hearing is not called for. Decided probability, based on the facts presented, is all that we are expected to require on this hearing. The evidence before us is voluminous, general, specific, and detailed, involving matters of the building, costs, expenses, receipts and disbursements, maintenance, and operation of the complainant's railway and numerous branches, intrastate and interstate, in Alabama, and also much of the same located in other states, and some involving costs, expenses, disbursements, and profits in practices of other railroads in and out of Alabama. To analyze the evidence at present and support my conclusions in the case will take more time than I have at my disposal or the exigencies of the case will allow (incidentally I refer to the voluminous briefs in the case); but to all these matters I have given careful examination and consideration in the light of decisions cited and all the very late decisions in rate cases by the Supreme Court of the United States, and my conclusions are that no changed conditions arising since the rendition of the final decree in the main case have been shown making a $2\frac{1}{2}$ -cent passenger rate reasonable and compensatory on complainant's lines, and that the complainant has made a case that entitles it to an injunction pending the suit—a case which, if as well established by evidence contradictorily taken, will entitle the complainant to relief on final hearing.

On Application for Appeal and Supersedeas, or for a Continuance of the Restraining Order Pending Appeal.

The plaintiff's petition for an interlocutory injunction having been denied, the plaintiff presented a petition praying for an appeal to the

Supreme Court and for a continuance of the restraining order heretofore granted, pending the appeal. After argument and consideration, the court entered the following order:

"This cause coming on to be heard upon the application of the plaintiff, the Louisville & Nashville Railroad Company, for the allowance of an appeal direct to the Supreme Court of the United States from an order of the District Court, composed of two Circuit Judges and a District Judge, denying the petition of the plaintiff for an injunction pendente lite, as prayed for in its supplemental bill in this cause, and upon the application of the plaintiff for a supersedeas and an order restraining the enforcement of an order of the Railroad Commission of Alabama set out in its supplemental bill;

"And the court being of opinion that, owing to uncertainty as to the proper construction of section 266 of the Judicial Code, with relation to the authority of the court to restrain the enforcement of the order, pending the appeal, and in view of the present status of the case, and the pendency of other cases that are likely to present the same question for decision, and of the importance of a final and authoritative decision thereof to the public and the litigants, the application for a supersedeas and for a restraining order would better be presented to the Supreme Court:

"It is therefore ordered that the plaintiff's application for the allowance of the appeal and for supersedeas or a restraining order against the enforcement of the order of the Railroad Commission of Alabama, pending the appeal, be denied, the court not passing upon the merits of the application, and without prejudice to the right of the plaintiff to renew its application for an appeal and for a restraining order, pending the appeal, in the Supreme Court, or as it may be advised.

"Given this 13th day of September, 1913."

SHELBY, Circuit Judge. I concur in the decree refusing to continue the restraining order pending the appeal, but I reach that conclusion from a consideration of the application on its merits. My view would lead to a denial of the application, but not to referring the motion to the Supreme Court. The plaintiff would, of course, be free to make such application to that court as it chose to make.

[8] The Railroad Commission of Alabama, by regular procedure, established for plaintiff's road an intrastate passenger rate of $2\frac{1}{2}$ cents per mile for adults and $1\frac{1}{4}$ cents per mile for children. The rate in force on plaintiff's road was 3 cents per mile for adults and $1\frac{1}{2}$ cents per mile for children. The plaintiff filed the present bill to enjoin the order of the Commission. The case was heard before three judges, under Judicial Code, § 266, on an application for an interlocutory injunction. The effect of the injunction, if granted, would have been to enjoin the rates fixed by the Commission and to continue in force, pending the suit, the higher rates. The court, by a majority of the judges, refused the injunction, and, on August 12, 1913, put in force the rates established by the Commission, which rates are now in force. The question of the granting of the injunction was within the judicial discretion of the court, governed by established equitable principles. In two opinions filed, the court gave reasons for the exercise of its discretion in refusing the writ. The application now before the court seeks to enjoin or stay the order of the Commission pending an appeal by the plaintiff to the Supreme Court from the order refusing the interlocutory injunction. The first application was for an injunction pending the suit which stood for trial in the District Court;

the second application is for an injunctive order pending the appeal. Relief on either application meant the suspension of the rates fixed by the Commission and the re-establishment of the higher rates fixed by the plaintiff. Both applications are urged by the same arguments and the same offer of bond. I can see no reason for granting the second application that would not have been equally applicable to granting the first. To have granted the first would not have delayed a trial on the merits, while to grant the second may have that effect. The real practical question on both applications is whether the Commission's order shall remain in force or be suspended. It is, of course, just as satisfactory to the plaintiff to enjoin it on appeal, with bond, as on the first application, with bond. The delay in enforcing the order, if it is finally enjoined, is likely to be greater by the granting of the stay on the second application than if it had been granted on the first. It seems to me utterly useless to have refused the first application, if the second is to be granted. If a case is now presented for the exercise of judicial discretion by revoking, in effect, our former order, we should have granted the interlocutory injunction on the first application. We gave reasons for the refusal of the injunction which seem to me equally controlling on the second motion. Conceding that the statutes allow a supersedeas after denial of the injunction in cases arising under section 266, we have before us practically the same question that we had on the first application—whether or not the Commission's order should be in force pending the litigation. The only difference is that the Commission's order is now fortified by the opinion of this court. Having refused to enjoin it and having put it in force on its merits after full hearing, it seems to me that it would be practically a reversal of our position to suspend it now after our elaborate approval of it. I do not lose sight of the fact that the first application was for an interlocutory injunction only, and that the second is also for appeal. The question of suspending the Commission's order is separate from the claim for appeal. The latter is granted as a matter of course. But as to the suspension of the Commission's order pending an appeal, if we have authority to grant it, the granting of it is a matter of judicial discretion. This application, like the one for the interlocutory injunction, is addressed to the judicial discretion.

It is argued that, because one of the judges dissented from the decision on the first application, such doubt is created that the second application should be granted. If one thing is made clear by the statute, it is that one judge cannot grant the injunction. If, when the injunction is refused by the court, composed of three judges, the dissent of one of the judges was permitted to control a second application, and cause an injunction or a continuance of the restraining order, the purpose of the statute would be defeated. One judge could still prevent the enforcement of the rates fixed by a Commission or by a Legislature.

It is urged that the second application should be granted because the decision of this court may be reversed. If a majority of the court now believe we have decided erroneously in refusing the injunction on the first application, the way to correct it here, if we have authority

to do so, is to set aside the order and grant the injunction. That should be done, if at all, directly, and not indirectly. The Supreme Court may, of course, reverse the decision. Many technical points are involved. But it is not likely that it will be held that the rates fixed by the Commission are confiscatory, in view of recent decisions of that court, some of them upholding even a 2 cents a mile rate on roads and facts not greatly different from those involved here. There is no danger of injustice to the plaintiff in letting the rates fixed stand till final hearing, for, on the evidence submitted, the rates fixed by the Commission are not confiscatory.

Stress is laid on the plaintiff's offer to give bond to indemnify passengers. The same tender was made on the application for an interlocutory injunction. Where the rights of a defendant may be protected by bond, the court will often exercise its discretion in favor of granting or continuing an injunction; bond being required of the plaintiff. This is often the case in controversies between individuals involving a sum of money or certain property, or even involving contracts, where the interest involved is certain and the defendant in the suit is the person to be indemnified. The bond in such cases protects the defendant. Here the defendants have no interest in the litigation. The suit is really against the people who travel or who may travel on the plaintiff's road. The Attorney General of the state receives notice under the statute, and appears, together with special counsel, for those really interested. The people who would travel at a lower rate, but who do not travel when the rate is unreasonable, are interested in enforcing the rate fixed by the Commission. No bond can be framed to protect them, for the individuals or numbers of individuals who would travel at the lower rate cannot be ascertained. The fact is, whatever the theory may be, that the bond in a case like this affords no adequate protection. The plaintiff, in argument, insists that at the 3 cents a mile rate it collects from passengers every day \$400 more than it receives at the $2\frac{1}{2}$ -cent rate; that is, if it obtains the stay, and if there is a delay of 300 days in deciding the appeal, it will collect \$120,000 that the Commission and this court have decided it ought not to collect. During the 300 days the plaintiff will hand each purchaser of a ticket a coupon representing the excess charge. The theory is that these coupons will be presented and redeemed if the lower rate is finally sustained. The fact is that such coupons are not, to any considerable extent, preserved and presented. Probably not one coupon in a hundred would ever be presented for payment. The plaintiff has nothing to lose and everything to gain by litigation and appeals prosecuted under such bonds. To allow an injunction under the circumstances is to needlessly encourage such suits and appeals and to prolong the litigation. The plaintiff has nothing to lose. If it fails in the final result, it will have the cash in hand to cover all possible claims, with probably a large surplus that would never be claimed.

The reasons which led to the passage of the statutes now forming section 266 of the Judicial Code are well known, and are part of the judicial and political history of the country, and no comment on them is necessary. The legislation was intended to check and prevent a

practice by which one judge, on ex parte hearings and affidavits, superseded acts of Legislatures and Commissions indefinitely, on the ground that they were unconstitutional. The purpose of the section should not be disregarded in construing it, or in the exercise of judicial discretion in deciding applications based on it. The purpose clearly is to restrict the issuance of interlocutory injunctions in a designated class of cases, and to prevent delays in the enforcement of certain statutes or orders of Commissions. The section authorizes a single judge to receive the application for an interlocutory injunction, but not to grant it. He is required to call to his assistance two other judges "to hear and determine the application." The two other judges are called for no other purpose, and no other duty is imposed on them by the text of the section. The judge to whom the application is made may, to prevent irreparable loss or damage—and only for that purpose—grant a temporary restraining order; but such order is to remain in force "only until the hearing and determination of the application for an interlocutory injunction." When the two judges who are called to the assistance of the judge to whom the application is made sit with him, and hear and determine the case, and make an order granting or denying the interlocutory injunction, they have discharged the duty placed on them by the words of the statute. They have done what they were called to do, and what the statute authorizes them to be called for; that is, to the assistance of the judge to whom the application was made—"to his assistance to hear and determine the application" for an injunction. The section provides that an appeal may be taken to the Supreme Court from the order granting or refusing the injunction, but there is nothing in the section to indicate that the District Judge alone could not grant the appeal. If he alone granted the appeal, it would, of course, be without an accompanying order suspending the operation of the disputed rates, for it cannot be held that it was intended that the one judge could defeat the order of the three judges by granting a stay on appeal which had just been refused by the three judges on the application for injunction. But the contention of the plaintiff is that the three judges, or a majority of them, may, after refusing the interlocutory injunction, grant an appeal and continue the restraining order against the rate in question until the appeal is decided. The very question which the section brings the three judges together to hear is whether or not an interlocutory injunction shall be granted. If it is granted, there is no longer any need for the restraining order to prevent the rates going into effect, for the interlocutory injunction would take the place of the restraining order; if it is refused, the restraining order should end, because the statute so provides, and because the refusal is a decision that there should be no injunction and that the rates opposed should go into effect.

The provision requiring five days' notice to the Governor and Attorney General and to the defendants, the provision peremptorily limiting the operation of the temporary restraining order, and the provision that the federal courts will surrender jurisdiction upon certain conditions of litigation in the state courts (Judicial Code, § 266), all point to a reluctance on the part of Congress to have state action en-

joined by federal power, and to the intention that, if the court composed of three judges refuse the interlocutory injunction, the contested rates shall be enforced.

But if it be conceded that the statute or the general law gives us a discretionary power to set aside the Commission's rate now in force and to reinstate the rates fixed by the railroad company—a question not necessary to decide now—I do not think a case is presented for the exercise of such discretionary power. The application to continue the restraining order should be refused, because we have already decided that the rate fixed by the Commission should not be enjoined. I reach this conclusion from reasons given in this opinion and from the reasons given in other opinions filed in this case on the application for an interlocutory injunction.

WALTERS v. ZIMMERMAN et al.

(District Court, N. D. Ohio, E. D. June 21, 1913. On Rehearing, July 10, 1913.)

No. 44.

1. BANKRUPTCY (§ 166*)—PREFERENCES—DUTY TO MAKE INQUIRY.

Where a creditor of an insolvent takes security within four months prior to bankruptcy, he is bound to make inquiry as to whether a preference is intended and is chargeable with knowledge of all that such inquiry, if made, would have disclosed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

2. BANKRUPTCY (§ 166*)—PREFERENCES—CONSTRUCTIVE NOTICE.

A partnership of which the bankrupt was a member was indebted to a bank in the sum of \$19,117.99, for which the bank held notes secured by government bonds and personal property of the bankrupt amounting to \$6,000. The bank refused to extend the credit, demanded payment, and the cashier advised the bankrupt to apply to the bank's president individually for a loan. This he did, receiving a loan of \$12,000 on real estate security; the lien being inferior as to one parcel to a lien for a \$5,000 loan effected in another place. The proceeds of the mortgage were immediately placed to the credit of the partnership and checked out to liquidate the partnership's debt to the bank, which also took the bonds at a fixed price in further liquidation of the indebtedness, leaving only a balance of \$2 in the bank to the credit of the firm. It also appeared that the bankrupt had practically no remaining equity in the mortgaged property. *Held*, that the president of the bank was chargeable with notice that a preference was intended and was not entitled to prove his claim as secured in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

In Bankruptcy. Action by S. E. Walters, as trustee in bankruptcy of L. F. Zimmerman, individually and as partner in the Zimmerman Music Company, against Mary E. Zimmerman and others to set aside an alleged preference consisting of a mortgage given by the bankrupt to one George H. Marsh. Decree for complainant.

White, Johnson & Cannon, of Cleveland, Ohio, for plaintiff.
Marshall & Fraser, of Toledo, Ohio, for defendant Marsh.

KILLITS, District Judge. This is an action by the trustee in bankruptcy to set aside as a preference, under section 60, par. "b," of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506), a certain mortgage, among others given by the bankrupt, to George H. Marsh.

It appears that at the time of the giving of the mortgage, which was within four months of the filing of the involuntary petition in bankruptcy, the mortgagor, L. F. Zimmerman, was, individually and as a partner in the Zimmerman Music Company, insolvent. The partnership was indebted to the First National Bank of Van Wert in the sum of \$19,117.99, for which the bank held the notes of the partnership and government bonds, personal property of Mr. Zimmerman, in the amount of over \$6,000. The partnership had always been borrowers from the bank, and its indebtedness had been steadily increasing until further credit had been refused by the cashier.

On the date of the mortgage, Mr. Marsh loaned to Zimmerman \$12,000 upon real estate security; the lien being inferior, as to one parcel, to a \$5,000 loan effected in another place. The proceeds of the mortgage were immediately placed to the credit of the Zimmerman Music Company in the bank and checked out, to the complete liquidation of the partnership's debt to the bank; the latter having, by arrangement with Mr. Zimmerman, taken the government bonds at a fixed price regarding premium to be applied to the reduction of the indebtedness. The result of this transaction was to leave a balance of \$2 in the bank to the credit of the partnership, which was at that time very largely indebted to other persons and firms.

The evidence shows that the value of the property conveyed by the mortgage was not very greatly in excess of the face of the two mortgages thereon, namely, \$17,000; some of the witnesses asserting that no equity remained, others that in their judgment an equity of \$3,000 to \$5,000 remained. Subsequent dealings with two parcels of the property within a few months by way of sales tended to show that the equity above the mortgages was very slight, if any existed.

Mr. Marsh at the time of this transaction was president of the bank. He knew that the money which he was furnishing was to be used to apply on the bank's claim. He was an old acquaintance and friend of Zimmerman. The circumstances indicate, in the court's judgment, very clearly that but casual inquiry on his part (such conversations and investigations as ordinary alert business men, especially in the banking business in small cities of the character and size of Van Wert, usually make) would have quickly developed knowledge to him that Zimmerman was insolvent and likewise the partnership.

[1] The duty of making inquiry and the responsibility to be charged with all the knowledge which inquiry, if made, would have brought are propositions too well settled in cases of this character to need citation of authority; the only question open for consideration being whether, Mr. Marsh, at the time of the making of the mortgage, not being a creditor, his mortgage could be avoided on the ground of his

knowledge that its proceeds were to be used to wipe out the antecedent debt held by his bank.

[2] In the judgment of the court, the case is settled by applying the principles discussed in *Newport Bank v. Herkimer Bank*, 225 U. S. 178, 32 Sup. Ct. 633, 56 L. Ed. 1042. The action in the case before us is founded upon the following provision of section 60, par. "b," of the Bankruptcy Act:

"If a bankrupt shall have * * * made a transfer of any of his property, and if, at the time of the transfer, * * * and being within four months before the filing of the petition in bankruptcy * * * the bankrupt be insolvent, and the * * * transfer then operate as a preference, and the person receiving it or to be benefited thereby or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

For the purpose of this case, emphasis should be laid upon the fact that the language quoted above allows that the person taking the transfer, but who does not hold the preferred debt, may be affected by constructive knowledge that a preference will result. In the case cited the court holds that to constitute a preference under the Bankruptcy Act, having reference to that portion of the act which we quote, it is not necessary that the transfer be made directly to the creditor; it may be made to another for his benefit; and, if preferential, circuitry of arrangement will not avail to save it. This is but a slight paraphrasing of the language of Justice Hughes' opinion in the case, at 225 U. S. 184, 32 Sup. Ct. 635 (56 L. Ed. 1042). Continuing, he says:

"It is not the mere formal method of the transaction that the act condemns but the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor's claim so that thereby the estate is depleted and the creditor obtains an advantage over other creditors."

We are cited to a very recent decision of the Supreme Court (*Van Iderstine v. National Discount Co.*, 227 U. S. 575, 33 Sup. Ct. 343, 57 L. Ed. 652), as sustaining the defense to the trustee's action. Attention, however, is called to the language of the opinion on page 583 of 227 U. S., page 345 of 33 Sup. Ct. (57 L. Ed. 652):

"Cases, under the present statute, like *In re Beerman* [D. C.] 112 Fed. 663, relied on by the trustee, relate to transactions in which the mortgagee was practically the representative of the preferred creditor and where consequently the conveyance was as much subject to attack as though it had been made directly to him. But here the discount company was not a creditor of *Fellerman & Son* and had no relation with the person to whom the money was paid. *National Bank of Newport v. National Bank of Herkimer*, 225 U. S. 178 [32 Sup. Ct. 633, 56 L. Ed. 1042]. The transfer, therefore, was not a preference to the discount company and could not be set aside without proof that it knew that *Fellerman* not only intended to pay some of his creditors but to defraud others."

It seems from this language that in this latest case the Supreme Court distinguishes the facts of that case from the facts in the case in 225 U. S., and in so doing reaffirms the proposition of Justice Hughes in the latter case.

The cases of *Lumpkin v. Foley*, 29 Am. Bankr. Rep. 673, 204 Fed. 372, and *Johnson v. Dismukes*, 29 Am. Bankr. Rep. 686, 204 Fed. 382,

from the Circuit Court of Appeals, Fifth Circuit, while upon another section of the act, yet furnish considerable support to the position which we take.

It is well suggested that, to permit these mortgages to stand, made as they are to a person who has at least constructive knowledge of the insolvency of the mortgagor and who is the executive officer and head of the creditor who obtains a preference, would be to furnish an easy opportunity to avoid the provisions of section 60 of the act.

Speaking of a situation very similar to this, Judge Newman, in *Re Beerman* (D. C.) 112 Fed. 663, at page 666, says:

"If transactions of this sort are to be permitted, then, instead of a creditor taking a mortgage himself, when a debtor is in failing circumstances, he will get some one else to advance the money, agreeing that the person advancing the money shall suffer no loss and thereby obtain by indirection a preference which he would be unable to get if he had acted directly with the debtor, provided, of course, that the debtor within four months thereafter becomes a bankrupt."

The fact that Mr. Marsh, as far as the record shows, took no indemnity from the creditor, thereby making the instant case more closely analogous to the *Beerman* Case, in our judgment, is amply offset by the other fact that Mr. Marsh was the nominal executive officer of the bank and that all the circumstances attending the transaction indicate that his interest as such was the motive actuating his taking the mortgage. There is no reason to suspect from the evidence before us that as a prudent business man he could have regarded the loan as a very safe one; the debtor being an aged man in failing circumstances, of which the bank's own records furnish full evidence, and the security being insufficient to warrant the feeling that the margin in the equity would protect accumulating interest and costs of foreclosure.

The decree in this case should be for the plaintiff.

On Rehearing.

At the urgent instance of counsel for defendant Marsh, this case has been reargued on the old record. No new facts are presented for consideration, and we notice none not referred to in our first memorandum save that Zimmerman was sent to Marsh, the bank's president, to borrow the money to pay for the unsecured portion of the bank's claim by Webster, the bank's cashier, who was demanding an adjustment and refusing the music company further credit.

We have, then, these facts shown either directly or established as the inevitable deductions from the facts: An insolvent pressed for a settlement by a bank knowing its debtor's plight; the president of the bank making a loan, of his own money, on security not gilt-edged, to say the least (the amount of the equity above the mortgage being a doubtful quantity), to the insolvent, known by the president to be such, with the knowledge and (the court feels justified in concluding) upon the understanding that the proceeds are to be applied on the bank's claim. The transaction concluded effects a preference to the bank in that the latter gets its unsecured claim fully paid while the other credi-

tors must receive but a meager dividend. We feel that no other deduction is possible from the facts than that Marsh intentionally helped Zimmerman to means whereby he, for the music company, might prefer Marsh's bank. Indeed, in a brief filed by Marsh's counsel on rehearing, this is conceded, but it is urged that, in the transactions up to and after the execution of the papers and the placing of Marsh's consideration money into Zimmerman's hands, no fraud had occurred, and therefore the transaction became unimpeachable unless it is proper to say from the evidence that Marsh was acting as the agent of the bank all through the business. We are unable to follow the argument thus made. In the light of both reason and the current of authority, a showing of agency is not indispensable to the avoidance of this transfer. The only case shown by counsel for Marsh sustaining the mortgage is *In re Hersey* (D. C.) 171 Fed. 1004, at page 1007, and that authority is not only out of harmony with cases hereafter referred to but it seems to be based in part upon an imperfect reading of section 67d of the act, which provides:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall * * * not be affected by this act."

That Marsh's mortgage lien was accepted in contemplation that an unlawful preference was to be effected is the inevitable conclusion from the facts. It does not answer very fully, therefore, the saving description of a lien found in section 67d, as it is not one "accepted in good faith and not in contemplation of * * * this act." Marsh must be charged with a "contemplation" of the provisions of the bankruptcy act when he made his loan that one known to him to be an insolvent might have the means to pay his bank and thereby prefer it unlawfully. We appreciate that the case before us, in all particulars essential to the point under discussion, is paralleled by *In re Hersey*, but we are forced to construe the facts in that case as creating a condition the opposite of that provided for by section 67d and not, as the court there held, one saved by that section.

In our former memorandum we found the circumstances to warrant an avoidance of the Marsh mortgage under section 60b. It is true that this section and 67e provide for distinguishable circumstances (*Coder v. Artz*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008), but it is also true that the two categories thus provided so shade into each other that it may be that each section has application at times and that the two must be jointly considered to effect the purpose of the law.

In the *Matter of Pease* (D. C.) 129 Fed. 446, Judge Swan, in a decision affirmed by the Circuit Court of Appeals for this Circuit, elaborately analyzed the authorities to the date of his opinion, in applying section 67 and its subdivisions to circumstances, in the essentials for determination, very similar to the facts before us. Pease owed \$10,000. He mortgaged a stock worth about the total of his debts to a security company for \$3,500. The loan was negotiated by an attorney who represented the mortgagee and also a creditor who obtained a

preference. In the Matter of McLam (D. C.) 97 Fed. 922, at page 923, Judge Wheeler held that a mortgage which effected a preference necessarily operated to hinder and defraud other creditors, reversing the finding of arbitrators that the mortgagor in that case had no such intent. In that case the court said:

"The provisions of section 67 of this act are contrasted with those of the former act * * * as more favorable in this respect. That act avoided a conveyance made within four months 'with a view to give a preference' to a person 'having reasonable cause to believe' the bankrupt to be insolvent, and that the conveyance was being made in fraud of the act. The latter act avoids such conveyances by the bankrupt 'with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them.' A conveyance to one creditor of what would otherwise, under the provisions of the act, go to all would hinder and defraud the others and amounts to a preference, contrary to the purpose of the act, as much as if the word 'preference' had been used in this act as it was in the former. This provision of the latter act is more prohibitive than that of the former, for no reasonable cause of belief of insolvency and fraud on the act, by the person receiving the preference, is necessary to avoid it. The purpose and intent of the bankrupt only is looked at and, if contrary to the act, is sufficient. The question seems to have been considered as if it arose at common law, or under statutes of fraudulent conveyances, where securing any creditor is allowable, and not as arising under a bankrupt law, where any intended preference among creditors is forbidden and avoided. Such a mortgage of the last available property within eight days of filing a voluntary petition and schedules could have no other effect than to give a preference to that creditor over others existing, to many times the amount of the debt intended to be secured, and of the property to secure it. The intent in giving the mortgage is to be taken to have been that it should have its obvious effect."

Judge Swan, in the Pease Case (D. C.) 129 Fed. 448, adopts this position and, speaking of the several subdivisions of section 67, says:

"It seems clear that these several subdivisions have a common purpose and should be read together as collectively definitive of the essentials of a valid lien. It follows that no person can be a 'purchaser in good faith' of any part of the bankrupt's estate, if title or security was accepted 'in contemplation of or in fraud upon' the bankrupt act, or if for any reason it would not have been valid against the claims of creditors of the bankrupt. The propositions that advances may be lawfully made in good faith to a debtor to carry on his business, and that the lender may lawfully take security at the time for such advances without violating the bankrupt act, are beyond denial. 'It makes no difference,' says the court in *Tiffany v. Boatman's Inst.*, 18 Wall. 375 [21 L. Ed. 868], 'that the lender had good reason to believe the borrower to be insolvent, if the loan was made in good faith, without any intention to defraud the provisions of the bankrupt act.' This was held in construction of section 35 of the bankrupt act of 1867, which avoided 'any conveyance, transfer or other disposition of the property of an insolvent, if the grantee had reasonable cause to believe the grantor insolvent, and that the conveyance was made to prevent the property coming to the assignee in bankruptcy, or to prevent the same from being distributed under the act, or to defraud the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade, any of the provisions of this title.' These two elements must have concurred in the transaction to avoid the conveyance. It was not enough that the grantor was believed to be insolvent in order to defeat the title of the grantee, but it must also appear that the grantee knew that the conveyance was made with a view to effect any purpose prohibited by the act. If that is shown, it avoids the transfer. Even though a present fair consideration for property transferred to the hindrance, delay of, or in fraud upon creditors, it will not save the conveyance. 'A sale may be void for bad faith, though the buyer pays the

full value of the property bought.' This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his creditors and where he buys recklessly, with guilty knowledge"—citing cases.

It is unnecessary to review the authorities considered by the court in the Pease Case save as we shall later quote from *In re Soudan Manufacturing Co.*, 113 Fed. 804, 51 C. C. A. 476. These cases all bear more or less on the facts before us in this case. While in the Pease Case the agency of the attorney negotiating the loan, acting for both mortgagee and preferred creditor, is patent, such agency is not fundamental to the court's conclusion, except so far as through it proof is found to charge the mortgagee with knowledge of the mortgagor's insolvency and the purpose to use the proceeds for an unlawful preference. It is admitted that such destructive information was Marsh's, whether or not he was an agent of the bank. In the Soudan Case, considered by Judge Seaman, the mortgage was upheld; the second paragraph of the syllabus succinctly stating the situation:

"A mortgage on the plant of a manufacturing corporation to secure a loan of money made in good faith by the mortgagee, who was wholly unacquainted with the company and acted through an agent, upon representations made by the president of the company and the report of an agent sent to examine the security, is not rendered void by the bankruptcy act, where the company was at the time a going concern and actively conducting its business and *not known by the lender or his agent to be insolvent*, although it was in fact insolvent and became a bankrupt within four months, and although the mortgagee knew that a large part of the money borrowed was to be used in paying outstanding unsecured debts."

In the body of the opinion in that case the court says:

"The mortgagor corporation was insolvent in fact, if not so considered by its president, and obtained the loan for the purpose of paying up certain indebtedness and with the effect of giving a preference to the creditors mentioned, within the definition of section 60a of the bankruptcy act; and while the appellant was not 'the person receiving' such preference 'or to be benefited thereby,' within section 60b, *it is clear that the transaction violated section 67e of the act, if the loan was made upon the mortgage with notice that the corporation was then insolvent, and that it was intended thereby to accomplish unlawful preferences, or under circumstances which charge the appellant with notice that violation of the act was the purpose of the loan.* It is equally clear that section 67d saves from invalidity the security thus founded upon a present consideration, if 'accepted in good faith and not in contemplation of or in fraud upon this act'; and, in the absence of notice which impeaches the good faith of the transaction as so defined, the mortgagee is entitled to the benefits of his lien, notwithstanding the fraud, if any there was, on the part of the mortgagor. *In this view the inquiry is narrowed to the proof of facts and circumstances brought home to the appellant or to the attorney who conducted the transaction for him, touching both the insolvency of the borrower and the unlawful purpose of the loan.* The findings below are, in effect, that the corporation was insolvent when the loan was made, and the appellant had notice of such condition, of the use to be made of the loan, and had 'reasonable cause to believe that it was intended thereby to give' preferences."

It is only because the court there is unable to find that Stites, the mortgagee, who knew that the money he advanced was to pay pressing debts, and who was a stranger to all the principals, and who paid a present consideration for the transfer, neither did know nor have reasonable cause to believe that his money was to be used by an insolvent

to effect an unlawful preference that the lien was upheld. Marsh's position as the executive head of the preferred bank makes his case less appealable to a chancellor than that of Stites, the Soudan Company's mortgagee, while possession of the fatal knowledge (which Stites did not have) is conceded to Marsh by his own counsel. The question of what the Circuit Court of Appeals of the Seventh Circuit would have done to Stites had the court found him with the information which Marsh had is easily answered. Later cases on the same subject, each of which add to authority condemning the Marsh mortgage, are *In re Lynden Mercantile Co.* (D. C.) 156 Fed. 713; *Hackney v. Hargreaves Bros.*, 68 Neb. 624, 94 N. W. 822, 99 N. W. 675, 13 Am. Bankr. Rep. 164; *Bank of Wayne v. Gold*, 146 App. Div. 296, 130 N. Y. Supp. 942, 26 Am. Bankr. Rep. 722 — in addition to those cited by us in the first memorandum. These cases and others cited in the notes sustain Collier's text, under sections 60a and 60b, as follows (Collier on Bankruptcy [9th Ed.] p. 813):

"A transfer may be made to a third person and still be a preference, for a creditor may be benefited thereby. Hence the phrasing, 'the person receiving it or to be benefited thereby,' words found in the same connection in the law of 1867. To constitute a preferential transfer, it is immaterial to whom the transfer is made, if it be made for the purpose of paying the claims of one creditor in preference to those of others. If a transfer be made to a third person merely as an agent or cover for the creditor, who is in effect benefited thereby, it is a preference. It seems to follow, from the last words in the subsection, that the suit can be brought not only against the creditor or his agent but also against a transferee not a creditor."

See, also, Loveland on Bankruptcy (4th Ed.) pp. 951, 989, et seq., where substantially the same conclusions are reached.

It seems evident that a transaction obnoxious to the provisions of section 67, and which also is reprehended by section 60b, may be attacked under the latter section. There the act gives the trustee an option either to pursue the property or the proceeds. Either course is open to him; no one can control his discretion, least of all in behalf of one who has engaged in an act in "contemplation of" the bankruptcy act, to effect a purpose condemned by the latter. Assuming that such is Marsh's position, a court of equity (and that is the character of this court sitting in bankruptcy) is not called upon to concern itself in his extrication from difficulties which result from the transaction; hence, the trustee having elected to hold the property, there was no occasion to make the bank a party to the case that Marsh may recover from the bank or for any other purpose.

Of course we quoted in our former memorandum merely dicta from the cases in 225 and 227 U. S. Reports, but these dicta are not only in harmony with the law as stated by Collier and Loveland but they illuminate the mind of the Supreme Court and suggest that it views transactions of this character in the same way as the courts whose decisions we have cited. Our conclusion, therefore, is that the trustee may avoid this conveyance.

We do not join in the fears of counsel for Marsh that, if the law is as claimed by the trustee, "it would prevent any person from obtaining assistance unless he can first show that he is solvent and does not

need help," for the decision in the Soudan Case settles that fear; nor that "it will compel persons dealing in good faith and for full consideration to ascertain at their peril the financial condition of the people they are dealing with," for, if their transactions are in absolute good faith, that fact alone saves such persons; nor that "it will give trustees the right to attack innocent persons when a direct and simple remedy is at hand," for this decision is directed at a person who cannot be held to be "innocent" when the provisions of the bankruptcy act are applied to his acts; nor is there a valid objection to this position in the fact that "it will subject to attack every transaction of a bankrupt made within four months, not only preferential payments but mortgages and sales," for that is undoubtedly the law and it does not need the construction which we place upon the sections under consideration to make that the law, as every transaction of the bankrupt occurring within four months previous to the filing of a petition against him is subject to scrutiny and such a condition is fundamental to the law itself; nor is it a valid objection to the trustee's claim against Marsh "that the remedies at law must be exhausted (there must be a want or inadequacy of the remedy at law before equity will assume its jurisdiction)," for the reason that the trustee is pursuing a plain remedy at law given to him by the last phrase of section 60b, wherein he is accorded, as we have seen, the option to pursue either the property or its proceeds.

In re SCHUYLKILL-HEIM BREWING CO.

(District Court, E. D. Pennsylvania. October 1, 1913.)

No. 4,085.

1. CORPORATIONS (§ 216*)—LIABILITY OF STOCKHOLDERS—LAW GOVERNING.

The liability of stockholders of a bankrupt corporation on account of payment for their stock in property is to be determined by the law of the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 829-834; Dec. Dig. § 216.*]

2. CORPORATIONS (§ 232*)—LIABILITY OF STOCKHOLDERS—PAYMENT FOR STOCK IN PROPERTY.

Stockholders of a brewing company, who paid in part for their stock by an agreement to transfer the good will of their business as wholesale dealers in beer to the company, *held* liable to assessment for such part of the subscription on the bankruptcy of the company, under the law of Pennsylvania; it not appearing what, if anything, such good will was worth.

[Ed. Not.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884, 987; Dec. Dig. § 232.*]

In the matter of the Schuylkill-Heim Brewing Company, bankrupt. On exceptions to report of special referee respecting liability of stockholders. Report confirmed.

Arthur L. Shay, of Pottsville, Pa., for trustees.

John F. Whalen, of Pottsville, Pa., for exceptants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. B. McPHERSON, Circuit Judge. The nature of this controversy will appear from the following report of the learned referee (Samuel E. Bertolet, Esq.):

"(1) The Schuylkill-Heim Brewing Company was adjudged bankrupt on June 23, 1911, and the liabilities proved and allowed against the estate within the year fixed by law, are \$31,384.20. The assets realized from all sources are and will not exceed \$18,826.45, from which must be deducted administration expenses and costs, leaving net assets of not over \$15,027.79. The secured claims paid in full total \$11,485.17, leaving about \$3,542.62 for distribution among unsecured creditors, whose claims total \$19,899.03. Allowing for additional expenses, it will thus take about \$16,000 to pay creditors in full.

"(2) Chas. Amann, some time before 1910, took title to about 50 acres of land in Schuylkill county, near Ashland. He and Martin Heisenberger began the construction of a brewery plant thereon. Amann was the moving spirit in the enterprise. Heisenberger advanced about \$4,500 toward the project, and Amann put in additional sums until the amount contributed by both aggregated about \$17,660. The construction of the brewery proceeded until early in 1910, when the superstructure was completed, including the installation of a boiler. Up to that time, no machinery had been installed.

"(3) Early in 1910, Amann conceived the idea of organizing a corporation and taking into the project Michael J. Hanley and Thos. R. Bennett, partners in a beer and liquor distributing business which they had established in the community. He agreed to give them an equal interest in the project with himself and Heisenberger, if they would pay \$5,000 for their share of the stock of the proposed company and divert their business to it. This business Hanley testifies was worth \$4,500 a year in profit to the company. The stock was to be shared equally between the four men, and Amann and Heisenberger were to turn over their interest in the brewery, for their stock.

"(4) On March 4, 1910, a meeting was held, attended by Amann, Heisenberger, Hanley, and Bennett, at which they agreed to apply for a charter for the proposed corporation, the capital stock to be \$70,000, divided into 1,400 shares of \$50 each. Each of the four were to and did subscribe for 350 shares each. On March 16, 1910, another meeting was held, the minutes of which state that 10 per cent. of the capital had been paid to the treasurer in cash. As a matter of fact this \$7,000 was not at the time paid.

"(5) An application for a charter was prepared and filed, in which Amann, Heisenberger, Hanley, and Bennett certified that they had subscribed for 350 shares each of the capital stock of the company, and that they four were the directors of the company. The charter was granted on April 26, 1910, and recorded May 2, 1910. Bennett was elected president, Hanley, vice-president, and Amann, treasurer.

"(6) On May 17, 1910, Amann at a meeting of the four directors reported that he would convey the brewery plant, three acres of land on which it stood, and the brewer's license held by him, to the company for \$40,000. This offer seems to have been accepted, for on June 17th the minutes of a directors' meeting show that the company's solicitor was directed to prepare a deed for the property, conveying it from Amann to the company. The deed was executed June 25, 1910, and duly recorded.

"(7) In order to enable the company to distribute its stock among hotel men, and thus stimulate its business, the four incorporators returned their 350 shares of stock to the company, and each received instead a certificate for 200 shares, par value \$10,000. They continued to hold this stock to the date of the bankruptcy of the company. Out of the remaining 400 shares about \$5,500 worth, or 110 shares, were sold to a number of other subscribers, who paid for their stock in cash at par; the company receiving the money.

"(8) Hanley and Bennett together paid in cash for the 400 shares of stock in their name the sum of \$4,300 in the following installments: On March 15, 1910, \$1,000; June 21, \$500; July 5, \$1,000; July 23, \$200; July 30, \$300; and August 3, \$1,300. They admit that they each owe \$350 on their agreement to pay \$5,000 for their stock.

"(9) Amann and Heisenberger, as payment for their shares, jointly contributed the brewery property and three acres of land, on which \$17,660 had been expended, and which was offered to and accepted by the directors of the company at \$40,000. Later, and at various times from May 12 to October 9, 1910, Amann advanced to the company from his private funds \$2,153 in cash. Amann was to receive a mortgage for \$5,000 difference between the \$35,000 worth of stock he and Heisenberger received originally and the transfer price of the brewery. It was never given to him.

"(10) In September, 1910, Amann, Heisenberger, Hanley, and Bennett indorsed a note for \$6,000 given by the bankrupt, and in November, 1910, another note for \$1,000. These notes were paid by them after the bank holding the notes sued the indorsers. They paid \$7,146.80, principal, interest, and costs, and took an assignment of the judgment against themselves, from the bank. Each indorser paid one-fourth, or \$1,786.70.

"(11) On February 23, 1912, the referee (Freiler) allowed the claims of Amann, Heisenberger, Hanley, and Bennett for \$1,786.70 each, being their payments made as indorsers of the bankrupt's notes plus interest. Amann had offered a claim for a much larger amount, including the \$5,000 difference between \$35,000 in stock received and \$40,000, the transfer price of the brewery, and including also the \$2,153 in cash advanced by Amann at various times. Allowance of this part of his claim was deferred. No review was taken from the referee's order allowing these claims. Only an exception was noted by counsel for the trustees, to the referee's rulings.

"Discussion.

"The four incorporators, Amann, Heisenberger, Hanley, and Bennett, agreed before incorporating the company, that its capital stock should be \$70,000, divided into 1,400 shares, and that each were to take 350 shares. Of these 350 shares, 150 were to be returned to the company to be sold to others, and 200 kept by themselves.

"For their 200 shares of stock, Amann and Heisenberger were to turn in the brewery property, which had been constructed with their money at a cost of \$17,660, plus three acres of land on which it stood. Amann, in whose name title to the real estate was held, also agreed to turn over, with the court's consent, his brewer's license, and, in addition, to concede to the company certain water rights originating upon the remaining land from which the brewery lot had been carved. Hanley and Bennett, for their 200 shares each, were to pay \$5,000 in cash and turn over their beer business, or, more properly speaking, its 'good will.'

"All this was, as the testimony seems to me to clearly show, done and agreed to before the company was incorporated. It remains to see, then, whether, after incorporation, the bargain was properly ratified and executed by and between the four incorporators, who held all the stock and offices of the company, and the corporation. To this end we must inquire (1) whether the property was fairly worth the \$20,000 worth of stock each pair of stockholders received, and (2) whether the necessary precautions were in good faith taken by those representing the company to make the transaction lawful and prevent liability by these stockholders to the creditors of the now insolvent company.

"That the capital stock of a corporation can be issued to the subscribers to its stock in return for money, property, or services received is, in general, a proposition too well settled to require the support of authorities. It seems only necessary for a stockholder to show that the property or services were not grossly and fraudulently overvalued, but fairly ascertained, that the proposition for its acquisition was fairly submitted to the company, and that the latter received the property, etc., in pursuance of the agreement for its transfer in exchange for stock, with an honest belief on the part of those representing the company that it had the value placed upon it, bearing in mind that such value is not to be determined by subsequent results, but rather by the prospects as they appeared at the time of sale (*Iron Co. et al. v. Hays et al.*, 165 Pa. 489, 30 Atl. 936), and bearing in mind, too, what was said in *Bole v. Murray*, 233 Pa. 589, at page 597 [82 Atl. 943, at page 946],

'Where an original subscriber to stock claims to have paid a subscription in something else than money, the burden is on him to show a contract with the corporation permitting it, and the further burden is on him of showing that the transaction was fair, and that the property turned over in payment had been valued by those representing the corporation in good faith.'

"With these principles in mind let us first direct our attention to the Amann and Heisenberger stock, and its alleged payment. As said before, the only stock these men actually received was 200 shares each, or \$20,000 worth. It is undoubtedly a fact that the brewery building cost them jointly \$17,660, and that the land on which it stood was worth something, that the license to brew beer on the premises had value, and that the water right was an asset. To say that this combined property, coupled with the prospects of profit from the project as they appeared at the time of sale, was reasonably worth \$20,000, and could be so regarded by the directors of the corporation, is surely not drawing upon one's imagination. That they were so regarded, and that a contract to take the property as it thus stood was recognized as existing, whether in writing or by parol, between Amann and Heisenberger and the corporation, seems to me to be clearly shown by the minutes of the May 17, 1910, meeting of the directors, when Amann offered to convey it all to the company for \$40,000, which offer was accepted and the sale ratified by the meeting of June 17th, when the company's solicitor was directed to prepare a deed conveying the property to the company. It is true that the purchase price was fixed at \$40,000, but what of that? The stock to be exchanged for the property was \$20,000 worth, and the only thing for us to determine is whether it was fairly worth that amount, and whether the directors were justified in parting with so much of their company's stock in return for it. It seems to me the question must be answered in the affirmative. That the price named in Amann's offer and in the deed was twice as much as the value of the property seems to me is of no more significance than if the consideration named had been a merely nominal one. Assuming that Amann was endeavoring to exact more for the property than it was worth, the fact remains that he did not receive it, and the evidence is ample to show that the company persistently refused to accede to his demands for additional remuneration in the shape of a mortgage for \$5,000. The sole point on this phase of the case is that the company got property fairly worth the stock it gave in return, that it had reason to and did believe it to be worth the consideration actually given, and that it executed the transaction in a legitimate way. It and its creditors must stand by the results.

"I am therefore of the opinion that Amann and Heisenberger held their stock fully paid, and are not liable to assessments upon it. It follows, in consequence, that such claims as they may have against the estate must be permitted to share in dividends. Heisenberger's has been allowed for \$1,786.70. Amann's has been allowed for a similar amount, with leave to prove the balance. I think he has clearly shown loans to the company amounting to \$2,153, which must be added to the sum already allowed. He attempts, however, to prove for \$5,000 more, an amount he alleges to be due on a promise made by the company to give him a mortgage for an alleged balance due him on the purchase price of the brewery. Having just said that the property turned in by him was worth \$20,000, for which he and Heisenberger received payment in stock, I do not think he can be allowed this part of his claim, and an order will be entered accordingly.

"This leaves the case against Hanley and Bennett to be disposed of. Here I think an entirely different conclusion must be reached. Their \$20,000 worth of stock was to be paid for by \$5,000 in cash and the turning over of their beer business to the company, which I have heretofore designated as 'good will.' The evidence shows and it is conceded that each of these two men paid only \$2,150 on account of their stock. Assuming that they had to pay only the \$5,000 testified to, they would still owe \$350 apiece. I am not, however, convinced that payment of the balance of their stock, viz., \$7,500 each, by 'good will,' has been made. It may be allowed that 'good will' is property, and as such can be used in payment of a stock subscription. *Washburn v. Natl. Wall Paper Co.*, 81 Fed. 17, 26 C. C. A. 312 (C. C. App. 2d Cir.). But I do not think that the Hanley and Bennett transaction has in this regard been

shown to be within the rules of law as heretofore laid down. There is no evidence of its fair valuation by the parties. It was put in at \$15,000 without any attempt having been apparently made by any one to show that it was worth that much money, or, for that matter, was worth anything. And, in truth, was it really worth anything? The business built up by Hanley and Bennett was in the sale of beer made by a brewery called Feigenspan's. How could any one tell that the customers who had given Hanley and Bennett their patronage while they sold Feigenspan beer would continue to patronize them after they began distributing an entirely different and perhaps inferior product? It seems to me that the value of this property was decidedly speculative, and incapable of appraisement or estimation. Such estimation was not, in fact, made either by the company or by Hanley and Bennett, at the time of the transaction, so far as the testimony shows. Also, the testimony is entirely void as to any contract or undertaking by the company to take this item of property in exchange for its stock. In these respects the case differs completely from that involving the Amann and Heisenberger stock, where the minutes of the corporation plainly indicate corporate intention to take property in exchange for stock. As was said in *Bole v. Murray*, supra, the burden was on Hanley and Bennett to show a contract with the company permitting payment of their stock in this way, to show that the transaction was fair, and to show that the 'good will' transferred by them had been valued by those representing the corporation. In the bearing of this burden I think they have failed, and I shall have to hold that they owe \$7,850 each on their stock, a total of \$15,700. As this amount will not pay creditors in full, it follows that they must be assessed the whole debt due by them.

"They have each presented claims against the estate, and their claims were allowed for \$1,786.70 apiece, by the referee preceding me in charge of this case. These allowances were not reviewed, and must therefore be taken as final. But they cannot be set off against the claimants' liability for unpaid stock. Both Hanley and Bennett must pay their assessment before they can receive dividends, and the latter will not be distributed to them so long as they have not paid up their stock in full.

"Conclusions.

"(1) Chas. Amann and Martin A. Heisenberger are not liable for stock held by them, the same having been fully paid.

"(2) Michael J. Hanley is the holder of 200 shares of stock of the bankrupt company, on which he has paid \$2,150 and owes \$7,850.

"(3) Thomas R. Bennett is the holder of 200 shares of stock of the bankrupt company, on which he has paid \$2,150 and owes \$7,850.

"(4) The total unpaid debts of the bankrupt company, after distribution of all dividends, will be at least \$20,000.

"(5) A call must be made upon Michael J. Hanley and Thomas R. Bennett for the entire amount due by them on the stock held by them, to wit, \$7,850 each, and an assessment must be levied against said persons for said amounts.

"Recommendations.

"I respectfully recommend that the court enter the following order on the petition of S. M. Enterline, Roscoe R. Koch, and J. D. McConnell, trustees in bankruptcy of the Schuykill-Heim Brewing Company, bankrupt: It is on this ——— day of ———, 1913, ordered, adjudged, and decreed that the petition of S. M. Enterline, Roscoe R. Koch, and J. D. McConnell, trustees of the Schuykill-Heim Brewing Company, bankrupt, praying, *inter alia*, that a call be made for an unpaid balance alleged to be due by Charles Amann, Martin Heisenberger, Michael J. Hanley, and Thomas R. Bennett on stock of the bankrupt corporation held by them, and that an assessment be levied against said persons for the amount alleged to be unpaid on the capital stock held by them, or so much thereof as may be necessary to pay the ascertained debts of the corporation, be dismissed as to Charles Amann and Martin Heisenberger; and that a call be made upon Michael J. Hanley to pay \$7,850, and upon Thomas R. Bennett to pay \$7,850, due by them, respectively, upon stock

of the bankrupt corporation held by them; and that an assessment be levied against said Michael J. Hanley and Thomas R. Bennett for the amount remaining unpaid upon 200 shares of the capital stock of said corporation held by each of them; and that the costs of this proceeding be equally divided, the estate to pay one half and said Hanley and Bennett the other half, or in such other form as the court may deem proper."

[1,2] To this report Hanley and Bennett have excepted, and the question for decision is whether the referee was right in recommending that an assessment should be levied upon their stock. Little need be added to the foregoing report, which states the facts clearly, and in my opinion reaches the proper conclusion. It is argued that the Pennsylvania decisions do not control, and that the exceptants are entitled to hold their stock as full-paid, because the business of the exceptants was actually turned over to the brewing company, and the company profited thereby. But the argument overlooks the fact that the rules laid down by the Supreme Court of Pennsylvania are not intended primarily to protect the company itself, but the creditors of the company; and it is obvious that creditors are, or may be, injured by the violation of these rules, even if the property contributed should actually be enjoyed by the company. I agree with the referee that the Pennsylvania decisions have settled the question now presented.

The clerk is therefore directed to enter the order recommended by the referee, dating it October 1, 1913.

ANDERSON v. MESSENGER.

(District Court, N. D. Ohio, W. D. Feb. 26, 1913.)

No. 1,897.

1. APPEAL AND ERROR (§ 1232*)—APPEAL BONDS—LIABILITY—TERMINATION.

U. S. Comp. St. 1901, p. 712, § 1000, provides that every justice or judge signing a citation on any writ of error shall take good and sufficient security that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and if he fail to make good his plea he will answer all damages and costs. Plaintiff, having been cast in an action against defendant, sued out a writ of error and gave a bond conditioned that he would prosecute the writ to effect and answer all damages and costs if he failed to make the appeal good. The judgment was reversed and the cause remanded for new trial. On the second trial plaintiff was again cast, and again sued out a writ of error and gave bond with a similar condition, and again succeeded in reversing the judgment, and the case was returned for a third trial, with instructions following which the trial court rendered a decree in favor of plaintiff, which on writ of error by defendant was affirmed by the Circuit Court of Appeals but was reversed by the Supreme Court on certiorari after which judgment was finally rendered for defendant. *Held*, that defendant's failure to obtain a review of the judgment of the Circuit Court of Appeals on the first two writs of error as he might have done, but his participation in a new trial on each of the cases, devitalized the bonds and precluded a subsequent recovery thereon for costs on the writs of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4753-4757; Dec. Dig. § 1232.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. APPEAL AND ERROR (§ 1234*) — COSTS ON APPEAL — BONDS — ITEMS RECOVERABLE—CLASSIFICATION.

Where plaintiff gave two bonds for costs on separate writs of error to the Circuit Court of Appeals, the surety in each binding himself only to answer for damages and costs arising if the plea was not made good, the bonds constituted a several liability only, so that no recovery could be had thereon except for the particular costs incurred on each writ.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4761-4777; Dec. Dig. § 1234.*]

Action by Peter Anderson against Rosewell E. Messenger on certain appeal bonds. Judgment for plaintiff.

See, also, 171 Fed. 785, 96 C. C. A. 445.

R. P. Cary, of Memphis, Tenn., for plaintiff.

King, Tracy, Chapman & Welles, of Toledo, Ohio, for defendant.

KILLITS, District Judge. This case is before the court on three motions for judgment against the surety on appeal and cost bonds. By consent, the motion as to the cost bond is allowed. The controversy arises upon appeal bonds in the sums of \$250 and \$500, respectively.

In order to understand the exact point raised, this short history of the case is necessary to be stated: Anderson, a resident of Tennessee, began an action in ejectment against Messenger to recover property in this district. 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094; 158 Fed. 250, 85 C. C. A. 468; 225 U. S. 436, 32 Sup. Ct. 739, 56 L. Ed. 1152. The action in the Circuit Court of this division was determined in favor of the defendant Messenger, whereupon Anderson filed his bond, with the American Bonding Company as surety, on August 26, 1905, in the sum of \$250, reciting the judgment against him and the fact that a writ of error had been allowed, with this condition in the bond:

"That if the said Peter Anderson shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said appeal good, then the above obligation to be void."

The Circuit Court of Appeals, considering the writ of error, reversed the Circuit Court and remanded the case for a new trial. Upon a second trial, with additional facts, the defendant Messenger again succeeded, whereupon a second writ of error was allowed, and Anderson filed, with the American Bonding Company as surety, a second bond in the sum of \$500, dated March 21, 1907, with the condition in precisely the same language as that quoted of the first bond. The Circuit Court of Appeals, on this second writ of error, again reversed the Circuit Court and returned the case for a new trial with instructions, following which the Circuit Court rendered a decree in favor of Anderson. Error was prosecuted by Messenger, and in the Circuit Court of Appeals this last judgment of the Circuit Court was affirmed. The Supreme Court, on a writ of certiorari allowed to the Circuit Court of Appeals, however, reversed both lower courts and remanded the case to the Circuit (now District) Court for this district with such construc-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion of the issues involved as required a final judgment in favor of Messenger, which has been entered.

Messenger now insists that the conditions of the two appeal bonds have been broken and that he is entitled to recover against the surety on them for the costs, which greatly exceed their aggregate amount.

[1] The question turns on the proper construction to be given to section 1000, United States Compiled Statutes, which reads:

"Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

There is no question of supersedeas in this case. The bonds affect only the costs.

In our judgment, the motions are not well taken. The authorities cited, with the exception of two, refer to cases in which the appeal or petition in error was one of a succession of steps leading to a final judgment. For instance, if, in this case, after the first reversal in the Circuit Court of Appeals, Messenger had succeeded in getting a hearing on certiorari before the Supreme Court and had obtained a reversal of the judgment of the Circuit Court of Appeals, there would be no question but that the first bond would have been available to him to the extent of its face to meet the costs, for the reason that the case in the Supreme Court would then have been but a transfer of the writ of error made in the Circuit Court of Appeals for which the bond stood, and the reversal by the Supreme Court would have amounted to the failure of Anderson to have prosecuted his writ of error to effect.

The two cases in which a bond not in the direct line of the course of procedure in a case has been allowed to be effective are the cases of *Humerton v. Hay*, 65 N. Y. 380, and *Lowry v. Tew*, 25 Hun (N. Y.) 257. In each of these cases the course of the case was quite like the situation before us, but the decision of the court with reference to the effectiveness of the bonds seems in each case to have depended upon the wording of the statute. In the *Lowry Case*, for instance, the plaintiff recovered a judgment in a justice court, the defendant appealed to the county court for a new trial and procured the bond to stay execution; the condition being "that if judgment be rendered against the appellant on said appeal and execution be returned unsatisfied in whole or in part" he would pay the amount unsatisfied. On the hearing of the appeal in the county court a new trial was ordered to be had before the same justice who rendered the first judgment. On this new trial the plaintiff again recovered, and, on the defendant's appeal to the county court, that judgment was affirmed. The court say:

"The ground taken by the respondent, and on which it is understood the case was disposed of at the circuit, is that as the judgment appealed from was not affirmed, but a new trial was granted, the obligation of the undertaking was at an end, and did not extend to the judgment recovered upon

the new trial. That construction we think does not accord with the spirit or letter of the undertaking. The object of the appellant in bringing the appeal was to obtain a new trial before the same justice. The granting of a new trial did not discharge the surety, for until the new trial was had the result of the appeal was undetermined. The judgment recovered upon the new trial, and subsequently affirmed by the county court, was the judgment rendered on said appeal. In other words, the condition of the undertaking refers to the final determination of the appeal."

This case was decided under the New York statute, whose language, referring to the condition of the bond, is in the terms of the bond which we have quoted.

In the case of *Humerton v. Hay*, 65 N. Y. on page 384, *supra*, per Judge Dwight, the distinction which we are making here, it seems to us, is clearly made. He says (speaking of a condition identical with that in the case of *Lowry v. Tew*):

"It will be observed that the language of this section is very broad. It refers both to the judgment and the execution to be issued thereon. It manifestly looks to the final judgment in the cause. In this respect, it is much more comprehensive in its terms than the 335th section, which simply provides that if the judgment appealed from be affirmed, etc., the appellant will pay the amount of the judgment. It might plausibly be urged in that case that the undertaking would not cover a series of new trials. In the case at bar, the defendant covenanted for the final result of the action and the payment of the debt, if an execution was returned unsatisfied. It is not required that any particular judgment be affirmed. The condition simply is that 'if judgment be rendered,' etc. This plainly means any final judgment which may be rendered in the cause, upon which an execution may issue."

If we keep in mind that sureties are held only to a reasonably close construction of their obligations and apply that proposition to the terms of the bonds before us and the statute, it seems to us that we will find a distinction between the case before us and the cases cited from the New York practice. The plaintiff in error in this case (*Anderson*), taking the first judgment of the Circuit Court up, undertook only, in the language of section 1000, United States Compiled Statutes, to "make his plea good." In the bond he undertakes to prosecute "said writ of error to effect, and answer all damages and costs if he fail to make the said plea good." There is not here, as in the New York cases, any suggestion that, if final judgment is rendered against him, the bond shall stand for the satisfaction thereof, but simply that the bond respond to all demands upon him which resulted from his failure to show that the judgment rendered against him was erroneous. He did show, in the Circuit Court of Appeals, that the first and second judgments against him were erroneous, and with that showing the conditions of the respective bonds were satisfied.

[2] On another issue the motions should be overruled, one arising from the fact that no attempt is made to classify the costs to indicate those which accrued upon the several processes in error; but movant is content with the simple allegation that the aggregate amount of costs greatly exceeds the penalty of the bonds. The surety in each bond is bound to answer only for "damages and costs" which arise if the "plea" is not made "good." The "damages and costs" are only those incidental to the prosecution of the particular writs of error to

which the bonds respectively apply. In *Hinckley v. Kreitz*, 58 N. Y. 583, this precise point was decided upon a statute substantially identical, in the particular now under consideration, with section 1000, Compiled Statutes. The syllabus to that opinion states succinctly the decision in this language:

"The sureties in an undertaking given on an appeal to the General Term, conditioned that the appellant will pay 'all costs and damages which may be awarded against him on said appeal,' are not liable for the costs of an appeal by their principal to the Court of Appeals from a judgment of affirmance of the General Term."

For want of a showing of what the costs were made on either of Anderson's writs of error, the motions could not be granted because there is no record to which they might be applied, even if either of these bonds now worked to Messenger's advantage. But this case of *Hinckley v. Kreitz* is authority for our opinion on the main point. That court is applying to the facts a construction of what was then known as section 335 of the New York Code, whereunder the bond before it was given and wherein the condition was provided to be the payment of "all costs and damages which may be awarded * * * on said appeal." As we suggested, this condition is equivalent to that in the bonds before us, and in the federal statute, where it is provided that the bond shall operate if the principal shall "fail to make his plea good," whereupon he shall, under the bond, "answer all damages and costs." Speaking of the matter before it, the New York Court of Appeals (Chief Justice Church, 58 N. Y. page 587) says:

"The liability of the defendants (in the action on the bond) was fixed. They had agreed to pay that judgment, and the costs *upon that appeal*. They did not agree to pay the costs upon an appeal by the defendant (in the main case) to any other court."

Babbitt v. Finn, 101 U. S. 7, on page 13 (25 L. Ed. 820), closely approaches, also, the main question. While there the issue was whether sureties on a bond with condition broken through affirmance in the intermediate court were discharged because their principal gave a new bond on appeal to the final court where again the judgment was affirmed, the decision being that no discharge took place, the court, speaking of the status of the obligation, says:

"Nothing will discharge the sureties given to prosecute the appeal from the court of original jurisdiction, but the reversal of the judgment in some court having jurisdiction to correct the alleged error."

Reversal of what judgment? Manifestly that particular rendition of the court of first instance to which the bond was directed. Had Messenger obtained an allowance of certiorari to either of the judgments of reversal by the Circuit Court of Appeals and secured from the Supreme Court a restitution of either of the judgments in his favor in the Circuit Court, then the appropriate bond would operate to charge the sureties on a motion such as those before us, on the authority of *Babbitt v. Finn*, and *Robinson v. Plimpton*, 25 N. Y. 484, cited to us and approved by the court in *Babbitt v. Finn*. He had the right in each instance to apply for a writ of certiorari. The presumption is

that he did not do so in either instance because of the judgment of his counsel that the record was not as favorable as it might become in another trial. The reports of this case in 146 and 158 Fed. show that a different record was made up in the first two trials; the feature of a tax title first appearing in the second. By choosing to go back twice to the Circuit Court for a new trial he successively accepted the first and second judgments of reversal by the Circuit Court of Appeals as final upon their respective records, and, successively, made final a situation which filled the condition of Anderson's two bonds and exonerated the sureties upon them respectively. Having chosen not to stand upon the records made in either of the first two trials, but to enter upon the making of a third record, he must bear the inconveniences of that choice.

While it is true, as urged by movant's counsel, that a writ of certiorari carries up the whole record, that principle does not assist him here. The record which went to the Supreme Court in this case was only that of the third trial, and bore nothing of the first or second except such matters therein as were still vital to the issues, law or fact, before the court in the third, such as the doctrine of the law of the case applied by the Circuit Court of Appeals in the second hearing. 158 Fed. 250, 85 C. C. A. 468; 225 U. S. 436, 32 Sup. Ct. 739, 56 L. Ed. 1152. The bonds in question were devitalized by the conduct of Messenger in stopping with the Circuit Court of Appeals and going back for new trial; nothing respecting either of them was a valid part of the record contributing to the issues on the writ before the Supreme Court.

In re LEMEN.

(District Court, N. D. Ohio, W. D. Oct. 22, 1912.)

No. 1,874.

1. BANKRUPTCY (§ 14*)—JURISDICTION—RESIDENCE—DOMICILE.

Under Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), conferring on the district courts jurisdiction to adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months or the greater portion thereof, it must be shown, in order to confer jurisdiction, that the alleged bankrupt either had his principal place of business, or his residence or domicile, within the division of the district in which jurisdiction is invoked.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. § 14.*]

2. BANKRUPTCY (§ 14*)—JURISDICTION—"RESIDENCE."

The word "residence" as used in Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), conferring jurisdiction on the bankruptcy courts to adjudge persons bankrupt who had their principal place of business, residence, or domicile within their respective territorial jurisdictions for the preceding six months or the greater portion thereof, should be construed as providing for jurisdiction in the alternative over those who have their residence, or their domicile, or their principal place of business within the district, and hence mere residence consisting of a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

relationship to the territory, which does not rise to the dignity of a domiciliary condition, if continued for the requisite proportion of the six months preceding the filing of the petition, is sufficient to confer jurisdiction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. § 14.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6151-6161; vol. 8, p. 7788.]

3. BANKRUPTCY (§ 14*)—JURISDICTION—RESIDENCE.

The bankrupt in March, 1910, having previously been engaged in sheep raising in Montana, sent his wife to her father's home in Michigan, and in October left Montana with a band of sheep, to feed and sell them in the East. He arrived in Ohio, within the district in which it was sought to have him adjudged a bankrupt, in the middle of October, 1910, where he resided until May, 1911, spending more than two-thirds of his time within the district; his absences being on business trips only. In February, 1911, he went back to Montana, sold his horses and remaining household goods, and definitely closed up his interests in that state, selling the wire on his leased ranch, and made expressions indicating a probability that he would never return to Montana. He also discussed the advisability of shipping his horses and remaining goods to Ohio or selling them in Montana. He returned to Ohio in March, and remained there until May 5th, when he took up his permanent residence in Michigan. *Held*, that though he testified that he had formed no intention of abandoning Montana as his home until his last trip, his residence from October, 1910, until May, 1911, was within the district of Ohio, and was therefore sufficient to establish jurisdiction in the bankruptcy court there.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. § 14.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Will R. Lemen. On objection to the jurisdiction of the court. Overruled.

C. L. Guernsey, of Fostoria, Ohio, for petitioners.

Jesse Stephens, of Fostoria, Ohio, for bankrupt.

KILLITS, District Judge. The alleged bankrupt questions the jurisdiction of this court to entertain the involuntary petition against him, and the matter is before the court on the report of the special master commissioner appointed to hear and report on the facts. The conclusions of facts and law of the special master sustain the jurisdiction.

No exception has been filed to the report, but the alleged bankrupt attempts to raise the question of jurisdiction by a motion now filed to dismiss the case for want of jurisdiction as the same appears on the face of the special master's report. Passing the question of whether or not this is good practice, and whether or not the alleged bankrupt has not waived all questions by failing to except to the master's report, we proceed to consider the issues on the merits.

At the outset it must be understood that the criterion of jurisdiction is the existence of one or more of three distinct and separable facts. By section 2 of the Bankruptcy Act district courts are given jurisdiction to—

“(1) Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicil within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof,” etc.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
208 F.—6

[1] It must be shown in this case that for the greater portion of the six months prior to the 19th day of May, 1911, the said Lemen either had his principal place of business in the Western division of the Northern district of Ohio, or his residence in such division, or his domicile therein.

The court, in *Re Garneau*, 127 Fed. 677, 62 C. C. A. 403, say:

"There is, of course, a legal distinction between 'domicile' and 'residence,' although the terms are generally used as synonymous; the distinction depending upon the connection in which and the purpose for which the terms are used. * * * 'Residence' indicates permanency of occupation as distinguished from temporary occupation, but does not include so much as 'domicile' which requires an intention continued with residence. 2 Kent, 576. Residence has been defined to be a place where a person's habitation is fixed without any present intention of removing therefrom."

And the court, quoting this language with approval from *Shaeffer v. Gilbert*, 73 Md. 66, 20 Atl. 434:

"It does not mean * * * one's permanent place of abode where he intends to live all his days, or for an indefinite or unlimited time; nor does it mean one's residence for a temporary purpose, with the intention of returning to his former residence when that purpose shall have been accomplished, but means, as we understand it, one's actual home, in the sense of having no other home, whether he intends to reside there permanently or for a definite or indefinite length of time"

—proceeds to say:

"The term is an elastic one, and difficult of precise definition. The sense in which it should be used is controlled by reference to the object."

Collier says (*Bankruptcy*, 9th Ed., 30):

"Under the former law 'domicile' and 'residence' were often held equivalent terms. By that act when residence within the district was required, the word 'domicile' was not used. The confusion resulting from the conflicting decisions as to whether residence included domicile has been obviated by inserting in this subdivision the language 'resided, or had their domicile' within the jurisdiction of the court."

If we are to construe this statute precisely as it reads, we are compelled to insist that there are in the statute these three criteria of jurisdiction, the existence of either alone of which may determine the forum. In *Hills v. McKinniss Co.* (D. C.) 188 Fed. 1012, 26 Am. Bankr. Rep. 329, we had occasion to say:

"It seems to us that this act must be construed, if the language reasonably permits such construction, to secure uniformity in the fullest measure and to avoid an interpretation, unless the same be compelled by the language of the statute, which permits a dishonest or tricky debtor to easily escape its provisions."

Here the language not only reasonably permits but, on its face, invites a construction which enlarges the field of the law's operation, and diminishes opportunity to avoid its beneficial influence. The question of residence or domicile, if those terms are to be confused as synonymous, as they so often are, depends very largely for determination on what the subject may find it convenient to say was his intention, and hence is open to the weakness and possible concealed viciousness of post hoc testimony inspired by present interest.

At the best, such confusion of terms furnishes much occasion for quibbling over the weight of testimony, and allows means of escape from the provisions of this salutary law to men who otherwise, in the interest of fair dealing with their creditors, should be subject to it. The facts of the case before us illustrate the mischief of such a construction, for apparently a large preference to one creditor is a stake in this contest, to be made absolute to Lemen's father if jurisdiction is defeated. Certainly as suggested by this court in *Hills v. McKinniss*, *supra*, such a law as the Bankruptcy Law, dealing as it does with a subject and over conditions which are common to all business operations within its purview, should be construed, as far as reasonably possible within the fair meaning of its language, to give it an operation as comprehensive as the evils at which it is aimed. No debtor, not of the excepted classes, should be permitted to avoid it unless either the particular fact or a deficiency in the law's wording requires that he escape. Here there is no loophole in the law at the point under consideration.

[2] We must indulge the presumption that every word in a statute was inserted for some purpose (*Bloom v. Richards*, 2 Ohio St. 388-402), and hence must regard the word "resided" in section 2, Bankruptcy Act, as providing for a condition of jurisdiction in the alternative to those meant by the expressions "had their domicile within" and "had their principal place of business." We hold, therefore, that a mere residence, a relationship to the territory which does not rise to the dignity of a domiciliary condition, if it continues for the requisite proportion of the six months immediately preceding the filing of the petition, is sufficient to clothe the court of that district with jurisdiction in bankruptcy. In applying the laws relating to electoral franchise, a distinction is made between residence and domicile, and it is settled that a man may reside in one state and be domiciled in another. The purpose underlying the Bankruptcy Act, that it may operate uniformly, requires that such distinction be employed here, and it is not impossible that the courts of two districts may have jurisdiction to entertain a petition against the same debtor; that one acting which is first invoked.

[3] Where then did Lemen reside for the greater proportion of the six months prior to May 19, 1911? In March, 1910, having theretofore maintained a home in Montana, engaging extensively in sheep-raising, he sent his wife to her home in Michigan, as she was expecting to be confined. In October of the same year he left Montana with several thousand sheep for the purpose of feeding and selling them in the East, having made arrangements to that end through his father, who resided at Fostoria, Ohio, in this district. From about the middle of October until early in February he fed as many as 2,800 sheep at Vanlue, in this district, gradually selling them off, and during that time and until the 5th of May, 1911, he spent more than two-thirds of his time within the district, either at Vanlue or at his father's house in Fostoria, and for at least the same proportion of time his wife and baby were within the district at one of these two places. His absences during this period were for business trips only. On the

5th of May unquestionably he took up his permanent residence in Michigan. In February, 1911, he went back to Montana and sold his horses and remaining household goods, and definitely closed up all interests in that state. He did not return to Ohio until after the 4th of March, and he says that he had formed no intention of abandoning Montana as his home until on this last trip.

The intention of the party under consideration is always a fact to be considered in cases of this kind, either as expressed by him when the subject is under controversy, or as he announces it when no issue has arisen, but obviously the potency of his testimony of his intention is to be measured in the light of the facts in the case, and especially in the light of his own conduct. His statement of what his intention was, made when his conduct is under question, upon an issue involving a determination which he had theretofore entertained, is not evidence of a very high degree of persuasiveness, if reliable evidence of conduct inconsistent with such present expression of past intention is at hand.

We feel that we must answer in the negative the question, Did he have an intention to return to Montana, to continue his habitation there, when he left in 1910? We do this in the light of these items of his conduct shown in testimony: (1) His sale of the wire on his leased ranch to the witness Mooney; that act being accompanied by expressions on his part that indicate a probability that he would never thereafter be seen in that part of Montana. (2) His talk to the witness Meyers, after he had come to Ohio, in 1910, and before his return to Montana in February, as to the advisability of his shipping his horses and remaining goods to Ohio or selling them in Montana. (3) His failure, in the summer of 1910, after his wife had left, to complete the work necessary to hold his homestead. (4) His admitted disappointment at the character of the land allotment which he had there by way of homestead, and his dissatisfaction with the prospects of the sheep raising business. (5) And, finally, and as perhaps the most significant fact of all, his shipping four boxes of household goods in the fall of 1910 to his father's home in Ohio. These boxes contained principally bedding, knickknacks, and clothing of his wife, but he was careful to ship also a rocking chair which was valued because of its associations—an act that is clearly inconsistent with any claim that his contemplated departure from Montana at that time was for a temporary absence only. He admits that he formed no intention of going to Michigan to live until after his return from Montana in March, and, of course, had he then formed it, such a mental attitude will not avail to control the question before us, for it was a mere thought until he carried it into effect two months later.

Our conclusion from these facts is that he lost his domicile in Montana with his first departure, certainly before May 5th. That being so, unless we construe the Bankruptcy Act as we do, he was, for several months, wholly beyond its provisions, and competent, although insolvent, to distribute his assets as he pleased.

It is an established canon of construction to avoid an absurdity unless the language of the statute in question compels that situation.

We have little difficulty in concluding that from the time when he

joined his wife at his father's home in October, 1910, in the city of Fostoria, where she had preceded him nearly a week, until he left with her in the early part of May, 1911, his residence was within this district, because of which this court acquired jurisdiction to entertain a petition in bankruptcy against him. The motion to dismiss for want of jurisdiction is, therefore, overruled, with exceptions, and, there being no exception to the report of the special master commissioner, the same is approved, and his recommendations made the order of the court.

UNITED STATES v. SWEET VALLEY WINE CO.

(District Court, N. D. Ohio, W. D. Feb. 26, 1913.)

No. 1,327.

1. **FOOD (§ 1*)—PURE FOOD AND DRUG ACT—VALIDITY.**

Pure Food Act (Act Cong. June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]) is constitutional.

[Ed. Note.—For other cases, see Food, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

2. **FOOD (§ ½, New, vol. 15 Key-No. Series)—MISBRANDING—WINE.**

Under Pure Food Act June 30, 1906, c. 3915, § 6, 34 Stat. 769 (U. S. Comp. St. Supp. 1911, p. 1356), defining the term "food" to include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound, the term applies to and includes wine.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, p. 2856.]

3. **STATUTES (§ 47*)—CERTAINTY—PURE FOOD—"WINE."**

Pure Food Act June 30, 1906, c. 3915, § 8, 34 Stat. 771 (U. S. Comp. St. Supp. 1911, p. 1357), prohibiting the misbranding of articles of food or drink so as to deceive or mislead the purchaser, was not invalid, so far as domestic wine was concerned, for failure to specify an established standard as applied to wine put out in bottles resembling genuine Rhine wine, and described as "Hochheimer Typo, Ohio Serial No. 124, Guaranteed," which in fact was a mixture of grape juice and a fermented solution of dextrose, otherwise known as starch sugar; the term "wine" being ordinarily construed to mean the fermented juice of undried grapes.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. § 47.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7487-7488; vol. 8, p. 7836.]

The Sweet Valley Wine Company was indicted for misbranding wine in violation of the Pure Food Act, and demurred to the indictment. Overruled.

U. G. Denman, Dist. Atty., and John S. Pratt, Asst. Dist. Atty., both of Toledo, Ohio, for the United States.

Lannen & Hickey, of Chicago, Ill., for defendant.

KILLITS, District Judge. The defendant is indicted on four counts for misbranding under the act of June 30, 1906 (c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]), commonly called the Pure Food Act.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Under the first count the defendant is charged with shipping an article of food branded as follows: "Select Riesling Wine, Special Vintage, Serial 124." It is charged that under section 8 of said act this article was misbranded so as to deceive and mislead the purchaser, in that it purported to be Riesling wine of select quality, whereas in fact it was a compound of wine and a fermented solution of commercial dextrose, otherwise known as starch sugar.

Under the second and third counts it was charged: That defendant's shipments purported to be Rhine wines of the character known as Hochheimer and Diedesheimer, respectively, whereas the article in each instance was merely an Ohio manufactured product, and a mixture of wine and a fermented solution of commercial dextrose. The character of alleged misbranding in the second count is typical of both the second and third counts. On the neck of the bottle was a label containing these words "Hochheimer Typo, Ohio Serial No. 124, Guaranteed," etc. On the box containing the bottles were the words: "Hochheimer Typo Wine." That the bottle itself was in the design and form of the bottles containing genuine Hochheimer wine, and contained as part of the label a picture representing a German village.

As to the fourth count, the charge is simply that the defendant shipped wine bottled with a label designating the same as "Typo-Niersteiner Wine, Ohio Serial No. 124, Guaranteed," etc., whereas in fact the article therein contained was a mixture of wine or of grape juice and a fermented solution of fermented dextrose, otherwise known as starch sugar.

To these counts a demurrer has been interposed, on the grounds of: (1) The alleged unconstitutionality of the act; (2) that section 8 thereof, under which this prosecution is attempted, is void for want of definiteness in fixing legal standards for the various wines enumerated in said counts; (3) for a failure of the indictment to aver that wines alleged to have been shipped are not normally composed of a mixture of wine and commercial dextrose, and for failure to allege in either of said counts what ingredients or constituents go to compose the normal wines of the various kinds mentioned in said counts; (4) for a failure to allege that other explanatory statements did not appear on the labels which might inform the purchaser of the exact nature of said wines; (5) for a failure to allege that the various wines therein mentioned and shipped by defendant were foods within the meaning of the act of Congress; (6) that the alleged picture of a German village should be more particularly described, and that the allegation that the picture is a representation of a German village is a mere conclusion; (7) for failure to allege that wines designated as Hochheimer Typo Wine and Diedesheimer Typo Wine, respectively, are not identical with Hochheimer wines and Diedesheimer wines, respectively.

[1] The constitutionality of this act is so generally conceded and so well established that the demurrer on that ground has not been seriously pressed to our consideration, and will not be further entertained.

[2] Section 6 of the act says:

"The term 'food,' as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound."

Applying that language and the principle that, unless compelled otherwise, we must take words in an indictment at their ordinary and usual meaning, we find no merit in the contention that this indictment should aver that the wine in question was a food within the purview of the act.

[3] Nor will we spend much time in considering the other grounds of demurrer, save that which insists that section 8 of the act is void for not establishing a standard for the various wines enumerated in the counts of this indictment. The other grounds are not urged upon our consideration in argument, and doubtless have been abandoned; at any rate they do not appeal to us as having much force.

Respecting the second ground of the demurrer, the argument as stated in the brief of counsel is as follows:

"Our second ground of demurrer goes to all the five counts of the indictment, and it is that the said act of Congress is void as applied to this particular case because it fails to fix standards for the various wines enumerated in said counts. We do not contend by this ground of demurrer that the said act of Congress is unconstitutional as applied to other cases, but what we maintain is that it is void for uncertainty and indefiniteness as applied to this case."

And to that point are cited a number of cases in which the proposition is urged that a penal act is void for uncertainty in which the offense depends, "not on any standard erected by the law which may be known in advance, but on one erected by a jury, and especially so as that standard must be as variable and uncertain as the views of the different juries may suggest, and as to which nothing can be known until after the commission of the crime." *Louisville & Nashville Rd. Co. v. Commonwealth*, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457. This citation is typical of other authorities depended upon by counsel for defendant. They are cases in which the question of what is a just and reasonable rate or toll of compensation for the transportation of passengers or freight is left open to determination by the various tribunals before which the case comes by the statute which makes an undue charge an offense.

Again we say that the words used both in the statute and in this indictment must be given their ordinary and common meaning in the absence of something to demand a special definition. The word "wine" is, by general acceptance and standard definition, understood to mean the fermented juice of the undried grape. The contention of the defendant would make it practically impossible for Congress to pass an act to correct the evils at which this statute is aimed, for the reason that it would be necessary, not only to amplify the act with very particular and minute definitions of standards, but to be constantly amending it and supplementing it as new devices and compounds were placed upon the market. All that can be done, granting that Congress

has the right to strike at the evils in question, is to pass a statute in general terms, using words of ordinary acceptance.

But we are referred to section 5796, General Code of Ohio, for a definition of the word "wine," and it is insisted that under the allegations of this indictment the defendant is within that definition. Perhaps we may grant that defendant is protected against the operation of the Pure Food Act respecting misbranding if it complies with the law of Ohio defining what wine is, and that immunity may possibly favor defendant without reference to Food Inspection Decision 120 of the Department of Agriculture, respecting the labeling of Ohio and Missouri wines, but the trouble is that, accepting the description of the indictment as true, defendant's product is not within the terms of the Ohio Code definition, which reads:

"The term 'wine' means the fermented juice of undried grapes. The addition of pure white or crystallized sugar to perfect the wine, or using ingredients necessary solely to clarify and refine it which are not injurious to health, shall not be adulterations. Such wines shall contain at least seventy-five per cent. of pure grape juice, and shall not contain artificial flavoring." Sec. 5796, General Code of Ohio.

Defendant's article of food alleged to be misbranded is not shown to be the fermented juice of undried grapes to which had been added "pure white or crystallized sugar" to perfect it, but it is described as wine ("the fermented juice of undried grapes") to which has been added "a fermented solution of commercial dextrose, otherwise known as starch sugar." It cannot be claimed seriously that there is no difference between adding to the fermented juice of undried grapes "pure white or crystallized sugar," which seems to mean sugar in its commercially dry state, and making a compound of pure wine and a fermented solution of commercial dextrose, or even a fermented solution of commercial sugar. The latter not only involves an additional element not found in the statute in the form of the water used for the solution, but brings into the compound that fermentation which may be peculiar to the dextrose or sugar solutions.

If we were forced to a construction of the Ohio statute, we see substance in the insistence that it provides only for cane or beet sugar of the accepted saccharine content as the perfecting addition rather than dextrose, which is not only but little over half the saccharine efficiency of sugar, bulk for bulk, but contains, in the commercial form at least, a large proportion of dextrin, which cannot be said to be in any sense an equivalent of sugar or within the scope of any reasonable construction of the Ohio statute. In view of the very prevalent impression, 20 years ago, when the act was passed, that glucose or dextrose was not altogether wholesome, a doubt which is not yet altogether dispelled, it is not likely that the Legislature contemplated its use under the terms "pure white or crystallized sugar."

The demurrer is overruled, and defendant will plead to the indictment March 15th next.

UNITED STATES v. TWENTY CHESTS OF TEA.

(District Court, N. D. New York. October 6, 1913.)

FOOD (§ 12*)—IMPORTATION OF IMPURE TEA—REIMPORTATION OF REJECTED TEA—FORFEITURE.

Under Act March 2, 1897, c. 358, § 9, 29 Stat. 606 (U. S. Comp. St. 1901, p. 3197), being "an act to prevent the importation of impure and unwholesome tea," which section provides that "no imported teas which have been rejected and exported under the provisions of this act shall be reimported into the United States under the penalty of forfeiture for a violation of this prohibition," any person offering tea for import is bound to know whether or not it has previously been offered and rejected, and if it has he cannot be relieved from the penalty of forfeiture because he did not in fact know but offered it in good faith.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 12.*]

Libel by the United States for forfeiture of Twenty Chests of Tea. Judgment of forfeiture.

Libel for forfeiture of 20 chests of tea rejected by customs examiner and released and exported under the provisions of the act entitled "An act to prevent the importation of impure and unwholesome tea," approved March 2, 1897, and reimported into the United States in alleged violation of section 9 of the said act.

John H. Gleason, U. S. Atty., of Albany, N. Y., and Thos. H. Dowd, Asst. U. S. Atty., of Cortland, N. Y.

Weeds, Conway & Cotter, of Plattsburg, N. Y., for claimants.

RAY, District Judge. On the 5th day of March, 1912, Theodore Crowell imported into the United States at the port of New York by the steamer Afghan Prince, 70 half chests of tea, marked F. M. March 5, 1912, on examination pursuant to the provisions of the act, said tea was found to be inferior in purity, quality, and fitness for consumption and was duly rejected. On appeal this determination was approved and affirmed.

On or about May 18, 1912, said tea was entered at the port of New York for exportation in bond to Montreal, Canada, and examined and delivered for exportation at the border port of Malone, N. Y., on the 24th day of May, 1912. Same was entered at the Canadian Custom House in Montreal, entry No. 17,287, June 13, 1912, by W. P. Lumley, custom house broker, for Alex Hendrey, agent for the Anglo-American Direct Tea Trading Company of Toronto, Canada. Said company sold said tea to Joseph Ward & Co. of Montreal, P. Q. Said Joseph Ward & Co. sold 28 half chests of said tea to John Moir of Montreal, P. Q. Said John Moir sold 20 of said 28 half chests of such tea to Kearney Bros., Limited, of Montreal, P. Q. On or about the 27th day of September, 1912, said Kearney Bros., Limited, entered said 20 packages of said tea so purchased by it from John Moir at the support of Rouses Point, N. Y., in the customs district of Champlain, for importation into the United States, and such tea was seized by the duly constituted and authorized officers and authorities of the United States.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

When Joseph Ward & Co. purchased said 20 half chests of tea from the said Anglo-American Direct Tea Trading Company, it had no knowledge or notice that the same had been imported into the United States, examined, found inferior, etc., and exported in bond to Canada as aforesaid; and, when John Moir purchased same of Joseph Ward & Co., he had no notice or knowledge that said tea had been examined, found inferior, etc., and exported from the United States to Canada as aforesaid; and, when Kearney Bros., Limited, purchased said 20 half chests of said tea from John Moir which he had so purchased from said Joseph Ward & Co., it had no knowledge or notice of said attempted importation of such tea into the United States, examination, finding of inferiority, etc., rejection, and exportation to Canada as aforesaid. When Kearney Bros., Limited, so purchased said tea of Moir, they purchased it for importation into the United States and at the time so stated to said John Moir and were then told by said Moir and believed that such tea was entitled to import into the United States and complied with the standards of purity, quality, and fitness required by the laws of the United States, and at no time did Kearney Bros., Limited, or any one acting for it, up to the time the said tea was seized by the government of the United States after it reached the subport of Rouses Point for importation into the United States, have any knowledge or information that such tea had once been offered for importation into the United States, examined, found inferior, etc., rejected, and exported to Canada in bond as aforesaid.

The Anglo-American Direct Tea Trading Company of Toronto, Canada, who received said tea after examination and rejection at the port of New York, must have known of such inferiority, examination, and rejection, and Joseph Ward & Co., on inquiry, could have ascertained the facts, and John Moir on inquiry could have ascertained the facts. Moir when he sold the tea to Kearney Bros., Limited, made representations which he did not know to be true and he had not, so far as appears, made any inquiry to ascertain the truth of such representations.

Section 9 of the said act entitled "An act to prevent the importation of impure and unwholesome tea" provides:

"That no imported teas which have been rejected by a customs examiner or by a board of United States general appraisers, and exported under the provisions of this act, shall be reimported into the United States under the penalty of forfeiture for a violation of this prohibition."

Section 10 of the act provides:

"That the Secretary of the Treasury shall have the power to enforce the provisions of this act by appropriate regulations."

Should and may this tea in question be forfeited under the provisions of section 9, above quoted, in the absence of evidence that the importer, Kearney Bros., Limited, had knowledge that such tea had once been offered for importation, examined, found impure, etc., and therefore exported to Canada? It is contended that such a forfeiture, under such circumstances, and in the absence of such evidence,

would amount to a confiscation of the property, or, as counsel for the owners of the tea put it:

"Therefore the question comes up squarely, can or should an innocent person be deprived of his goods because the prior owner, unknown to him, has so acted with these goods that if the present owner exercises his right to offer them for import into the United States he should forfeit them and lose his property because of the act of the prior owner?"

The claimant or owner also urges that the government of the United States "could easily have so branded or stamped the packages showing that it had once been rejected by the customs authorities and thus give notice to the world and all subsequent innocent purchasers, who could then protect themselves."

The standard of purity, etc., for tea is fixed by regulation of the Treasury Department, and all persons offering tea for importation into the United States are bound at their peril to conform to that standard. There is no law, rule, or regulation requiring the examiners or officers of the United States government to brand or mark the packages of tea rejected by them. It was easy for the owner who offered it for import in the first instance to mark it after rejection or have it marked. It was the duty of Kearney Bros., Limited, to make inquiry as to the origin of the tea and as to its quality, etc., before offering it for importation into the United States. Due inquiry would have traced it back to the original importer. The stipulated facts fail to disclose that any inquiry was made as to the history of this tea, who brought it from the country where produced. Articles of merchandise for human consumption are not presumed to be up to the standard of purity fixed by the laws of the United States, and the rules and regulations of the Treasury Department and every person who deals in teas outside the limits of the United States and offers them for importation into the United States does so at his peril, and so far as our laws are concerned is presumed and bound to know that they are subject to seizure and condemnation if offered in violation of law.

When this tea was examined and rejected and sent out of the country, the owner and all who purchased from such owner thereafter were bound at their peril to know the status of such tea, and subsequent purchasers were bound to ascertain and know that such tea had been offered for importation, examined, rejected, and sent out of the United States, and was subject to seizure and forfeiture if offered for reimportation into the United States.

The act in question has been the subject of judicial inquiry and decision and held constitutional by the Supreme Court of the United States. *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525. In that case the point was urged, the destruction of the tea having been ordered, that:

"There was a denial of due process of law in failing to accord plaintiff in error a hearing before the Board of Tea Inspectors and the Secretary of the Treasury in establishing the standard in question, and before the general appraisers upon the re-examination of the tea."

The court said:

"Waiving the point that the plaintiff in error does not appear to have asked for a hearing, and assuming that the statute did not confer such a right, we are of opinion that the statute was not objectionable for that reason."

The court then said on the question of the provision for the destruction of the tea:

"It remains only to consider the contention that the provision of the statute commanding the destruction of teas not exported within six months after their final rejection was unconstitutional. The importer *was charged with notice of the provisions of the law, and the conditions upon which teas might be brought from abroad*, with a view of their introduction into the United States for consumption. Failing to establish the right to import, because of the inferior quality of the merchandise as compared with the standard, the duty was imposed upon the importer to perform certain requirements, and to take the goods from the custody of the authorities within a period of time fixed by the statute, which was ample in duration. He was notified of the happening of the various contingencies requiring positive action on his part. The duty to take such action was enjoined upon him, and if he failed to exercise it the collector was under the obligation after the expiration of the time limit to destroy the goods. That plaintiff in error had knowledge of the various steps taken with respect to the tea, including the final rejection by the board of general appraisers, is conceded. We think the provision of the statute complained of was not wanting in due process of law."

Buttfield v. United States, 192 U. S. 499, 24 Sup. Ct. 356, 48 L. Ed. 537, was a proceeding, like this, for the condemnation of seven packages of tea which had been reimported after export from this country upon a final rejection of the tea by the board of general appraisers as not entitled to admission into the United States for consumption under the provisions of the act in question. *Buttfield* appeared as claimant and filed a demurrer to the information. This was overruled and a final decree and judgment of forfeiture was pronounced. An appeal was taken on the ground that the act was repugnant to the Constitution of the United States. The contention was overruled and the judgment of forfeiture affirmed.

From the report of that case it does not appear that the question of a purchase in good faith for value by the one seeking to reimport the tea was involved. But I am not able to see that this is at all important. As stated, it seems to me that the status of this tea as to importation or attempted importation into the United States by any one had been fixed, and that *it* was subject to the penalty of seizure and forfeiture in whose hands soever it might be. The remedy of the government in such case is drastic, and the penalty is severe; but the act is constitutional, and the only question is: Does section 9 subject tea once rejected and sent out of the country to forfeiture if offered for reimportation by any one, one ignorant of the facts? Must the government re-examine tea offered in fact for reimportation whenever the importer offers it and alleges that he had no knowledge of its previous history, that is, its examination, rejection, etc., or go to the trouble and expense of hunting up evidence to show that the one offering it for importation had knowledge of such facts?

The government has the right and power to enact and enforce the

most arbitrary laws as to the importation of goods from foreign countries. He who offers them subjects himself and his goods offered for importation to the operation of those laws. This court does not intend to hold that in exercising this power the United States may seize and forfeit goods offered for importation for the reason such goods are not up to the standard prescribed, but when once offered, examined, condemned as impure, and rejected and sent out of the United States, it seems to me clear that Congress intended that a subsequent offer of the same goods *by any person* for importation subjects such goods to forfeiture.

In *The Abby Dodge*, 223 U. S. 166, 32 Sup. Ct. 310, 56 L. Ed. 390 (citing *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525) the court held:

"The power of Congress over foreign commerce is complete; no one has a vested right to carry on foreign commerce with the United States. * * * When Congress, under its power to regulate foreign commerce, prohibits the importation of certain merchandise, it may cast on the one seeking to bring merchandise in the burden of establishing that it is exempt from the operation of the statute."

In this case it seems to the court the importer is charged with knowledge of the law and knowledge that if the teas offered had once been offered, examined, rejected, and sent out of the United States, that same were subject to forfeiture if again offered. He took his chances and was bound to ascertain and know that such teas were within the condemnation of section 9 of the tea act. If in such cases the only remedy of the United States on identifying teas offered for importation as having before been offered for importation, examined, found impure, etc., and sent out of the country, is to turn them back, refuse importation, they may be offered again and again at the same or different ports of entry. The purpose of the tea act is to keep out of this country impure and unwholesome teas. It is in the nature of a police regulation. The standard of teas prescribed by the United States is easily ascertained, and this importer, had he caused the tea to be examined and tested before offering it for importation into the United States, would have known it was not up to the standard, and, as stated, I do not think he was justified in relying on the statements of Moir that the teas were of a character and quality suitable for importation into the United States. *Kearney Bros., Limited*, should have ascertained the source of John Moir's title and that of his vendor, and, had they pursued their investigations, presumably it would have been disclosed to them that these teas had been sent out of the United States as unfit for importation into this country. On the whole, I do not see that any injustice is done importers by casting on them the responsibility of knowing whether or not teas offered by them for importation into the United States are subject and liable to forfeiture under the laws of the United States. Under the facts stipulated it is apparent that *Kearney Bros., Limited*, had no intent or purpose to defraud the United States; but there is nothing in the tea act that makes such intent a prerequisite to forfeiture, and hence the absence of such intent is immaterial in this and similar cases.

In *St. Louis, Iron Mountain Ry. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061, the court held:

"The courts have no responsibility for the justice or wisdom of legislation. They must enforce the statute, unless clearly unconstitutional, as it is written, and, when Congress has prescribed by statute a duty upon a carrier, the courts cannot avoid a true construction thereof simply because such construction is a harsh one."

In this statute we find no words of limitation confining the forfeiture to one who imports the teas with knowledge that they had once been rejected and sent out of the country, and I think the courts are powerless to import such words into the statute.

I have examined the numerous cases cited by the claimants, but find nothing that requires or permits a different holding in giving construction of this tea act.

There will be a judgment of forfeiture.

In re *HERSHBERGER*.

(District Court, M. D. Pennsylvania. October 1, 1913.)

No. 2,301.

1. **BANKRUPTCY (§ 482*)—PROVABLE CLAIMS—CONTRACT FOR ATTORNEY'S FEES.**

Where a judgment called for an attorney's commission of 5 per cent. "if collected by legal process," and the creditor employed an attorney, who was proceeding to collect by process, when the debtor was adjudged bankrupt, he was entitled to the allowance of a reasonable fee, not exceeding 5 per cent., for the services of his attorney, from the proceeds of the property on which the judgment was a lien. On the other hand, when under a similar contract no process had been issued, no attorney's commission was allowable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. § 482.*]

2. **BANKRUPTCY (§ 267*)—MORTGAGE LIENS—INTEREST.**

On the sale by the court of real estate of a bankrupt free from the lien of a first mortgage, such lien is transferred to the proceeds, under the Pennsylvania Statutes, and the mortgagor is entitled to interest until actual payment is made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 371, 380; Dec. Dig. § 267.*]

In Bankruptcy. In the matter of Charles D. Hershberger, bankrupt. On review of referee's report of audit. Modified.

Andrew Hourigan, O. H. Dilley, and W. N. Reynolds, all of Wilkes-Barre, Pa., for exceptants.

W. H. Goodwin, of Wilkes-Barre, Pa., for trustee.

WITMER, District Judge. [1] Joseph K. Weitzenkorn held a judgment against the bankrupt, entered to No. 308 May term, 1911, court of common pleas of Luzerne county. The judgment was for \$3,509, dated April 3, 1911, payable one day after date, and in addition to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

debt and interest calls for a "five per cent., attorney's commission if collected by legal process." The plaintiff made numerous demands for its payment, which were refused by the defendant, resulting in the employment of an attorney who, on October 22, 1912, proceeded to collect by issuing a fieri facias on the judgment. The following day a petition in bankruptcy was filed, the execution was stayed, and on distribution of the fund realized from the sale of the premises, bound by the lien, the referee disallowed the claim for attorney's commission.

In this there was error. At the time the petition in bankruptcy was filed there was a fixed liability, on the part of the bankrupt, which had attached to his obligation for compensation to plaintiff's attorney necessarily incurred to collect his judgment. It is true that collection of it was not effected by the legal proceedings then instituted; however, it is equally certain that the plaintiff had invoked legal aid to enforce collection of his judgment at a time when he had every assurance that the defendant would reasonably pay for the same. The exact phraseology of the usual stipulations, including the one under consideration, in instruments for the payment of money is of no importance if from the language employed it plainly appears that the creditor should be indemnified for his reasonable expense of counsel fees in attempting to collect the money by legal process, and when such is apparent, as in this case, liability attaches to the obligation when the creditor shall be subjected to the expense reasonably incurred by the employment of counsel to collect the money, not exceeding the agreed limit. *Imler v. Imler*, 94 Pa. 375; *In re Edens & Co.* (D. C.) 18 Am. Bankr. Rep. 643, 151 Fed. 940.

It does, however, not necessarily follow that the amount specified in the instrument must be allowed. Compensation for the services necessitated should be reasonable and commensurate with the services rendered, not exceeding the limit fixed in the instrument; and what constitutes such necessarily must rest in the sound discretion of the court, "which is to be exercised upon equitable principles, having regard to the circumstances of each case." *Salsbury v. Mack*, 1 Pa. Dist. R. 492.

The services of the attorney having been materially limited in the collection of the judgment, by the bankruptcy proceedings, a fee of \$100 is regarded as reasonable compensation for the services performed, and this amount is allowed.

The other matters brought here for review relate to the mortgage of Wm. N. Reynolds, Jr., being a first lien upon the bankrupt's real estate, given for the sum of \$3,800, with interest payable every six months, containing an allowance of 5 per cent. for attorney's commission, if execution is issued. The exceptions are:

(1) Because interest was allowed only to August 9, 1913 (confirmation of sale of real estate), and not to August 22, 1913, the date of the audit.

(2) In not allowing prothonotary's costs and the sheriff's costs incurred on the writ of fieri facias.

(3) In not allowing to C. N. Bowman, attorney for your exceptant, 5 per cent. attorney's commission, as provided in the bond and mortgage, by reason of writ of fieri facias having been issued upon said judgment bond amounting to \$199.

The last two propositions have already been decided against the exceptant in passing upon the right to attorney's commission claimed on the judgment of Joseph K. Weitzenkorn. It was, in connection therewith, said that the attorney's commission is allowable because the bankrupt's liability to pay for legal process had attached to his obligation or instrument prior to the filing of the petition; hence the converse, by the same process of reasoning, must also be admitted that where, as in this instance, legal process had not been resorted to for the collection of the instrument, before filing, costs and fees incurred subsequent will not be allowed.

[2] The other exception that interest should have been allowed to the date of audit will be affirmed. It is true, as said by the referee:

"In Pennsylvania interest on a judgment runs until the date of the sheriff's sale, out of the proceeds of which the judgment is payable. *Walton v. West*, 4 Whart. [Pa.] 221; *Glacheus' Est.*, 9 Pittsb. Leg. J. 50; *Fackler v. Bale*, 1 Pears. [Pa.] 171; *Bachdell's Appeal*, 56 Pa. 386; *Potter v. Langstrath*, 151 Pa. 216 [25 Atl. 76]. On an orphans' court sale of real estate, interest ceases at the return day of the order of sale. *Ramsey's Appeal*, 4 Watts [Pa.] 71. In case of a sale by an assignee for the benefit of creditors, interest on liens ceases on final confirmation by the court, and not on the date of distribution. *Carver's Appeal*, 89 Pa. 276; *Tomlinson's Appeal*, 90 Pa. 224; *Herbst's Appeal*, 90 Pa. 353; *Burkholder's Appeal*, 94 Pa. 522; *Scheafer's Appeal*, 14 Lanc. Bar. 170; *North v. Cathrell*, 22 Lanc. L. R. 150. In the sale of a decedent's land for payment of debts, interest is calculated down to date of confirmation of sale. *Wanger's Appeal*, 14 Wkly. Notes Cas. 429."

However, it will not be argued that the lien of the mortgage under consideration, being a lien prior to all other liens, could have been discharged by any judicial sale in face of the Pennsylvania statute of May 8, 1901 (P. L. 141). Now, while the land bound by it may be divested, by the bankruptcy court, through sale of the aliened premises for the benefit of the bankrupt's general creditors, by authority of the bankruptcy act (*In re Vulcan Foundry & Machine Co.*, 24 Am. Bankr. Rep. 825, 180 Fed. 671, 103 C. C. A. 637; *In re Frank S. Keet* [D. C.] 11 Am. Bankr. Rep. 117, 128 Fed. 651), such act will not permit the lien to become impaired thereby (Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]). After sale the lien will attach to the fund realized until actual payment is made, or its nigh equivalent in the form of a decree authorizing such.

It was said by Judge Orr, in *Re Torchia* (D. C.) 185 Fed. 584:

"Interest is allowable on such a mortgage to the date of payment of the principal. Having been transferred from the land to the fund realized by sale, they must be payable when and only when the fund is distributable; that is, when the referee under the bankruptcy act first prepares a decree or order for distribution."

And this was tacitly affirmed on appeal, *In re Torchia*, 188 Fed. 207, 110 C. C. A. 248. See, also, *In re Allert* (D. C.) 23 Am. Bankr. Rep. 101, 173 Fed. 691.

The report of distribution will be modified as herein indicated.

MAYES et al. v. PALMER.

(Circuit Court of Appeals. Eighth Circuit. October 9, 1913.)

No. 3,804.

1. BANKRUPTCY (§ 159*)—PREFERENCES—VACATION—REQUISITES—DEED OF TRUST.

To entitle a bankrupt's trustee to set aside a deed of trust executed by the bankrupt as a preference in violation of Bankruptcy Act July 1, 1898, c. 541, § 60, subds. "a," "b," 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1506), as they stood in 1903 when the deed was executed, it was essential that the trustee prove, first, that the bankrupt was insolvent at the time of the transfer; that the transfer was made within four months of the filing of the petition; that its effect would be to give the creditor a greater percentage of his debt than other creditors of the same class; and that such creditor had reasonable cause to believe that it was intended by the transfer to give such preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248, 262, 268-281; Dec. Dig. § 159.*]

2. PARTNERSHIP (§ 52*)—WHAT CONSTITUTES—EVIDENCE.

Where a bankrupt and another were jointly interested in ventures in Mississippi and jointly bought real estate, but there was no proof that either could sell without the consent of the other, and they never used any firm name, purchasing the property in the names of both, a partnership was not shown.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 75, 79; Dec. Dig. § 52.*]

3. BANKRUPTCY (§ 167*)—PARTNERSHIP—PREFERENCES.

Since partnership creditors are entitled to be first paid out of firm assets and individual creditors out of individual assets, if an individual member of a firm which is insolvent transfers his property in payment of a firm debt, such transfer constitutes a preference in violation of Bankruptcy Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), not by the firm but by the individual member.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 282; Dec. Dig. § 167.*]

4. BANKRUPTCY (§ 303*)—PREFERENCES—INTENT TO PREFER—KNOWLEDGE.

In a suit by a bankrupt's trustee to set aside a deed of trust executed by the bankrupt within four months prior to the filing of the petition as security for certain notes, evidence *held* to warrant a finding that the beneficiary of the deed had reasonable cause to believe that a preference was intended.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

Appeal from the District Court of the United States for the Eastern District of Missouri; Smith McPherson, Judge.

Suit by Joseph R. Palmer, as trustee in bankruptcy of William W. Reid, bankrupt, against W. O. Mayes and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Shepard Barclay, of St. Louis, Mo. (O. H. Avery and R. H. Norton, both of Troy, Mo., and William R. Orthwein, P. H. Cullen, and Thomas T. Fauntleroy, all of St. Louis, Mo., on the brief), for appellants.

Byron F. Babbitt, of St. Louis, Mo., for appellee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 208 F.—7

Before HOOK and SMITH, Circuit Judges, and VAN VALKENBURGH, District Judge.

SMITH, Circuit Judge. This was a suit by Joseph R. Palmer, as trustee in bankruptcy of William W. Reid, to set aside a deed of trust of 230 acres of land made by the bankrupt to W. O. Mayes, as trustee for Charles A. Mayes, as an unlawful preference under subdivisions "a" and "b" of section 60 of the bankruptcy act of 1903. So far as material those sections then read:

"(a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

"(b) If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

[1] To entitle the trustee to a decree it was necessary that it appear: First, that William W. Reid was insolvent at the time of the transfer; second, that the transfer was made within four months of the filing of the petition in bankruptcy; third, that the effect of the transfer would be to enable Charles A. Mayes to obtain a greater percentage of his debt than other creditors of the same class; and, fourth, that Charles A. Mayes had reasonable cause to believe that it was intended by the transfer to give such preference.

It appears that William W. Reid, the bankrupt, had been for many years county judge of Lincoln county, Mo., retiring about January 1, 1907. He had been a farmer, a merchant, and a banker. In the later years he resided at Elsberry, Mo. He had an excellent reputation for integrity and was supposed for a long time to be wealthy. June 22, 1908, a petition in involuntary bankruptcy was filed against him and on October 2d he was adjudged a bankrupt. On November 23d Joseph R. Palmer was elected and qualified as trustee as provided by law. November 24, 1903, William W. Reid borrowed of Charles A. Mayes \$2,500 upon an unsecured note signed by himself and B. C. Welch due one year after date, with interest at 7 per cent. About 1906 or 1907 Charles A. Mayes bought two notes both signed by William W. Reid and B. C. Welch, one dated in March, 1902, for \$91, due six months after date, and the other dated in April, 1902, for \$500, due one year after date. On January 24, 1908, Charles A. Mayes loaned William W. Reid \$3,000 upon the note of Reid and B. C. Welch due one year after date. The obligations of Reid to Mayes, exclusive of interest, thus amounted to \$6,091. In the spring of 1908 Charles A. Mayes suddenly became insistent upon these notes being paid or secured. He had held the note of November 24, 1903, which had been past due for nearly 3½ years, and never collected any interest upon

it; had held for approximately two years the note for \$500, which had been due in the spring of 1908 for five years, and no interest had been paid; the note of \$91, which had been due at the same time, 5½ years, and no interest had been collected. These notes had never been renewed or extended, and yet in January, 1908, he made an additional loan of \$3,000. He contends that William W. Reid and B. C. Welch were in partnership, and, while Mayes' notes originally constituted partnership debts, they were assumed individually by Reid; that Reid's property exceeds his individual debts, including the notes held by Mayes; and that, as Reid's individual debts must be first paid out of his individual property and the firm debts be first paid out of the firm property, there was no legal preference in Reid's securing him so long as it did not make the aggregate of Reid's individual debts exceed his individual property.

[2] Conceding for the time the legal position of appellants, the question at once arises: Do the facts essential to the application of the legal principles exist? Were William W. Reid and B. C. Welch partners? It is true they were jointly interested in some ventures in Mississippi but it is not every joint venture which constitutes a partnership within the meaning of the law. They jointly bought land but there is no evidence that either could sell without the consent of the other. They never had any firm name. Of course this is only a circumstance which would not be conclusive. 30 Cyc. 419. They borrowed money but always in the names of William W. Reid and B. C. Welch and never in any firm name.

The Supreme Court in *Thompson et al. v. Bowman*, 6 Wall. 316, 18 L. Ed. 736, said:

"There is no doubt that a copartnership may exist in the purchase and sale of real property equally as in any other lawful business. Nor is there any doubt that each member of such copartnership possesses full authority to contract for the sale or other disposition of its entire property, though for technical reasons the legal title vested in all the copartners can only be transferred by their joint act. But the fact that real property is held in the joint names of several owners, or in the name of one for the benefit of all, is no evidence of copartnership between them with respect to it. In the absence of proof of its purchase with partnership funds for partnership purposes, real property standing in the names of several persons is deemed to be held by them as joint tenants, or as tenants in common; and none of the several owners possesses authority to sell or bind the interest of his co-owners."

The referee and the District Court both found there never was any partnership and in that finding we concur. But even if there was a partnership all the obligations were included in notes signed in the individual names of William W. Reid and B. C. Welch, and one holding the individual note of William W. Reid and B. C. Welch could not be informed that these men were partners, and he could recover nothing from William W. Reid until his individual debts were all paid. There is no such rule as this on the marshaling of assets.

[3] Again it was held in an opinion by then Judge Lurton (*Mills v. Fisher*, 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. [N. S.] 656), that, as the partnership creditors are entitled under the rule with reference to

the marshaling of assets to be first paid out of the firm assets and the creditors of the individual members to be first paid out of the individual assets, if an individual member while the firm is insolvent transfers his property in payment of a firm debt, that constitutes a preference not by the firm but by the individual member under subdivision "a" of section 60 of the bankruptcy act.

For all three of these reasons we think this position of the appellants could not be sustained, and the last two reasons would defeat the appellants' contention even if there was a firm and if there had been an express adoption of the debts of the firm by William W. Reid. Treating the notes signed by William W. Reid and B. C. Welch as the indebtedness of William W. Reid, there can be no doubt that he was hopelessly involved on May 28, 1908.

The evidence shows the transfer was made within four months of the filing of the petition, and it appearing that William W. Reid was at the time hopelessly insolvent, it is quite apparent that the effect of the transfer if sustained would be to enable Mr. Mayes to obtain a greater percentage of his debt than the other creditors of the same class.

[4] The sole question, then, is: Did Mr. Mayes have reasonable cause to believe that it was intended by the transfer to give a preference? While conceding that he had held William W. Reid's paper for years after it was due and no interest had been paid thereon, Mr. Mayes explains his sudden anxiety for security upon the theory that he had become ill and was in fear of death and wished his affairs left in a settled state. While he may have been ill, he was all the time up and about. He returned with his wife from spending the winter in the South about April 1, 1908. He met Mr. Reid on the train when returning but did not then mention the subject of security. In a week or two thereafter he met Reid near the depot and they walked thence up to the schoolhouse; Mayes urging security. Again they met in a vacant house and talked the matter over, and again Mr. Mayes took Mr. Reid out buggy riding and again urging security. Mr. Reid testified that in the first conversation Mr. Mayes asked for security and Mr. Reid told him he did not like to do it. Mr. Mayes said he wanted to get his things in better shape. He was not satisfied with it in that shape; did not think it was safe. He could sleep better if he had some security. Mr. Reid told him he thought he could get some money for him before a great while. Mr. Mayes said:

"A fellow says he will sometimes get money when he don't get it."

He was not satisfied about the condition things were in. Mr. Reid testified in the last talk he told Mr. Mayes that he did not like to ask his wife to sign the papers. Mr. Mayes said she did not have to sign them. He said he did not propose to have it recorded; did not aim to have it recorded.

"The day we fixed it up Mr. Mayes said he would leave it with Mr. Palmer; there would be nothing done in this until you give your consent to it or know about it or something to that amount. Mr. Mayes spoke to me frequently about security, insisted on it. I told him he would get his money. He said he didn't think he would. He was afraid he wouldn't."

Mr. Palmer, the trustee, testified that about May 14th Mr. Mayes asked him:

"If a man had some notes against a party part due and part not due, could he sue all of them, those that were not due as well as those that were due?"

That Mr. Mayes was back in his office some time from the 24th to the 27th of May and said:

"I have some notes against Reid and I have learned that he is very heavily indebted' or 'broke' or something to that effect. It left the impression with me that the judge was busted. He says, 'Part of them are due and part not due;' and he says, 'I have been trying to get Judge Reid to give me some security but he has not done it yet.' He says, 'I am going to try further to get the security.' He said he would sue Judge Reid but if he did the other people would all come in and there would not be anything for any of them; his other creditors would file suits and there would not be anything for any of them. Mr. Mayes said, referring to the deed of trust, 'I have agreed to leave it here with Joe for him to keep and nothing to be done with it,' or 'not record it,' I do not recall just which he said, 'until you (Judge Reid) give your consent.'"

Mr. Palmer further testified that on June 5th Mr. Mayes came to his office and asked Palmer if he would let him have the deed of trust. Mr. Palmer told him that he knew the agreement under which it was left there and that he would rather not do it unless Mr. Reid was present and gave his consent. Mr. Mayes said if he would let him have it he would take it by Judge Reid's house that evening and unless Judge Reid gave his consent that he should have it recorded he would leave it with Judge Reid. Mr. Palmer told him that under these circumstances he would let him have it and did so.

While it is true that substantially all of this evidence is denied by Mr. Mayes, the mere recital of it is sufficient to show that we ought not to interfere with the finding of the trial Judge that Mr. Mayes had reasonable cause to believe that it was intended by the transfer to give a preference. This conclusion makes it unnecessary to consider other points raised in the argument, and the decree is affirmed, at the cost of the appellants.

TOWN OF AURORA v. GATES.

SAME v. WILDER.

(Circuit Court of Appeals, Eighth Circuit. September 26, 1913.)

Nos. 3,956, 3,957.

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 923*)—BONDS—ESTOPPEL BY RECITALS.

If the laws are such that there might, under any state of facts or circumstances, be lawful power in a municipality or quasi municipality to issue its bonds, it may, by recitals therein, estop itself from denying that those facts or circumstances existed, unless the Constitution or the act under which the bonds are issued prescribes some public record as the test of the existence of some of those facts or circumstances.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1924, 1936; Dec. Dig. § 923.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MUNICIPAL CORPORATIONS (§ 943*)—BONDS—ESTOPPEL BY RECITALS.

The recitals, in municipal bonds by the officers or the representative body invested with power to perform a precedent condition and with authority to determine when that condition has been performed, that all of the requirements of law necessary to authorize the issue of the bonds have been fulfilled precludes inquiry, as against an innocent purchaser for value, whether or not the precedent condition had been performed before the bonds were issued.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1972-1977; Dec. Dig. § 943.*]

3. MUNICIPAL CORPORATIONS (§ 943*)—BONDS—ESTOPPEL BY RECITALS.

Where, by legislative enactment, authority has been given to the officers of a municipality to issue its bonds on some precedent condition, and when it may be gathered from the enactment that those officers were invested with power to decide whether or not that condition had been fulfilled, their recital in the bonds issued by them that it was fulfilled is duly authorized, and it estops the municipality from proving its falsity to defeat the bonds in the hands of an innocent purchaser.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1972-1977; Dec. Dig. § 943.*]

4. MUNICIPAL CORPORATIONS (§ 943*)—BONDS—ESTOPPEL BY RECITALS.

The recital in municipal bonds that they were issued in accordance with the provisions of the enabling statute imports that they were sent forth in pursuance of a lawful and proper resolution or ordinance and of just and proper action by the governing board and officers of the municipality. It relieves the innocent purchaser of all inquiry, notice, and knowledge of the record, action, or omission of the municipal board or council or of the other officers of the municipality and estops the municipality or quasi municipality from denying that a lawful resolution or ordinance was passed and published and that proper action was taken.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1972-1977; Dec. Dig. § 943.*]

Bona fide purchasers of municipal bonds, see note to Pickens Tp. v. Post, 41 C. C. A. 6.]

5. MUNICIPAL CORPORATIONS (§ 923*)—BONDS—POWERS AND DUTIES.

The Legislature of Colorado empowered the mayor and recorder of a town in that state to issue its bonds for waterworks on condition that an enabling ordinance was passed by the board of trustees of the town and was published. By its enactments the Legislature imposed upon the mayor and recorder the duty of recording the enabling ordinance in the book of ordinances as soon as might be after its passage and of authenticating it by their signatures and made the record in the book prima facie evidence of the publication of the ordinance. *Held*, this legislation imposed on the mayor and recorder the duty, and gave them the power, to publish the ordinance, to ascertain and determine whether or not it had been legally published before they authenticated the record of it or issued the bonds, and to insert in the bonds a certificate of the town that the ordinance had been duly published.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1924, 1936; Dec. Dig. § 923.*]

6. MUNICIPAL CORPORATIONS (§ 945*)—RECITALS IN BONDS—ESTOPPEL.

The certificate in the bonds signed by the mayor attested by the clerk and by the official seal of the town that "all acts, conditions, and things requisite to be done precedent to and in the issuing of said bonds have been done and performed in regular and due form as required by law" estops the town from defeating the bonds in the hands of an innocent

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

purchaser for value on the ground that the enabling ordinance was never published.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1979-1981; Dec. Dig. § 945.*]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Two actions, one by Martha L. Gates, the other by Robert P. Wilder, both against the Town of Aurora. Judgments for plaintiffs, and defendant brings error. Affirmed.

William A. Bryans, of Denver, Colo., for plaintiff in error.

Hugh McLean, of Denver, Colo., for defendants in error.

Before SANBORN and CARLAND, Circuit Judges, and WIL-LARD, District Judge.

SANBORN, Circuit Judge. [5, 6] The town of Aurora complains of judgments against it upon some of its bonds and coupons which it issued and sold in 1891 for waterworks on the ground that the ordinance under which they were issued was never published. The court below held that it was estopped from defeating the bonds on this ground by the recital and certificate therein as against the plaintiffs below, who were innocent purchasers for value. The recital was that each bond was issued "in pursuance of an ordinance in relation to waterworks bonds and also under and by virtue of and in full compliance with an act of the General Assembly of the state of Colorado entitled 'An act in relation to municipal corporations,' approved April 4, 1877, and an act amendatory thereof, approved March 2, 1887." The certificate was:

"It is certified that this issue of bonds is for the purpose of purchasing waterworks for fire and domestic purposes, and further, that all the provisions of said ordinance and said act have been complied with, and that all acts, conditions and things requisite to be done, precedent to and in the issuing of said bonds have been done, happened and performed in regular and due form as required by law."

The acts of the Legislature recited in the bonds granted to the officers of the town plenary power to issue and sell the bonds and coupons for waterworks. They did so and levied taxes to pay and paid the coupons on these bonds for many years. Before they were issued the board of trustees of the town passed an ordinance to the effect that the town issue the bonds for the waterworks and that "the mayor and other officers of the town * * * are hereby directed and instructed to issue said bonds in the name of the town and to carry out the terms and provisions of this ordinance." The statutes of Colorado provided that the mayor should preside at all meetings of the board of trustees and that the clerk should make a true and accurate record of all the proceedings, rules, and ordinances made and passed by the board of trustees (Mills' Ann. Statutes of Colorado, § 4511); that all ordinances should be published in a manner specified in the statutes; that they should not take effect or be in force until the expiration of five days after their publication; that as soon as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

might be after their passage they should be "recorded in a book kept for that purpose and be authenticated by the signature of the presiding officer of the council or board of trustees and the clerk"; and that "the book of ordinances herein provided for shall be taken and considered in all courts of this state as prima facie evidence that such ordinances have been published as provided by law" (section 4443, Mills' Ann. Stat.). The ordinance under which the bonds were issued was recorded in the book of ordinances and authenticated by the signatures of the presiding officer of the board of trustees and the clerk, and the bonds were signed by the mayor, who was the presiding officer of the board of trustees, and the treasurer, and they were attested by the signature of the clerk and by the official seal of the town.

The argument against the estoppel by the recital and certificate from proving that the ordinance was not published is twofold. The first runs in this way: In the absence of an ordinance neither the town nor its officers had any power to issue the bonds or to make the recital and certificate therein. The ordinance never was published; therefore it never went into effect; and the bonds, the recitals, and certificates were issued without authority and are void. In support of this contention counsel cites *Post v. Pulaski County*, 49 Fed. 628, 1 C. C. A. 405; *National Bank of Commerce v. Town of Granada*, 54 Fed. 100, 104, 105, 4 C. C. A. 212, 216, 217; *Hinkley v. City of Arkansas City*, 69 Fed. 768, 773, 16 C. C. A. 395, 400; *Town of Aurora v. Hayden*, 23 Colo. App. 1, 126 Pac. 1109; *Peck v. City of Hempstead*, 27 Tex. Civ. App. 80, 65 S. W. 653; and other less pertinent opinions. But the validity of this contention is no longer open to debate in the national courts. It ignores the vital distinction between that total want of power which no act or recital of the municipality or quasi municipality may remedy and the total failure to exercise or the inadequate exercise of a lawful authority. It ignores the essential difference between a total lack of power under the laws under all circumstances and a lack of power which results merely from the absence of the exercise or the inadequate exercise of the power. The former, it is true, cannot be affected by the estoppel of recitals or certificates, but the latter may be.

[1] A municipality or a quasi municipality may not, by the recitals or certificates in its bonds, estop itself from denying that it is without power to issue them when the laws are such that there can be no state of facts or of circumstances under which it would have authority to emit them. But, if the laws are such that there might under any state of facts or of circumstances be lawful power in the municipality or quasi municipality to issue its bonds, it may, by recitals therein, estop itself from denying that those facts or circumstances exist and that it has lawful power to send them forth, unless the Constitution or act under which the bonds are issued prescribes some public record as the test, and no such test was prescribed in this case, of the existence of some of those facts or circumstances. *Chaffee County v. Potter*, 142 U. S. 355, 364, 12 Sup. Ct. 216, 35 L. Ed. 1040; *City of Evansville v. Dennett*, 161 U. S. 434, 441, 443, 446, 16 Sup. Ct.

613, 40 L. Ed. 760; *Stanly County v. Coler*, 190 U. S. 437, 23 Sup. Ct. 811, 47 L. Ed. 1126; *Waite v. Santa Cruz*, 184 U. S. 302, 320, 22 Sup. Ct. 327, 46 L. Ed. 552; *Quinlan v. Green County*, 205 U. S. 410, 419, 27 Sup. Ct. 505, 51 L. Ed. 860; *Presidio County v. Noel-Young Bond Co.*, 212 U. S. 58, 65, 67, 69, 70, 29 Sup. Ct. 237, 53 L. Ed. 402; *Board of Com'rs v. Sutliff*, 97 Fed. 270, 277, 38 C. C. A. 167, 173; *National Life Ins. Co. v. Board of Education*, 62 Fed. 778, 739, 792, 10 C. C. A. 637, 648, 651; *City of Huron v. Second Ward Savings Bank*, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 49 L. R. A. 534; *Wesson v. Saline County*, 73 Fed. 917, 919, 20 C. C. A. 227; *City of South St. Paul v. Lampbrecht Bros. Co.*, 88 Fed. 449, 453, 31 C. C. A. 585, 589; *Board of Com'rs of Haskell County v. National Life Ins. Co.*, 90 Fed. 228, 231, 32 C. C. A. 591, 594; *Hughes County v. Livingston*, 104 Fed. 306, 311, 43 C. C. A. 541, 546; *Independent School District v. Rew*, 111 Fed. 1, 7, 49 C. C. A. 198, 204, 55 L. R. A. 364; *Fairfield v. Rural Independent School District*, 116 Fed. 838, 840, 841, 54 C. C. A. 342, 344, 345. If the town had published the ordinance under which the bonds were sent forth, it would have had ample authority to issue them and to make the recital and certificate they contain. There might therefore have been a state of facts under which it would have had authority to issue the bonds and to make the recital and certificate they contain and it was within the power of the town to bring that state of facts into existence. The town, therefore, had the power, by a recital or a certificate in the bonds to the effect that this state of facts existed, to estop itself from denying its existence for the purpose of defeating the bonds and the coupons which innocent purchasers had bought in reliance upon that recital or certificate.

[4] It is true that before the decision of the Supreme Court in *City of Evansville v. Dennett*, 161 U. S. 434, 441, 443, 446, 16 Sup. Ct. 613, 40 L. Ed. 760, this court fell into the error in *National Bank of Commerce v. Town of Granada*, 54 Fed. 100, 104, 105, 4 C. C. A. 212, and in *Hinkley v. City of Arkansas City*, 69 Fed. 768, 773, 16 C. C. A. 395, of holding that a recital or certificate that all preliminary steps had been taken or all precedent conditions had been fulfilled under which the bonds were issued, would not estop a quasi municipality from defeating its bonds by proof that no ordinance required by the statute had been passed or published; and in *Town of Fletcher v. Hickman*, 165 Fed. 403, 91 C. C. A. 353, this court said, citing the *Granada Case*, that counsel in the *Hickman Case* assumed that the publication of the ordinance was a prerequisite to the validity of the bonds and held that the ordinance was duly published. But as this court and the Supreme Court had repeatedly declared, that has never been the law since the decision in 1895 of *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760, by the Supreme Court of the United States. In that case the city charter empowered the city to issue the bonds on condition that a petition of two-thirds of the resident freeholders of the city was presented to the city council praying it to subscribe for the stock for which the bonds were issued, and no such petition was ever made. A void

amendment to the city charter by its terms authorized the city to issue the bonds on condition that a majority of the qualified electors of the city, who were also taxpayers, voted in favor of the subscription for the stock for which the bonds might be issued. The bonds were issued under the void amendment, and some of them contained a recital that they were issued by virtue of the city charter and by virtue of the void amendment which was specified by the date of its passage, and by virtue of a resolution of the city council ordering an election which resulted in a legal majority in favor of the subscription to the stock, and by virtue of a resolution ordering the issue of the bonds. The Supreme Court first declared that the recital that the bonds were issued by virtue of the city charter was equivalent to a declaration that everything had been done that was required to be done in order that the power to issue the bonds granted by the charter might be lawfully exercised, and then said:

"As therefore the recitals in the bonds import compliance with the city's charter, purchasers for value, having no notice of the nonperformance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had in fact been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the Legislature." *Evansville v. Dennett*, 161 U. S. 443, 16 Sup. Ct. 617, 40 L. Ed. 760.

By the same mark the purchasers of the bonds of this town were not bound to inquire whether the requisite ordinance had been passed or whether or not it had been published. They had the right to assume that it had been duly passed and lawfully published in reliance upon the certificate in the bonds that "all acts, conditions, and things requisite to be done precedent to and in the issuing of said bonds have been done, happened, and performed in regular and due form as required by law." The petition to the city council praying that it subscribe for the stock by two-thirds of the resident taxpayers was as essential to the power of the city of Evansville to issue its bonds under its charter as the publication of the ordinance was to the power of this town to issue those in suit, for the charter of Evansville expressly prohibited the subscription to the stock which conditioned the city's power to issue the bonds in these words:

"Provided that no stock shall be subscribed or taken by the common council in any such company, unless it be on the petition of two-thirds of the residents of such city who are freeholders of the city, distinctly setting forth the company in which stock is to be taken, and the number and amount of shares to be subscribed."

After the decision of the Supreme Court in *Evansville v. Dennett*, and after a careful reconsideration in the light of all the authorities of the question decided in *National Bank of Commerce v. Town of Granada*, 54 Fed. 100, 4 C. C. A. 212, *Hinkley v. City of Arkansas City*, 69 Fed. 768, 773, 16 C. C. A. 395, and *Post v. Pulaski County*, 49 Fed. 628, 1 C. C. A. 405, this court, as early as 1898, overruled its decision in those cases, followed the decision of the Supreme Court, and declared the law upon this subject to be this: The recital in mu-

municipal bonds that they were issued in accordance with the provisions of the enabling statute imports that they were sent forth in pursuance of a lawful and proper resolution or ordinance and of just and proper action by the governing board of the municipality. It relieves the innocent purchaser of all inquiry, notice, or knowledge of the record, action, or omission of the municipal board or council or of the other officers of the municipality and estops the municipality from denying that a lawful resolution or ordinance was passed and proper action was taken. *Board of Com'rs v. National Life Ins. Co.*, 32 C. C. A. 591, 594, 90 Fed. 228, 231. In the year 1900 in *Hughes County v. Livingston*, 104 Fed. 306, 316, 43 C. C. A. 541, 551, this court declared that this proposition had been repeatedly affirmed and that it was no longer open to debate, citing *National Life Ins. Co. v. Board of Education*, 62 Fed. 778, 792, 10 C. C. A. 637, 651; *Rathbone v. Board of Com'rs*, 83 Fed. 125, 131, 27 C. C. A. 477, 483; *City of South St. Paul v. Lampbrecht Bros. Co.*, 88 Fed. 449, 453, 31 C. C. A. 585, 589; *Board of Com'rs v. Heed*, 41 C. C. A. 668, 101 Fed. 768; *Wesson v. Saline County*, 73 Fed. 917, 919, 20 C. C. A. 227, 229. Since the decision in *Hughes County v. Livingston*, the proposition has been reaffirmed by this court in *Independent School District v. Rew*, 111 Fed. 1, 7, 49 C. C. A. 198, 204, 55 L. R. A. 364, and in *Fairfield v. Rural Independent School District*, 116 Fed. 838, 840, 841, 54 C. C. A. 342, 344, 345.

The opinion of the Court of Appeals of the state of Colorado in *Town of Aurora v. Hayden*, 23 Colo. App. 1, 126 Pac. 1109, to the effect that this court has never overruled its decision in *National Bank of Commerce v. Town of Granada*, 54 Fed. 100, 4 C. C. A. 212, and that the decision in that case is right and in harmony with the decision of the Supreme Court in *Evansville v. Dennett*, has received a careful reading and deliberate consideration, but for the reasons stated in this opinion and in the other cases in this court cited, notably in *Hughes County v. Livingston*, 104 Fed. 306, 43 C. C. A. 541, and because the Supreme Court of the United States, whose decisions it is our pleasure and duty to follow, still adheres to the views this court has expressed (*Quinlan v. Green County*, 205 U. S. 410, 419, 27 Sup. Ct. 505, 51 L. Ed. 860; *Presidio County v. Noel-Young Bond Co.*, 212 U. S. 58, 65, 29 Sup. Ct. 237, 53 L. Ed. 402), this court is not persuaded that it is in error upon this subject and it declines to depart from the position it has maintained for more than a decade. The town of Aurora cannot escape from the estoppel of its certificate in the bonds that all the acts required by its enabling statutes to be done before the issue of the bonds had been performed because an ordinance of its board which it might have published was required by those statutes to be published before the bonds were issued and it omitted to publish it.

The second argument against the estoppel is: The mayor, treasurer, and recorder, the officers who issued the bonds, derived their power to issue them and to make the recital and certificate therein from the ordinance. The ordinance did not take effect or have force until it was published, and it never was published. Therefore these

officers never had any power to issue the bonds or to make the recital and certificate they contain, and they are all ineffective. But the ordinance by its express terms granted the power and imposed the duty on these officers to issue the bonds. They could not lawfully issue them without the publication of the ordinance. The only condition precedent to the vesting of their power to send forth the bonds was the publication of this ordinance, and by the statutes and by the direction of the board of trustees contained in the ordinance to issue the bonds they were empowered and directed to publish it. The statutes provided that the ordinance should not take effect until the expiration of five days after its publication; that as soon as possible after its passage it should be recorded in the book of ordinances and be authenticated by the signatures of the mayor and the clerk; and that this record of it in the book of ordinances should be *prima facie* evidence of its publication. It was therefore within the power and it was the duty of the officers who signed and issued these bonds to publish the ordinance. It was within their power and it was their duty to ascertain and decide before they authenticated the record of the ordinance by their signatures and before they issued the bonds that the ordinance had been lawfully published, and the case falls within these indisputable rules of law:

[2] The recitals in municipal bonds by the officers or the representative body invested with power to perform a precedent condition and with authority to determine when that condition has been performed, that all the requirements of law necessary to authorize the issue of the bonds have been complied with, precludes inquiry, as against an innocent purchaser for value, whether or not the precedent condition had been performed before the bonds were issued. *Platt v. Hitchcock County*, 139 Fed. 929, 933, 71 C. C. A. 649; *Clapp v. Otoe County*, 45 C. C. A. 579, 587, 104 Fed. 473, 481; *City of Huron v. Second Ward Sav. Bank*, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 49 L. R. A. 534; *National Life Ins. Co. v. Board of Education*, 62 Fed. 778, 792, 793, 10 C. C. A. 639, 651, 652; *School District v. Stone*, 106 U. S. 183, 187, 1 Sup. Ct. 84, 27 L. Ed. 90; *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Commissioners v. Beal*, 113 U. S. 227, 5 Sup. Ct. 433, 28 L. Ed. 966; *City of Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803, 37 L. Ed. 673.

[3] Where, by legislative enactment, authority has been given to the officers of a municipality to issue its bonds on some precedent condition, and where the fact may be gathered from the enactment that those officers were invested with power to decide whether or not that condition had been complied with, their recital in the bonds issued by them that it was fulfilled is duly authorized, and it estops the municipality or quasi municipality from proving its falsity to defeat the bonds in the hands of an innocent purchaser. *Quinlan v. Green County*, 205 U. S. 410, 419, 27 Sup. Ct. 505, 51 L. Ed. 860; *Presidio County v. Noel-Young Bond Co.*, 212 U. S. 58, 65, 29 Sup. Ct. 237, 53 L. Ed. 402; *Stanly County v. Coler*, 190 U. S. 437, 451, 23 Sup. Ct. 811, 47 L. Ed. 1126; *Tulare Irrigation District v. Shepard*, 185 U. S. 1, 23, 22 Sup. Ct. 531, 46 L. Ed. 773. A municipality, a quasi

municipality, or a corporation and its officers, who by the apparent legality of their obligations or by recitals of their validity have induced innocent purchasers to invest in them are estopped from denying their legality on the ground that in some of the preliminary proceedings which led to their execution, or in their execution itself, they failed to comply with some law or rule of action relative to the mere time or manner of their procedure, with which they might have lawfully complied, but which they carelessly disregarded. *Speer v. Board of Commissioners*, 88 Fed. 749, 758, 32 C. C. A. 101, 111; *Clapp v. Otoe County*, 45 C. C. A. 579, 587, 104 Fed. 473, 481; *Union Pacific Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 2 C. C. A. 174, 239, 241, 51 Fed. 309, 326, 328; *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 27 C. C. A. 73, 86, 82 Fed. 124, 137; *Board of Commissioners v. Sherwood*, 11 C. C. A. 507, 510, 64 Fed. 103, 108; *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272, 49 L. R. A. 534.

The result is that the contentions of counsel for the town in this case cannot be sustained, and the judgment below must be affirmed. It is so ordered.

FORREST CITY BOX CO. v. SIMS.

(Circuit Court of Appeals, Eighth Circuit. August 18, 1913.)

No. 3,916.

CONTRACTS (§ 303*)—EXCUSES FOR NONPERFORMANCE—BREACH BY OTHER PARTY.

Where one party to a continuing contract has himself broken it, he cannot recover damages for the refusal of the other party to go on with it in consequence of such breach.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1409-1443; Dec. Dig. § 303.*]

2. CONTRACTS (§ 292*)—PERFORMANCE—CONCLUSIVENESS OF DECISION OF UMPIRE—FRAUD OF PARTY.

Under the rule that the action of an engineer, architect, or other person invested with the power of decision as to the performance of a contract is conclusive except in cases of fraud or such gross mistake as implies bad faith or a failure to exercise an honest judgment, the fraud mentioned is not limited to fraudulent conduct on the part of the umpire, but, although he acted in good faith, his determination will not be conclusive on a party, where it was brought about by the fraudulent conduct of the other party.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1310, 1343; Dec. Dig. § 292.*]

3. SALES (§ 387*)—ACTION FOR BREACH—QUESTIONS FOR JURY.

Plaintiff contracted to manufacture for defendant 5,000,000 feet of red gum lumber, the contract providing that it should be cut from good merchantable logs 24 inches and up in diameter only, also that it should be inspected by a person to be employed by both parties. In an action for breach of the contract by defendant by refusing to accept and pay for further shipments, defendant alleged that a large quantity of that shipped was cut from logs of less than 24 inches diameter. There was evidence tending to support such defense and to show that the inspector had in fact inspected and rejected certain logs as not within the terms of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

contract but the plaintiff had ordered them sawed; that from his position while cars were being loaded the inspector could not see the logs being cut and could not tell that the lumber passed was from small logs. He testified that if he passed any such lumber he did not do it knowingly. *Held*, that if such were the facts, which was a question for the jury, the fact that the lumber was passed by the inspector was not conclusive on defendant that it conformed to the requirements of the contract, and that the direction of a verdict for plaintiff was error.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1108; Dec. Dig. § 387.*]

In Error to the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Action at law by G. W. Sims against the Forrest City Box Company. Judgment for plaintiff, and defendant brings error. Reversed.

Charles T. Coleman, of Little Rock, Ark. (W. W. Hughes, of Forrest City, Ark., and William M. Lewis, of Little Rock, Ark., on the brief), for plaintiff in error.

Thomas M. Scruggs, of Memphis, Tenn. (S. H. Mann, of Forrest City, Ark., on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and WILLARD, District Judge.

WILLARD, District Judge. Sims, the defendant in error, who was the plaintiff below, recovered damages of the box company for its refusal to receive lumber which it had contracted with Sims to take and pay for. The contract was made on October 14, 1910, and is as follows:

"This contract, executed this 14th day of October, 1910, by the G. W. Sims Company of Proctor, Arkansas, and the Forrest City Box Company, of Forrest City, Arkansas, witnesseth as follows:

"The G. W. Sims Company agrees to saw and deliver on board cars of the C. R. I. & P. Ry. Co., at Proctor, Ark., five million feet board measure of log run gum lumber, for which the Forrest City Box Company agrees to pay the G. W. Sims Company on the basis of \$13.00 per M. ft. B. M., subject to the following stipulations and conditions:

"Manufacture:

"1. The lumber is to be cut from good merchantable logs 24" and up in diameter, only, and the manufacture is to be performed in a thorough workman-like manner; lumber cut to even thickness in the piece and properly edged, particular attention being given to the manner of sawing so as to obtain the highest percentage of red possible out of the log. The green stock will be cut $\frac{1}{8}$ " full of standard thickness required, so as to insure plump thickness when thoroughly dry.

"2. The lumber as manufactured is to be loaded on cars, green and shipped to Forrest City, Ark.; it being agreed, however, that no part or any portion of stock is to be held in dead pile at Proctor, Ark., because of inability on the part of G. W. Sims Company to procure cars for prompt shipment as rapidly as manufactured; so as to admit of improper staining or deterioration of any such portion as may have been manufactured and on hand awaiting shipment; but in the event of such inability on the part of the G. W. Sims Company to procure cars for prompt hauling or any other cause operating to the same end, such portion or part of such stock necessarily delayed shall be piled on crossing sticks in standard manner at the expense of and by the G. W. Sims Company, so as to prohibit all possibility of said staining and deterioration.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"3. The lumber as manufactured shall average 35 per cent. of the total scale in feet B. M. to common and better red gum; it being agreed, however, in consideration of the fact that the Forrest City Box Company has reduced the stated percentage of red gum from 40 per cent. to 35 per cent. as originally stipulated, that said Forrest City Box Company shall receive all the red gum developing in manufacture, notwithstanding that the percentage as compared with the whole may be over and above the 35 per cent. stipulated and agreed on, and is to receive the full cut of the log to all other grades developing in the log run.

"4. Manufacture is to be such thicknesses as the Forrest City Box Company may from time to time direct, saw bills stipulating the proportions of the different thicknesses to be furnished periodically.

"Delivery:

"1. Delivery of the logs f. o. b. cars on the C. R. I. & P. R. R. Co. at Proctor, Ark., is to commence on or before December 1st, 1910, and is to continue as manufacture progresses, on the basis of an average of 200,000 feet B. M. per current month, though the Forrest City Company agrees to receive over and above this amount up to 300,000 feet B. M. per month.

"Inspection:

"1. Inspection, grading and measurement is to be on the basis of log run and common and better red gum as prescribed by the rules and regulations relating to gum of the National Hardwood Mfr. Assn., and is to be performed by an inspector in the joint employ of the two parties to this contract, the expense of such inspection and grading to be borne by each in equal proportion.

"Settlement:

"1. The G. W. Sims Company is to bill on the Forrest City Box Company for each car as loaded, with B/L attached, and payment is then to be made by the Forrest City Box Company for the total of such invoices, on the basis of \$13.00 per M. feet B. M. for the stock covering shipments within periods of two weeks each following the date of the first, which first payment is to be made when 100,000 feet B. M. have been shipped and billed for.

"Supervision:

"1. The manufacture of the lumber of G. W. Sims Company at Proctor, Ark., is at all times to be subservient to the occasional personal directions and suggestions of a competent expert representative of the Forrest City Box Company, whenever the said Forrest City Box Company shall deem it necessary or expedient to send such representative for such purpose of supervision, so as to insure intelligent manufacture according to standard good methods to the satisfaction of said Forrest City Box Company."

The breaches alleged by the plaintiff are: (1) That after 196,223 feet of lumber had been delivered under the contract, and on May 19, 1911, the defendant refused to go on with it unless the provision for joint inspection was abolished; and (2) that the defendant had not paid for a part of the lumber which had been delivered. There was evidence to sustain the complaint upon both of these claims. The contention of the defendant was that the plaintiff had prior to May 19, 1911, broken the contract by delivering to the defendant lumber manufactured from logs less than 24 inches in diameter.

[1] If, prior to the refusal by the defendant to go on with the contract, the plaintiff himself had broken it, and for that reason the defendant refused to perform, the plaintiff cannot recover damages for such refusal. *Rice v. Fidelity Deposit Co.*, 103 Fed. 427, 43 C. C. A. 270 (8th Cir.).

The contract required the plaintiff to deliver to the defendant lumber cut from logs not less than 24 inches in diameter. Did he do so? Nash, the president of the defendant company, testified as follows:

"I saw with my own eyes logs that measured 13 inches in diameter, a log that measured 17 inches in diameter, a log that measured 19 inches in diameter—several of those—go through the mill, go over the edger, go over the trimmer, go down the slide, and I saw Mr. Epps put his rule on them and pass them to the men who put them on the cars."

S. L. Emmert, who was sawing the logs for the plaintiff, testified that the large logs and the small logs were piled all together in the yard; that between April 21st, and May 11th, he scaled 1,063 logs; of these 503 were 24 inches and up in diameter and 560 were less than 24 inches in diameter; that these logs produced in all 367,060 feet; that of this amount 325,615 feet were delivered to defendant under this contract, and of this amount 104,535 feet were produced from logs that were less than 24 inches in diameter. He also testified that the plaintiff knew that these logs less than 24 inches in diameter were being manufactured and delivered to the defendant under the contract; that the plaintiff was afraid that they were not going to get the contract filled by putting in all large logs, and said, "Put in anything until you get the amount of lumber, and then the balance of it put in the yards"; and he instructed the witness to cut this small lumber up and put it into cars for the defendant. John L. Emmert, who was employed as the superintendent of the mill by the witness S. L. Emmert, testified that the product of the smaller logs was shipped to the defendant, and that Sims knew it.

[2] This was evidence from which the jury would have been justified in finding that the plaintiff had delivered to the defendant lumber cut from logs that did not comply with the contract. But the plaintiff says that whether or not he complied with the contract in the matter of the size of the logs is now of no importance, because the joint inspector, in allowing the lumber from these small logs to pass his inspection, necessarily decided that he had complied with the contract; the decision of the inspector upon that matter being final and conclusive. The court below adopted this view, and it said:

"The law is well settled now, especially in this circuit, and in fact in almost every other circuit, that, where parties agree on an umpire or person who is to pass on certain questions, his judgment can only be impeached for fraud or such gross mistake as implies bad faith or failure to exercise honest judgment."

It therefore instructed the jury to find a verdict for the plaintiff, and left to them only the question as to the amount of the damages.

[3] There is evidence to show that Epps, the joint inspector, went into the yard where the large and small logs were piled together indiscriminately, and marked with chalk those of the logs which were less than 24 inches in diameter. His purpose in so marking them was to prevent their being manufactured into lumber with which to fill this contract. He testified that if he passed lumber made from small logs he did not do it knowingly; that he did his best to see that none of the logs which he had marked went to the defendant; that he had instructed one of the employes at the mill to whistle or call to him when any small logs went on to the carriage. There was

evidence to show that this was not always done. Moreover, S. L. Emmert testified as follows:

"Q. Did any logs which he marked pass through the saw and into the car which was shipped to the defendant? A. Yes, sir.

"Q. Was Mr. Epps in a position to notice that that was going on? A. No, sir; he couldn't tell.

"Q. Explain to the jury why he couldn't tell. A. Well, because Mr. Epps worked out on the slip, and he had no opportunity to see when these logs came into the mill. He could see logs out on the skidway as they were unloaded from the cars. From there on, he couldn't see them. There were times, you know, when we had at least 200,000 feet of lumber piled on this slip when they were behind. He couldn't tell. These logs when they got up in the mill—there might have been 300 feet, or more, of lumber, coming from the saw until it got to the slip—that is, probably some piled on the rest, and the edger behind a little, and he had no opportunity to tell when these boards came from this individual log. Then another thing, he couldn't have picked them out, after they got down the slip, mixed in with all the rest of the logs, because there might have been one big log and one little log come, and he had no opportunity to tell when the little logs come. We couldn't handle the logs any other way, the way they were brought to us on the cars. We had to take them just as they came.

"Q. Where did he stand when he was inspecting and checking the lumber that was loaded into the cars? A. He stood down on the slip.

"Q. Down on the slip? A. Down below the mill.

"Q. Is that on a level with the saw? A. No, sir.

"Q. How high is the saw above that? A. About six feet.

"Q. Standing there could he see— A. Six feet from the saw floor.

"Q. Standing where he had to stand, could he see the logs as they were being cut? A. Not after we put in this extra dock there to load this red lumber, he couldn't see the logs, because the cars were there, and he couldn't even see to the log deck."

J. L. Emmert testified as follows:

"Q. Did any of the logs he marked go in under this contract? A. Yes, sir.

"Q. Was he in a position to prevent that—Mr. Epps? A. No, sir; he wasn't.

"Q. Now, explain to the jury why he wasn't? A. Well, for the reason after the logs entered the mill, it was impossible for him to see the log. In fact, he wasn't able to see the lumber until it left the trimmer and started down the chute. Well, practically at all times, there was a great amount of lumber lying in the slip, properly speaking, that they didn't get away fast enough. I've seen as high as 3,000 or 4,000 feet piled on the slip at a time, that I had to put a man on the trimmer to keep turning it back. There would be a thousand or two feet at a time. It is absolutely impossible for a man to tell the description of the lumber between the different sizes of logs, and they all went in together as they came from the mill. Everything went over except the heart—a six by eight—that's a tie—of the gum. The rest of the lumber went out the slips."

It is true that there is evidence contradicting that of the defendant above referred to; but, the court having directed a verdict for the plaintiff, the evidence must be considered in the light most favorable to the defendant.

It therefore appears that there was evidence tending to show, and the jury would have been justified in finding, that Epps had in fact inspected and rejected certain logs because they did not come within the terms of the contract; that the plaintiff, knowing that they were not logs that the contract called for, ordered them to be sawed and

delivered to the defendant; that persons employed by the plaintiff to do so knew that Epps could not tell whether the lumber which he passed came from the rejected logs or not; and that if Epps had known that the logs which he rejected were being used he would not have accepted the lumber coming from them as a fulfillment of the contract. Is the fact that, under these circumstances, Epps allowed this lumber to pass inspection, conclusive evidence that it came from logs more than 24 inches in diameter? We have no hesitation in saying that it is not. In so saying, we assume for the purposes of this appeal that the contract provided that the determination of the inspector should be final. In *Bates County v. Wills*, 200 Fed. 143, 118 C. C. A. 361 (8th Cir.) this court stated the rule to be:

"That the action of an engineer, architect, or other person invested with the power of decision as to the performance of a contract is conclusive, 'except in case of fraud or such gross mistake as implies bad faith or a failure to exercise an honest judgment.'"

In no one of the cases cited therein by this court, and in no one of the cases decided by the Supreme Court and referred to in *El Paso & Southwestern Ry. Co. v. Eichel*, 226 U. S. 596, 33 Sup. Ct. 179, 57 L. Ed. 369, was it in any way intimated that the fraud mentioned in the rule above quoted was limited to fraudulent conduct on the part of the umpire. No case has been called to our attention in which it has been held that, where the umpire had acted in good faith, his determination was conclusive, although it had been brought about by the fraudulent conduct of one of the parties. On the contrary, in *Pauly Jail Bldg. & Mfg. Co. v. Hemphill County*, 62 Fed. 698, at page 704, 10 C. C. A. 595, at page 601 (5th Cir.), the court said:

"An intentional perversion of the truth, for the purpose of obtaining some advantage of another, would, we consider, be necessary to remove the presumption of the fairness of action in such a case as this. The contract provided that the commissioner should be a man qualified to judge of the work, and was to be selected by the defendant; and alleging in the answer that no such man was selected, but one not qualified for the duty devolving upon him, should have no weight as a matter of defense, and nothing but positive proof of mala fides on the part of the plaintiff or its representatives should be permitted to overcome the finality of the commissioner's action."

If a jury should find the facts to be such as the evidence tended to show that they were, as we have before stated, fraudulent conduct on the part of the plaintiff would be made out; the inspection would not be binding upon the defendant, and the plaintiff would not be entitled to recover any damages for the refusal of the defendant to go on with the contract.

This disposition of the case makes it unnecessary to consider other errors assigned.

The judgment is reversed, and a new trial ordered.

RHODE v. DUFF et al.

(Circuit Court of Appeals, Eighth Circuit. August 18, 1913.)

No. 3,893.

1. NEGLIGENCE (§ 32*)—CONDITION OF BUILDING—CARE REQUIRED AS TO LICENSEES.

Plaintiff, while out riding in the evening with an acquaintance who owned an automobile, accompanied him into defendants' garage to make some repairs. Plaintiff was not a customer of defendant nor employed by the owner of the machine, but voluntarily assisted in the work. At his request an employé of defendant directed him to a toilet room in the corner of a rear work room, and by mistake he entered the door of a cellarway which was near but not in the corner of the room, and fell and was injured. An electric light was burning a few feet in front of the door. *Held*, that plaintiff was a mere licensee, who sought the toilet room without invitation, and who accepted and used the license subject to all its concomitant risks and perils, and that defendant was not chargeable with any negligence which rendered him liable for the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. § 32.*]

2. DISMISSAL AND NONSUIT (§ 6*)—VOLUNTARY DISMISSAL—MOTION AFTER CLOSE OF EVIDENCE.

Under the Nebraska practice, a motion by plaintiff to dismiss, made after he has rested his case and a motion for a directed verdict has been argued, comes too late.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 13, 14; Dec. Dig. § 6.*]

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action at law by John G. Rhode against Ralph A. Duff and the R. A. Duff Company. Judgment for defendants, and plaintiff brings error. Affirmed.

I. N. Flickinger, of Council Bluffs, Iowa (R. A. Flickinger, of Council Bluffs, Iowa, Burkett, Wilson & Brown, of Lincoln, Neb., and Flickinger Bros., of Council Bluffs, Iowa, on the brief), for plaintiff in error.

Paul Jessen, of Nebraska City, Neb., and B. F. Good, of Lincoln, Neb. (A. M. Bunting, of Lincoln, Neb., on the brief), for defendants in error.

Before SANBORN and CARLAND, Circuit Judges, and WILLARD, District Judge.

WILLARD, District Judge. The court below directed a verdict for Duff, who was the defendant below, on the ground that when the plaintiff fell into the cellar in the defendant's garage he was there as a mere licensee. The claim of the plaintiff was that he was there as a customer, or by implied invitation.

[1] The evidence showed the following facts: Paul, a young man of about plaintiff's age, having nothing to do at home and finding it dull, about 7 o'clock p. m. on January 11, 1911, made up a pleasure

party and decided to go to Nebraska City in his automobile, to get some wire for the magneto. He invited three young men to go with him, among whom was the plaintiff. On the bridge crossing from Iowa into Nebraska they discovered a flat tire.

"It was pretty cold out there, and we didn't have any inner tubes, and we ran into the garage to fix that tire, and while we were there Jack decided that he would go to work on the magneto. It was warm in there, and he would fix it in there in place of the cold shed at home. He started on it, anyhow; he started, and his brother Joe and I started to fix the punctured tire.

"Q. Did Jack, the plaintiff, get the wire from the garage there for the purpose of fixing the magneto? A. I got the wire."

The garage which they entered and which belonged to the defendant faced to the south, fronting upon Main street. It extended about 120 feet to an alley on the north, and was about 40 feet wide from east to west. Across the building, and from 80 to 100 feet back from the entrance, was a partition from 10 to 12 feet high which divided the place into two rooms. The front room was the office and sales and show room. The back room was a machine or repair shop.

About 20 minutes after the plaintiff commenced to work on the magneto, he asked Armstrong, an employé of the defendant, where the toilet room was. Armstrong told him to go to the rear end of the building in the northwest corner. Plaintiff went into the repair room, and instead of going to the northwest corner, stepped through an open door that led to the cellar, about two or three feet south of the water-closet, fell, and received the injuries complained of. He thought that this door was the door to the closet. The closet was, in fact, in the northwest corner of the repair shop, and there was an electric light burning about 10 or 12 feet east of the opening into which he fell.

Paul was a frequent visitor to the garage, had bought articles there before, and did so on this occasion. He was undoubtedly a customer. The amended petition alleged that the plaintiff also was a patron. There was an attempt on his part to prove that Paul had employed him to repair the magneto at the garage, and had taken him there for that purpose. But this attempt entirely failed. Plaintiff testified that he was not employed at that time by Paul, and Paul said that he did not take him there for any particular purpose. It clearly appears that the idea of repairing the magneto at the garage was suggested by some one of the party after they arrived there, and that they had no such intention before they entered.

There was evidence to show that the plaintiff while working for a firm had at one time before this occasion repaired the radiator on Paul's machine, and at other times had mended the tires and the pump. But this evidence did not tend to show that he was the servant of Paul while he was at the garage.

Plaintiff therefore was in no sense a customer of the defendant. He was at the garage solely for his own convenience or pleasure. We consider that he stands in no better position than would a passer-by who desiring to use a water-closet, entered the garage, asked where it was, and had been directed to it, as was the plaintiff. While there was evidence that persons coming into the front part of the garage had

used the water-closet with the consent of the defendant, yet it was in no sense a part of the premises to which the public was invited.

The law applicable to these facts, as declared by this court in *Foster v. Portland Gold Mining Co.*, 114 Fed. 613, 52 C. C. A. 393, is as follows:

"So, too, if she were a bare licensee or volunteer (that is to say, if she went upon defendant's land by its mere sufferance or toleration, without its invitation or inducement, but solely for her own convenience or pleasure), she would be held to accept and enjoy the license, subject to all its concomitant risks and perils. *Sweeny v. Railroad Co.*, 10 Allen (Mass.) 368, 87 Am. Dec. 644; *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369; *Redigan v. Railroad Co.*, 155 Mass. 44, 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. Rep. 520; *Benson v. Traction Co.*, 77 Md. 535, 26 Atl. 973, 20 L. R. A. 714, 39 Am. St. Rep. 436."

To the same effect are *Shults v. C., B. & Q. Ry. Co.*, 91 Neb. 587, 136 N. W. 834; *Galveston Oil Co. v. Morton*, 70 Tex. 400, 7 S. W. 756, 8 Am. St. Rep. 611; *Means v. Southern California Ry. Co.*, 144 Cal. 473, 77 Pac. 1001, 1 Ann. Cas. 206; *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261.

We have referred particularly to the evidence showing that the plaintiff was not a customer, nor in the garage by the implied invitation of the defendant, because the cases upon which the plaintiff relies are all of that character. In *Glaser v. Rothschild*, 221 Mo. 180, at page 185, 120 S. W. 1, at page 3 (22 L. R. A. [N. S.] 1045, 17 Ann. Cas. 576), the plaintiff was on the premises by the express invitation of the defendant. Moreover, the court there said:

"A bare licensee (barring wantonness or some form of intentional wrong or active negligence by the owner or occupant) takes the premises as he finds them."

In *Sheyer v. Lowell*, 134 Cal. 357, 66 Pac. 307, the plaintiff was sent by his employer to the warehouse of the defendant, to secure a sample of nuts stored there. Moreover, the court said that the negligence of the defendant's porter, who accompanied the plaintiff and did not warn him of the dangerous place, was sufficient to sustain the action. In *Engel v. Smith*, 82 Mich. 1, 46 N. W. 21, 21 Am. St. Rep. 549, it appeared that the plaintiff, a tinsmith, was occupying a room upon the second floor of the building leased by the defendants. He was therefore their tenant. In *Burner v. Higman & Skinner Co.*, 127 Iowa, 580, 103 N. W. 802, it appeared that the plaintiff, an employé of a dray line, was requested by the owner of goods stored for hire by the Higman & Skinner Company to go to their building and remove the goods. In *Burk v. Walsh*, 118 Iowa, 397, 92 N. W. 65, the petition alleged that the plaintiff was a customer of the defendant, and the court so considered him. The plaintiff was also a customer in *Gardner v. Waterloo Cream Separator Co.*, 134 Iowa, 6, 111 N. W. 316. The decision in *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235, was upon the ground that the plaintiff was upon the defendant's premises at its implied invitation.

The court below directed a verdict for the defendant upon the ground that:

"Mr. Rhode at the time he was in this place of business was there merely by permission as a licensee, and that the defendant owed no duty to him to change his arrangements in his place of business with regard to this doorway and the location of the water-closet and the lights maintained there. If it was satisfactory to the defendant, it served his purpose, and then the plaintiff was bound to take the place as he found it."

We think that this was a correct statement of the law under the evidence produced, and that there was no error in directing a verdict for the defendant.

The plaintiff on the argument in this court claimed that the defendant maintained on his premises a dangerous pitfall. The facts, as they appeared from the evidence as above stated, show that there is nothing in this claim.

[2] The court did not err in refusing to allow the plaintiff to dismiss the case. This motion came after the plaintiff had rested, with the right only to introduce later the testimony of a doctor upon the question of damages, after the defendant had moved for a directed verdict, and after that motion had been argued. Under the decision of the Supreme Court of Nebraska in the case of Bee Building Co. v. Dalton, 68 Neb. 38, 93 N. W. 930, 4 Ann. Cas. 508, the request of the plaintiff came too late.

The judgment of the court below is affirmed.

TOWN OF FLETCHER v. HICKMAN.

(Circuit Court of Appeals, Eighth Circuit. September 26, 1913.)

No. 3,952.

(Syllabus by the Court.)

APPEAL AND ERROR (§§ 1097, 1195*)—LAW OF THE CASE—FACTS—CONCLUSION.

Legal propositions once considered and decided in a given case by the appellate court may not be again questioned in that court on a subsequent writ or appeal to review a second trial of the same case on the same issues and evidence. Such propositions are res adjudicata between the parties to that suit and their privies and constitute the law of the case. On a review of the former trial of the case, this court held the defendant estopped, by judgments in other actions between the same parties, from introducing evidence to show that the bonds in suit were void because the ordinance under which they were issued had not been properly published. *Held*, the defendant was estopped by that decision from introducing on the second trial, under the same issues and in the same state of the evidence, evidence to defeat any of the bonds pleaded at the first trial on the ground that the ordinance was not duly published.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427, 4661-4665; Dec. Dig. §§ 1097, 1195.*]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by Samuel G. Hickman against the Town of Fletcher. Judgment for plaintiff, and defendant brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

William A. Bryans, of Denver, Colo., for plaintiff in error.

William P. Malburn, of Denver, Colo. (W. H. Bryant and George L. Nye, both of Denver, Colo., on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges, and WIL-LARD, District Judge.

SANBORN, Circuit Judge. The controversy between the parties to this action has narrowed to the single question whether or not by the prior adjudications of the question whether or not ordinance No. 10 of the town of Fletcher was published as provided by law the town is estopped from asserting that it was not so published, for the purpose of defeating a recovery on its three bonds for \$1,000 each, numbered 89, 97, and 98, which were part of the 150 bonds which it issued under that ordinance on July 1, 1891, for the purpose of raising money to buy waterworks. The statute of Colorado (section 4443 of Mills' Ann. Stat. 1891) required the publication of such an ordinance in the manner therein described and declared that it should not be in force until five days after its publication and that the record of it in the town's book of ordinances should be *prima facie* evidence that it was legally published. In 1903 Hickman was the owner of 69 of the 150 bonds but not of the three bonds numbered 89, 97, and 98. In that year he brought suit against the town on some of the coupons attached to his 69 bonds; the town defended on the ground that the coupons and the bonds were void because its ordinance No. 10, under which they were issued, had not been published; the court rendered a judgment against the town for \$20,789.20, the amount claimed, which was subsequently affirmed by this court on the ground that the record of the ordinance in the book of ordinances was *prima facie* evidence of its publication, and the town had failed to prove that it was not duly published. *Town of Fletcher v. Hickman*, 136 Fed. 568, 69 C. C. A. 350. In 1905 Hickman brought a second action on (1) the judgment just mentioned and (2) the coupons attached to his 69 bonds which had matured after he brought his first action. The town defended the causes of action upon the coupons on the ground that they and the bonds to which they were attached were void because its ordinance No. 10, under which they were issued, had not been published; the court rendered a judgment for the amount claimed by Hickman, \$62,216.72, on May 15, 1907, and that judgment was affirmed by this court on the ground that the record of the ordinance in the book of ordinances was *prima facie* evidence of its publication and the town had failed to prove that it was not legally published. *Town of Fletcher v. Hickman*, 165 Fed. 403, 407, 91 C. C. A. 353, 357.

On June 30, 1909, Hickman had purchased and was the owner of the three bonds now in question numbered 89, 97, and 98, and he brought the action now in hand on (1) the judgment for \$62,216.72, (2) the 72 bonds, and (3) the coupons attached to the 72 bonds which had matured after the commencement of his second action. The town defended itself against a recovery on the bonds and coupons on the

ground that they were void because its ordinance No. 10, under which they were issued, had not been published. Hickman replied that the town was estopped to make this defense by the fact that, at the trial of the former causes of action between the same parties, the issue whether or not the ordinance No. 10 had been published as provided by law had been actually litigated and adjudged in his favor. At the first trial of this action the 72 bonds, the coupons attached to them, and the pleadings and judgments in the two prior actions were received in evidence. In this state of the case the town offered evidence that ordinance No. 10 was not duly published, to which counsel for Hickman objected on the ground that the issue regarding its publication was *res adjudicata* by reason of the adjudications of it in the two prior actions between the same parties. The trial court admitted this evidence and Hickman took an exception. At the close of the trial the court rendered a judgment for Hickman on the former judgment but found that the ordinance was not properly published, that the question of its publication was not *res adjudicata* between the parties, and rendered a judgment in favor of the town upon the causes of action upon the bonds and coupons. Hickman sued out a writ of error, and this court reversed the judgment below on the ground that the question of the publication of the ordinance was *res adjudicata* and the admission of the evidence that it was not published error, and directed the trial court to grant a new trial and to proceed according to the principles laid down in the opinion of this court. The controlling principle laid down in that opinion was that:

"A question of fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense cannot be disputed in a subsequent suit between the same parties or their privies. And, even if the second suit is upon a different cause of action, the right, question, or fact so determined must, as between the parties or their privies, be taken as conclusively established so long as the judgment remains unmodified."

At the end of the opinion this court stated its conclusion in these words:

"A jury was waived in writing and the cause tried to the court who found as a fact (from evidence admitted over the objection and exceptions of the plaintiff that the validity of the ordinance had been determined in the prior cases) that the ordinance in question was not published as required by the Colorado statute and was therefore void; and, as a conclusion of law, that the prior adjudications were not conclusive against the defendant upon that question, as to the causes of action based upon the bonds themselves and the coupons thereon maturing since those included in the former judgments. In admitting such testimony and so finding and adjudging, the Circuit Court erred. Its judgment should have been in favor of the plaintiff upon the bonds and the interest coupons maturing since those included in the prior actions, as well as for the judgment in the second of the actions above mentioned." *Hickman v. Town of Fletcher*, 195 Fed. 907, 912, 913, 115 C. C. A. 595, 600, 601.

After the mandate was received by the court below it tried this case again on the same evidence that was introduced at the first trial and rendered a judgment against the town upon the 72 bonds and

upon the coupons maturing since the commencement of the second action, and counsel for the town concede that this judgment is right as to the coupons and as to all the bonds, except Nos. 89, 97, and 98, but they contend that the town is not estopped to defeat a recovery on these three bonds because neither they nor any of the coupons from them were in suit in either of the two prior actions. There are many reasons why this position is untenable, but there is one so conclusive that it is useless to recite the others. The record before this court on the review of the former trial of this action disclosed the facts that these three bonds were introduced in evidence and that neither they nor any coupon from any of them had been sued in either of the former actions. If, in the opinion of this court, the town was not estopped by the judgments in the former actions from proving that ordinance No. 10 was not duly published for the purpose of defeating a recovery on these three bonds, or on any bond or coupon in evidence at the first trial, the evidence which the town offered that the ordinance was not published was competent and admissible and the judgment of the trial court should not have been as directed by this court in its opinion, "in favor of the plaintiff upon the bonds," but it should have been in favor of the plaintiff upon 69 of the bonds and in favor of the defendant upon the 3 bonds now in controversy and upon any coupon attached thereto. This court, however, directly decided and clearly declared that the court below was in error in admitting any of the evidence of no publication of the ordinance for any purpose, and that its judgment should have been for the plaintiff upon all the bonds and coupons. That decision is now the law of this case. The issues and the evidence at the second trial differ in no material respect from those at the first trial. A legal proposition once considered and decided in a given cause by an appellate court may not be again questioned in that court on a subsequent writ or appeal to review a subsequent trial of the same case on the same issues and evidence. Such propositions are *res adjudicata* between the parties to that suit and their privies and constitute the law of the case. *Thompson v. Maxwell Land Grant & Railway Co.*, 168 U. S. 451, 456, 18 Sup. Ct. 121, 42 L. Ed. 539; *Guarantee Co. of North America v. Phenix Ins. Co.*, 124 Fed. 170, 174, 59 C. C. A. 376, 380; *Balch v. Haas*, 73 Fed. 974, 20 C. C. A. 151; *Thatcher v. Gottlieb*, 59 Fed. 872, 8 C. C. A. 334; *Board of Com'rs v. Geer*, 108 Fed. 478, 47 C. C. A. 450; *Denver & Rio Grande R. R. Co. v. Arrighi*, 141 Fed. 67, 72 C. C. A. 400; *Mutual Reserve Fund Life Ass'n v. Ferrenbach*, 144 Fed. 342, 75 C. C. A. 304, 7 L. R. A. (N. S.) 1163; *Crotty v. Chicago Great Western Ry. Co.*, 169 Fed. 593, 596, 95 C. C. A. 91.

The court below was of this opinion, and its judgment must be affirmed. It is so ordered.

MINNEAPOLIS, ST. P., R. & D. ELECTRIC TRACTION CO. v.
SEARLE.

(Circuit Court of Appeals, Eighth Circuit. September 23, 1913.)

No. 3,882.

(*Syllabus by the Court.*)

1. EMINENT DOMAIN (§ 119*) — EASEMENT IN STREETS — STREET RAILWAYS — RIGHT TO COMPENSATION.

The construction and operation of a commercial railroad across a city street in Minnesota in front of a lot abutting thereon infringes the private easement of the owner of the lot in the street to its full width in front of his lot for the purposes of access, light, and air, imposes an additional servitude upon his lot, constitutes a taking of or damage to his property, and entitles him to compensation therefor.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 304-314; Dec. Dig. § 119.*]

2. EMINENT DOMAIN (§ 119*) — EASEMENT IN STREETS — STREET RAILWAYS — RIGHT TO COMPENSATION.

The construction and operation of such a railroad across such a street does not fall within the limits of the public highway or street easement, but is inconsistent with the proper use thereof, and neither the Legislature nor the city can, by contract with or grant to the constructing or operating company, deprive the owner of the lot of his easement, or of his right to recover compensation for its impairment or destruction.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 304-314; Dec. Dig. § 119.*]

Eminent domain, consequential and indirect damages, see note to High Bridge Lumber Co. v. United States, 16 C. C. A. 468.]

Appeal from the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Action by George W. Searle against the Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

M. H. Boutelle, of Minneapolis, Minn. (R. T. Boardman, of Minneapolis, Minn., on the brief), for appellant.

Charles R. Pye, of Northfield, Minn., for appellee.

Before SANBORN and CARLAND, Circuit Judges.

SANBORN, Circuit Judge. This appeal assails a decree of the court below to the effect that the Traction Company pay to George W. Searle \$1,000 damages for the construction and operation of its railroad diagonally across Linden street, in the city of Northfield, Minn., in front of his residence, and in large part upon that part of his lot covered by the street. The railroad which the Traction Company was building was a commercial, as distinguished from a street, railway. The city of Northfield had granted to it the right to lay and operate its railroad across Linden street at the place and in the way in which it was doing, on condition that this grant should not affect the rights of individual property holders. Searle brought suit to enjoin the construction and operation of the railroad. The company

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

answered and filed a cross-bill for an injunction against interference by Searle, and prayed that if that injunction should be denied the court should assess the damages for the crossing. The facts in the case were stipulated, and the court assessed the damages and held that Searle was entitled to recover them. No complaint of the amount of these damages is made, and the only question here is whether the damage resulting to the owner of a lot by the careful construction and operation of a commercial railroad across a street in front of his lot imposes an additional servitude thereon and constitutes a legal injury, or is such a public use of the street for one of the purposes for which it was dedicated that it is *damnum absque injuria*. Both parties concede that this is a question of local law, and that, if it has been answered by the decisions of the Supreme Court of Minnesota, that answer is decisive of this case. Counsel for the Traction Company, however, persuasively argue that the Minnesota court has never directly answered it, and that it is the duty of this court to hold under general principles that the crossing of a street by a commercial railroad in front of a lot imposes no additional servitude thereon.

Conceding, but not admitting, that the Supreme Court of Minnesota has never expressly decided that such a crossing by a public corporation imposes an additional servitude upon the lots in front of which it is made, has it not announced and adhered to rules of law which demonstrate that such is its opinion, and that this opinion will inevitably be declared whenever the question is squarely presented to it for determination? For, as this is a question of local law, regarding which it is the duty and pleasure of this court to follow the decisions of the Supreme Court of Minnesota, it is the part of wisdom, if the decisions of that court clearly show what its answer to this question will be when it is squarely presented, to so answer it now that the answer of this court will be in harmony with that of the Supreme Court of Minnesota.

[1, 2] It has been the settled law of Minnesota since 1868 that the construction and operation of a commercial railroad upon and along the streets of a city did not fall within the public highway or street easement, but imposed an additional servitude upon abutting lots for which their owners could recover damages. *Gray v. First Division of St. Paul & Pacific R. R. Co.*, 13 Minn. 315 (Gil. 289); *Harrington v. St. Paul & Sioux City R. R. Co.*, 17 Minn. 215 (Gil. 188); *Carli v. Stillwater Street Railway & Transfer Co.*, 28 Minn. 373, 376, 10 N. W. 205, 41 Am. Rep. 290. Judge Berry, who delivered the first opinion of the Supreme Court to this effect, while discussing and applying the principle upon which that decision rests in *Newell v. Minneapolis, Lyndale & Minnetonka Ry. Co.*, 35 Minn. 112, 114, 27 N. W. 839, 840 (59 Am. Rep. 303), said:

"The public easement in a public street is the public and common right to use the same for the passage of persons and things, and for purposes incidental thereto. The exercise of this right is subject, in some degree, to regulations to be made by the proper authorities. The ownership of the soil on which the street is laid being absolute, subject only to the street easement, the owner has the right to insist that the street shall be used and enjoyed for the legitimate purposes of its creation and existence, and for no others. * * * Thus, for instance, an ordinary railroad, constructed and

operated in and along a street, though it is used for the passage of persons and property, and is therefore, so far as this general nature of its business is concerned, using the street for proper street purposes, yet the mode of its construction or operation, or both, are such as to monopolize the street, and virtually and practically exclude the general public from its legitimate use. So that the use of the street for such railroad is inconsistent with the common and public use of it, in which every person is entitled to share, and hence it is held to be the imposition upon the soil of a servitude differing from, and additional to, that of the proper and lawful street easement. The case of an ordinary street railway is otherwise. * * * So that when a street is being used for the purpose (legitimate in its general nature) of the passage of persons and property, but objection is made to the mode of use, the question of rightfulness depends upon whether the use objected to is consistent or inconsistent with the common public use, in which every person is entitled to share."

In *Adams v. Chicago, Burlington & Northern R. Co.*, 39 Minn. 286, 295, 39 N. W. 629, 1 L. R. A. 493, 12 Am. St. Rep. 644, and in *Lamm v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 45 Minn. 71, 78, 47 N. W. 455, 10 L. R. A. 268, the Minnesota court after twice hearing and considering elaborate arguments of the question, decided that the construction and operation of a commercial railroad on one-half of a street was the taking of the property of an owner of a lot on the opposite side of the street, who was also the owner of the fee of the land in front of his lot to the middle line of the street, subject to the public highway easement, because it was an impairment of his individual easement in the street in front of his lot to the full width of the street for the purposes of access, light, and air. In the *Adams Case* that court stated its conclusions, to which it adhered in no uncertain terms in the *Lamm Case*, in these words:

"The conclusions arrived at are that the owner of a lot abutting on a public street has, independent of the fee in the street, as appurtenant to his lot, an easement in the street in front of his lot to the full width of the street, for admission of light and air to his lot, which easement is subordinate only to the public right: that depriving him of, or interfering with his enjoyment of, the easement for any public use not a proper street use is a taking of his property within the meaning of the Constitution; that appropriating a public street to the construction and operation of an ordinary commercial railroad upon it is not a proper street use; that where, without his consent and without compensation to him, such a railroad is laid and operated along the portion of the street in front of his lot, so as upon that part of the street to cause smoke, dust, cinders, etc., which darken or pollute the air, coming from that part of the street upon his lot, he may recover whatever damages to his lot are caused by so laying and operating such railroad on that part of the street."

It is true, as counsel for the company point out, that these cases were actions for damages for trespass, and not for full compensation for the taking of the property in the plaintiff's easements; but the basic question was whether or not the owners of the lots had private easements to the full width of the streets, which were infringed by the construction and operation of a commercial railroad on the side of the street more remote from the lots, and that question conditioned alike the plaintiff's rights to recover compensation for the taking and damages for the trespasses.

In *Cater v. Northwestern Telephone Exchange Co.*, 60 Minn. 539, 545, 63 N. W. 111, 113 (28 L. R. A. 310, 51 Am. St. Rep. 543) the

Supreme Court of Minnesota held that the construction and operation of a telephone line along the side of a country highway was not such an impairment of the easement of the owner of the abutting lot in the highway as to constitute a legal injury; but in the opinion in that case Judge Mitchell, who wrote the opinion in the Lamm Case, said:

"This court has held, in common with the great majority of courts, that an ordinary commercial railroad imposes an additional servitude on a street, and we applied a test as to what did and did not constitute an additional servitude. As far as it went, and as applied to such a case, the test was doubtless correct; but, after all, the bottom fact upon which the decision really rests was that such an appropriation of a street was practically subversive of its use by the public in the ordinary way, and also unreasonably impaired the special easements of abutting owners."

In *Gustafson v. Hamm*, 56 Minn. 334, 338, 339, 57 N. W. 1054, 1055 (22 L. R. A. 565) the Minnesota court, at the suit of the owner of a lot abutting on a street in St. Paul, sustained an injunction against the construction and operation of a commercial railroad across the street in front of his lot by a private party to whom the city, by the terms of an ordinance, had granted this privilege. The decision was placed on two grounds: (1) That the city had no power to grant such a privilege to a private party; and (2) that the construction and operation of the railroad infringed the plaintiff's easement in the street for the purposes of access, light and air. On the latter subject the court said:

"That the construction and operation of any ordinary commercial railroad on a street is the imposition of an additional servitude, and amounts to a perversion of the street to a use for which it was not intended, which the state or municipality cannot, as against private rights, authorize, the decisions of this court are explicit. *Carli v. Stillwater Street Ry. & T. Co.*, 28 Minn. 373, 10 N. W. 205 [41 Am. Rep. 290]; *Adams v. Chicago, B. & N. R. Co.*, 39 Minn. 286, 39 N. W. 629 [1 L. R. A. 493, 12 Am. St. Rep. 644]. * * * It is the settled doctrine of this court that the owner of a lot abutting on a public street has, as appurtenant to the lot, and independently of the ownership of the fee in the street, an easement in the street, to its full width, in front of his lot, for the purposes of access, light, and air, which constitutes property. *Adams v. Chicago, B. & N. R. Co.*, 39 Minn. 286, 39 N. W. 629 [1 L. R. A. 286, 12 Am. St. Rep. 644]; *Lamm v. Chicago, St. P., M. & O. Ry. Co.*, 45 Minn. 71, 47 N. W. 455 [10 L. R. A. 268]. The act of defendant in maintaining and operating this track on any part of the street, to its full width, in front of plaintiff's premises, so as to pollute the air, and depreciate their value, was, if not a trespass, at least a nuisance, which amounted to a positive invasion upon plaintiff's private property rights, and for which he may maintain a private action."

There are other decisions not unworthy of perusal, but less pertinent to this decision (*Schurmeier v. St. Paul & Pacific R. R. Co.*, 10 Minn. 82 [Gil. 59] 88 Am. Dec. 59; *Adams v. Hastings & Dakota R. R. Co.*, 18 Minn. 260 [Gil. 236]; *Hartz v. St. Paul & Sioux City R. R. Co.*, 21 Minn. 358; *Kaiser v. St. Paul, Stillwater & Taylors Falls R. R. Co.*, 22 Minn. 149; *Robinson v. Great Northern Ry. Co.*, 48 Minn. 445, 51 N. W. 384; *Brakken v. Minneapolis & St. Louis Ry. Co.*, 29 Minn. 41, 11 N. W. 124; *City of International Falls v. Minnesota, D. & W. Ry. Co.*, 117 Minn. 14, 20, 134 N. W. 302; *Shaubut v. St. Paul & Sioux City R. R. Co.*, 21 Minn. 502; *Rochette*

v. Chicago, Milwaukee & St. Paul Ry. Co., 32 Minn. 201, 20 N. W. 140; Carroll v. Wisconsin Central R. R. Co., 40 Minn. 168, 41 N. W. 661), but none inconsistent with those which have been reviewed.

The reading and careful consideration of the opinions of the Supreme Court of Minnesota to which reference has been made, have persuaded that they sustain these propositions: The owner of a lot abutting on a public street in Minnesota has, as appurtenant to the lot, an easement in the street to its full width in front of his lot, for the purposes of access, light, and air, which constitutes property. The construction and operation of a commercial railroad upon such a street in front of the lot does not fall within the limits of the public highway or street easement, but is inconsistent with and a perversion of the use of that easement, which infringes the easement of the owner of the abutting lot, takes or damages his property, and inflicts upon him a legal injury. As such construction and operation do not fall within the public street easement, neither the state nor the city can, by contract with or grant to the railway company, deprive the owner of the abutting lot of his right to recover for the taking or damage to his easement caused thereby. *Gray v. First Division of St. Paul & Pacific R. R. Co.*, 13 Minn. 315, 319, 320 (Gil. 289); Revised Laws of Minnesota, § 2916; *Kaiser v. St. Paul, Stillwater & Taylors Falls R. R. Co.*, 22 Minn. 149, 151, 152; *Lamm v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 45 Minn. 71, 75, 47 N. W. 455, 10 L. R. A. 268. And since the construction and operation of a commercial railroad across a street in front of a lot unavoidably infringes, no less than its construction and operation along the street on its farther side, the easement of the owner of the lot in the street in front of it to its full width for the purposes of access, light, and air, the decisions of the Supreme Court of Minnesota have convinced that it is the fixed opinion of that court that such a construction and operation imposes an additional servitude upon the lot, takes or damages the property of the owner, and legally entitles him to full compensation therefor.

This was the opinion of the court below, and its decree must therefore be affirmed.

It is so ordered.

GRAND TRUNK WESTERN RY. CO. v. GILPIN.

(Circuit Court of Appeals, Seventh Circuit. April 15, 1913.)

No. 1,946.

I. EVIDENCE (§ 474*)—VALUE OF SERVICES—OPINION.

In an action for death of a married woman who was the manager of her household, in which resided her husband and a grown daughter, it appearing that decedent was in good health, that she did housework, sewing, mending, etc., and tended to the buying and general management of the house, evidence of the daughter, who had opportunity of observation and experience in household affairs, that her mother's services were worth to herself and father from \$40 to \$45 a month was admissible,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

though advisory, only to be considered by the jury in awarding damages in the light of their own observation and experience.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.*]

2. COURTS (§ 366*)—FEDERAL COURTS—RULES OF DECISION—STATE STATUTES—CONSTRUCTION BY STATE COURT.

The construction placed on a state statute by the state court of last resort is binding on the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*]

Conclusiveness of judgment between federal and state courts, see notes to *Lant v. Kinne*, 21 C. C. A. 478; *Union & Planters' Bank of Memphis v. City of Memphis*, 49 C. C. A. 468; *Converse v. Stewart*, 118 C. C. A. 215.]

3. DEATH (§ 16*)—STATE STATUTE—WIFE'S SERVICES—RIGHT OF HUSBAND.

Under the Michigan Wrongful Death Act (Comp. Laws 1897, § 10,427), an action may be maintained by a husband against a railroad company for the wrongful killing of his wife by which he lost her services, though death was instantaneous.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 18; Dec. Dig. § 16.*]

4. DEATH (§ 18*)—BENEFICIARIES—ADULT DAUGHTER OF DECEASED.

Where an adult daughter was residing with her father and mother at the time the latter was killed, the fact that the daughter was not a minor did not deprive her of the right to damages under the Michigan Wrongful Death Act (Comp. Laws 1897, § 10,427); it also appearing reasonably certain and probable that deceased would have continued to contribute to the daughter's support.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 20; Dec. Dig. § 18.*]

5. TRIAL (§ 255*)—INSTRUCTIONS—REQUEST TO CHARGE.

In an action for death of a wife, the court's omission to charge that the jury in assessing damages should deduct the cost of the wife's maintenance to her husband was not error in the absence of a request so to charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

6. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE.

Where, in an action for wrongful death of a married woman, there was no proof as to the reasonable cost of her maintenance to her husband, the court did not err in omitting to charge the jury to deduct such cost of maintenance from the value of the wife's services in assessing the damages.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

7. COURTS (§ 406*)—CIRCUIT COURT OF APPEALS—REVIEW—DAMAGES—EXCESSIVENESS.

Ordinarily the Circuit Court of Appeals will decline to consider the question of inadequate or excessive damages.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1103; Dec. Dig. § 406.*]

8. DEATH (§ 99*)—EXCESSIVENESS—WRONGFUL DEATH.

In an action for the wrongful killing of a wife 62 years old, leaving her surviving as beneficiaries a husband of the same age and a daughter 33 years of age living together in one family, a verdict awarding \$4,092.50 was not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

In Error to the District Court of the United States for the Northern District of Illinois; George A. Carpenter, Judge.

Action by Gertrude Gilpin against the Grand Trunk Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

George W. Kretzinger, Jr., and L. L. Smith, both of Chicago, Ill., for plaintiff in error.

James C. McShane, of Chicago, Ill., for defendant in error.

Before BAKER and KOHLSAAT, Circuit Judges, and WRIGHT, District Judge.

WRIGHT, District Judge. This suit was brought in the trial court by the defendant in error against the plaintiff in error for causing the death of Elizabeth Gilpin, in the state of Michigan, by wrongful act, neglect, or default, under the provisions of the statute of that state, called by counsel in their briefs the Death Act (Comp. Laws 1897, § 10,427), in contradistinction to another act described as the Survival Act, the latter named act not being relied upon, because the death for which the action is brought was instantaneous. It was not disputed upon the trial of the cause, and is not here denied, that the death of Elizabeth Gilpin was caused as described in the declaration; the main contention of the plaintiff in error being then and now that under the evidence produced upon the trial, under the Death Act of the state of Michigan, as construed by the court of last resort in that state, the plaintiff below is entitled to recover no damages, or at most merely nominal damages. This contention, with certain ruling of the trial court upon the evidence, and in its charge to the jury, incidental to and arising out of the chief contention mentioned, is the subject for the judgment and decision of this court; the arguments of counsel both oral and in their briefs having been chiefly confined to this subject. The deceased, Elizabeth Gilpin, was 62 years of age when she died, and the beneficiaries in this suit are her husband, aged 62 years, her daughter Gertrude, aged 33 years, who lived together as one family, and a son and two other daughters, who lived apart from the deceased, her husband and daughter Gertrude, and these latter were eliminated from the case by the trial court and were not therefore considered by the jury in the award of damages.

The statute under which the suit is prosecuted provides *inter alia* that:

"In every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to those persons who may be entitled to such damages when recovered."

[1] It was in evidence before the jury that the deceased was in good health; she did housework, sewing, made her daughter's clothes, her own clothes, mended and sewed for her husband, did the buying and general management of the house, and the care for her husband. Over the objection and exception of the defendant, the daughter was permitted to testify that the mother's services to herself and father were worth \$40 to \$45 a month. The insistence of counsel for plain-

tiff in error is that the allowance of such evidence was and is reversible error, but we are not so impressed. Such testimony is but the expression of an opinion and, as we think, may be given by any mature person who has had opportunity of observation and experience in household affairs, and such opinions are not in any way conclusive, but advisory merely, to be considered by the jury in the light of their own observation, experience, and common sense, and when thus applied, as we believe, such evidence could not be otherwise than proper.

[2] It has been contended broadly, and argued with great earnestness by counsel for the plaintiff in error, that under the statute of Michigan, as construed by the judicial decisions of that state, the death of Elizabeth Gilpin having been instantaneous, no action for the loss of services of the wife survives to the husband, and damages are not allowable to the adult daughter of the deceased. We recognize and apply the rule, because it is elementary, that the construction placed upon a statute of a state by the court of last resort in such state is binding upon the courts of this jurisdiction.

[3] We have examined, as we believe, with care the citations of counsel in support of this his chief contention in the case. The case of principal reliance by counsel in support of this insistence (*Walker v. Traction Co.*, 156 Mich. 514, 121 N. W. 271) was a suit brought by the husband as administrator to recover for loss to the wife's estate; in other words, under the Survival Act. The court held that no action survived for the loss of services which belonged to the husband. The action, if any survived, was one personal to her and for damages to which she alone was entitled. In other words, the husband being entitled to his wife's services, and not the wife to such services, the wife could not, if living, recover for the loss, nor could her estate after her death. Moreover, in the argument it appears in that case the husband did not recover for the loss of his wife's services in a personal action of his own, presumptively under the Death Act. So, from our analysis of the situation, it appears to us that the court of Michigan has not decided that no action for services of the wife survives to the husband but has decided that the services belonged to the husband, and it therefore conclusively follows that if under the plain provisions of the statute the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to those persons who may be entitled, the husband is the person entitled to damages for the loss of his wife's services. Any other construction than this would, it seems to us in effect, render the statute nugatory, and we cannot think this has been or is the result of cases cited.

[4] It is also argued that under the same statute, as interpreted by the courts of Michigan, damages are not allowable to the adult daughter of the deceased; that only minor children can be or are beneficiaries; that only such persons as have legal demands upon the deceased are entitled to damages. We do not believe the decisions to which the counsel refer are authority for the rule of law sought to be applied here. It is doubtful if these decisions do or were intended to construe the statute at all but afford mere rules of evidence, adopted

or prescribed by the court as a guide in determining the pecuniary interest of the persons entitled to damages. So the court would not presume, without evidence, that a minor, after attaining majority, would continue to live with and receive contributions of support from the parent, and surely it could not have been intended by such decisions to exclude from consideration such persons as might be actually living with and receiving support from the deceased at the time of death, although such fact alone might not be sufficient evidence to warrant the court in giving such person the damages described in the statute, without additional facts or circumstances that would render it certain, reasonable, or probable that the deceased would have continued such contributions of support had not life been wrongfully destroyed. Therefore we find no error in the ruling of the trial judge in this respect.

[5] It is complained that the trial judge erred in omitting to charge the jury to deduct from the value of the services of the wife her cost of maintenance to the husband. A sufficient answer to this is that we fail to discover in the record that the court was requested to give such charge.

[6] If the court had been so requested, we likewise fail to discover any evidence upon which such charge could have been predicated. It is true the husband is legally bound to provide suitable clothing and maintenance for his wife, but this duty affords no presumption of fact, without evidence that he was accustomed to do so, and the reasonable cost thereof. Had plaintiff in error relied upon this point on the trial of the case by inquiry of the witnesses, and request for charge in relation thereto, it would now be in position to advance the argument upon the question properly. Having failed to do this, it is too late to raise the question for the first time after verdict, as the record shows was done. And while upon this point we say generally, in response to the complaint that the court refused proper instructions requested, that we believe that the charge of the court as given contained all that was proper to be given that was included in those asked.

[7] It is argued the damages are excessive. Ordinarily, if not always, this court declines to consider the question of inadequate or excessive damages (*Hunt v. Kile*, 38 C. C. A. 647, 98 Fed. 49), but, were we inclined to do so in this case, we would be unable to say the pecuniary value of \$4,692.50 of the life of this woman to her husband and daughter is excessive.

[8] The jury had all the evidence before them, and it was their province to consider it, in the light of their own observation, experience, and common sense, and determine what it proved, and find their verdict accordingly. This they did, in a greater sum than above stated, which the court in its discretion required to be lessened. It is also complained the jury failed to follow the instructions of the court as to the amount of the damages as to the pecuniary loss to the husband and daughter, but this they might properly do, as such instructions were merely advisory, relating to a question of fact, upon which the jury were at liberty to give their independent judgment.

Finding no reversible error, the judgment of the trial court is affirmed.

SMITH v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 26, 1913.)

No. 3,911.

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION (§ 34*)—INDORSEMENTS—MISNOMER OF OFFENSE.

A misnomer, on the back of a good indictment and in the other records of the court of the offense charged as a violation of one statute when it is a violation of another, is not fatal to a conviction because it is the charge in the indictment only, and not that in the notation on its back, or in the other records of the court, against which the accused is called to defend himself.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 138-143; Dec. Dig. § 34.*]

2. CRIMINAL LAW (§§ 300, 881*)—POST OFFICE (§§ 35, 50*)—"USING MAILS TO DEFRAUD"—ELEMENTS OF OFFENSE—PLEA—INSTRUCTION.

It is indispensable to a conviction of a crime by a jury that they find every material issue against the defendant.

There are three essential elements of the offense described in section 5480, Revised Statutes, as amended by Act March 2, 1889, c. 393, 25 Stat. 873 (U. S. Comp. St. 1901, p. 3697): (1) That the person charged has devised a scheme or artifice to defraud; (2) that he intended to effect this scheme by opening, or intending to open, correspondence with some other person through the post office establishment, or by inciting such other person to open communication with him; and (3) that in carrying out such scheme such person must have either deposited a letter or packet in the post office, or taken or received one therefrom. A plea of not guilty denies the existence of each of these elements, and it is fatal error to charge the jury that if they find the existence of the first and third only, they may return a verdict against the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 684-686; Dec. Dig. §§ 300, 881;* Post Office, Cent. Dig. §§ 55, 87-89; Dec. Dig. §§ 35, 50.*]

Nonmailable matter, see note to *Timmons v. United States*, 30 C. C. A. 79; *McCarthy v. United States*, 110 C. C. A. 548.]

In Error to the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

John N. Smith was convicted of using the mails to defraud, and brings error. Reversed and remanded.

Guy A. Miller, of Detroit, Mich. (Orville S. Franklin, of Des Moines, Iowa, on the brief), for plaintiff in error.

Marcellus L. Temple, of Osceola, Iowa, for the United States.

Before SANBORN and CARLAND, Circuit Judges, and WIL-LARD, District Judge.

SANBORN, Circuit Judge. The defendant below was indicted in September, 1911, for devising a scheme to defraud by the use of the mails, and mailing a letter in execution of this scheme, in the year 1908. In 1908 this was an offense under section 5480 of the Revised Statutes as amended by Act March 2, 1889, c. 393, 25 Stat. 873 (U. S. Comp. St. 1901, p. 3697). That section was repealed; it was pro-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

vided that offenses committed under it prior to January 1, 1910, might be prosecuted and punished in the same manner and with the same effect as if it had not been repealed, and section 215 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1911, p. 1653]), which denounces a similar offense and prescribes a more severe punishment for it was put in force on January 1, 1910, by the act of March 4, 1909, to codify, revise and amend the Penal Laws of the United States. 35 Stat. c. 321, p. 1088; section 341, p. 1153; section 343, p. 1159; section 215, p. 1130. The record of the court below is that the grand jurors on September 20, 1911, returned an indictment against the defendant below "for violating section 215 of the Criminal Code, * * * which said indictment is in words and figures, as follows," and the indictment set forth in the record properly charges the offense to have been committed in 1908. On the back of the indictment there appears the title of the case and "Violation of Sec. 215 C. C. A True Bill. S. E. Thompson, Foreman." The bench warrant for the defendant's arrest recited that an indictment charging him "with the crime of violating the postal laws of the United States, to wit, section 215 of the Criminal Code," had been returned. The criminal code docket of the court contains, under the title of the case, the notation, "Vio. Sec. 215 Crim. Code," and in a similar place in the judge's docket are the words and figures, "Kind of Action, Vio. Sec. 215 Crim. Code." At the close of the evidence the accused moved for a directed verdict on the ground that he had been arraigned and tried for a violation of section 215 of the Criminal Code, an *ex post facto* law. The court denied the motion and the defendant specifies this ruling as error.

[1, 2] But he was not required to answer the notation on the back of the indictment or the statements in the record, aside from the indictment, of the nature of the offense with which he was charged. The only charge against which he was arraigned to plead or to defend was that in the indictment. That charge was plain and clear. It was that he devised a scheme to defraud to be effected by the use of the mails and deposited a letter in execution of the scheme in 1908, "contrary to the form of the statute in such case made and provided." The indictment specified no statute. The offense alleged therein was not a violation of section 215 of the Criminal Code because that section was not in force in 1908. It was a violation of section 5480 of the Revised Statutes, as amended. The accused was defended by counsel learned in the law. They and he must be presumed to have known, and we doubt not that they did know, what statute denounced the offense charged in the indictment. The sentence of the court was within the limit of punishment fixed by section 5480, as amended, and there is no merit in the specification of error here presented. The erroneous naming on the back of a good indictment for a violation of one statute and in the records of the court, of the offense charged as a violation of another statute of which it is not a violation, is not fatal to a trial and conviction under the indictment, because it is the charge in the indictment only and not that in the notation on its back or in the other records of the court against which the accused is called to defend himself.

The court instructed the jury that the defendant was charged with depositing a letter in the post office addressed to C. H. Thorley in furtherance of a scheme to defraud him out of \$5,000 by falsely representing that the defendant had security in the form of certain real estate, described in a deed in evidence, to offer for the repayment of the \$5,000, and that if there were such a scheme to defraud and the letter described in the indictment was deposited in the post office by the accused, duly stamped and addressed, they should return a verdict of guilty. The defendant excepted to this charge on the ground that it omitted "one of the essential elements of the crime, to wit, the intent on the part of the defendant to consummate the scheme which he had devised by opening communication through the mail, or inciting another to communicate with him through the mail," but the court made no modification of or addition to its charge although that charge nowhere mentioned such an intent, and this ruling is assigned as error.

It has been settled law, ever since the opinion of the Supreme Court in *Stokes v. United States*, 157 U. S. 187, 188, 15 Sup. Ct. 617, 39 L. Ed. 667, was filed in 1895, that in the prosecution of a charge of an offense under section 5480 as amended, these three essential elements must be established by the evidence beyond a reasonable doubt:

"(1) That the person charged must have devised a scheme or artifice to defraud; (2) that he must have intended to effect the scheme by opening, or intending to open, correspondence with some other person through the post office establishment, or by inciting such other person to open communication with him; (3) and that in carrying out such scheme such person must have either deposited a letter or packet in the post office, or taken or received one therefrom." *Erbaugh v. United States*, 173 Fed. 433, 435, 97 C. C. A. 663, 665; *Ewing v. United States*, 136 Fed. 53, 54, 69 C. C. A. 61, 62; *Brown v. United States*, 143 Fed. 60, 62, 65, 74 C. C. A. 214, 216, 219; *Rumble v. United States*, 143 Fed. 772, 776, 75 C. C. A. 30, 34.

The defendant's plea of not guilty denied the existence of each element of the offense with which he was charged. The instruction of the court was that if the jury found the existence of the first and third elements of the offense, they might return a verdict of guilty against him, and when counsel for the accused, by their exception, called the attention of the court to the fact that it had by its charge omitted to require the jury to find the existence of the second element of the offense as a condition of a verdict of guilty, the court remained silent and left the jury to condemn the accused upon the existence of the first and third elements only. There is no doubt that this error was inadvertent, but it was as fatal to the defendant as though it had been intentional, for it resulted in his conviction without a finding by the jury upon the crucial issue whether or not he intended to effect his scheme to defraud by opening, or intending to open, correspondence with some other person through the post office establishment, or by inciting such other person to open communication with him. The judgment must accordingly be reversed, and the case must be remanded to the court below, with directions to grant a new trial.

It is so ordered.

R. H. HERRON CO. v. MOORE.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1913.)

No. 2,254.

BANKRUPTCY (§ 166*)—PREFERENCES—REASONABLE CAUSE BY CREDITOR TO BELIEVE INSOLVENCY.

Payments made to a creditor by an oil company within four months prior to its bankruptcy on a pre-existing indebtedness for machinery and supplies *held* to have been received by the creditor with knowledge of such facts as gave it reasonable ground to believe that the company was insolvent so as to constitute preferences, where the evidence showed that the indebtedness was large, that the creditor had been obliged to take up the bankrupt's notes which had been discounted at a bank, had repeatedly urged payment, and for a year before the bankruptcy had refused the bankrupt further credit except for small amounts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250-253, 255-258; Dec. Dig. § 166.*]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Olin Wellborn, Judge.

In the matter of the Cleveland Oil Company, bankrupt; William H. Moore, trustee. From an order disallowing the claim of the R. H. Herron Company except on repayment of preferences, claimant appeals. Affirmed.

Geo. E. Whitaker, of Bakersfield, Cal., for appellant.

Ross T. Hickcox and L. O. Crenshaw, both of Los Angeles, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. On January 12, 1911, a petition in bankruptcy was filed against the Cleveland Oil Company, and thereafter that company was duly adjudged a bankrupt. The appellant herein filed a claim against the bankrupt's estate for the sum of \$14,804.32. The trustee filed objection to the claim on the ground that the appellant had received preference payments as follows: That on September 15, 1910, the bankrupt had paid the appellant the sum of \$2,000; that on October 31, 1910, the bankrupt had returned to the appellant oil well casings of the value of \$2,823.37; and on December 31, 1910, the bankrupt had returned to the appellant two pumps of the value of \$300. Upon the testimony taken, the referee found that each of said payments constituted a preference, and ordered that the appellant's claim be not allowed unless the preferences be surrendered. On a petition for review, the court below sustained the ruling of the referee. The payments were made within four months preceding the filing of the petition in bankruptcy, and they were made on a pre-existing debt owing by the bankrupt to the appellant. Under the Bankruptcy Act (Act July 1, 1898, c. 541, § 60, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), as amended by the Act of Congress of June 25, 1910, c. 412, § 11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506), it is no longer neces-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sary, in order to establish a preference, to prove the existence of the debtor's intent to prefer. It is sufficient if it is shown that the creditor receiving the alleged preference payment had, at the time when it was made, reasonable cause to believe that the bankrupt was insolvent, and that in accepting and retaining the same he would receive a larger per cent. of his debt than the other creditors of the same class. It is not disputed that, on the dates when the payments were made to the appellant, the bankrupt was hopelessly insolvent. It is not disputed that the result of the payments was to give the appellant a greater percentage of its debt than other creditors of the same class. But it is earnestly contended that the evidence falls short of showing that, at the time of the payment of the money or the transfer of the property by the bankrupt to the appellant, the latter had reasonable cause to believe that the payment or the transfers would effect the preference prohibited by the Bankruptcy Act.

The bankrupt was operating certain oil wells, and the appellant was engaged in the business of furnishing supplies and machinery for such wells, and was operating stores for distribution at Bakersfield, Taft, and Maricopa, in Kern county, Cal. The appellant's account with the bankrupt began February 23, 1909. In May, June, and July, 1910, the appellant received from the bankrupt notes aggregating \$12,726.68 in payment for goods sold, and thereafter it sold the bankrupt additional goods on open account in July to the amount of \$3,547.23, in August \$2,920.76, and in September \$65.54. The notes as they were received were indorsed and discounted by the appellant at its bank. On January 10, 1910, the appellant's general manager notified the manager of its store at Taft that he might deliver the bankrupt supplies to the amount of \$1,500, and that, if more than that were desired, it would be necessary to communicate with the head office at Los Angeles. The general manager wrote:

"They are owing us considerable money, and they have not acquired the habit of discounting their bills, which is our reason for the limited credit."

On January 12th, the general manager wrote to the store at Bakersfield stating the amount of the open account, and adding that the appellant felt that this amount was quite enough providing the information which was given by the district manager at Bakersfield was correct, that the bankrupt was owing considerable sums for lumber bills, and that there were creditors for other smaller bills who were not able to get their money. The letter called for a report as to the holdings of the bankrupt in that district. On July 22, 1910, the appellant's general manager notified all its stores in Kern county that the state of the account with the bankrupt was such that goods could only be delivered to it in small quantities, not exceeding \$100, and that anything in excess of that was to be referred to the Los Angeles office. On August 22d, the secretary of the appellant wrote to the general manager and said:

"They haven't taken care of their note due to-day. We are simply giving you this information that you may be in touch with the matter."

On receipt of this letter, the general manager indorsed thereon:
"Keep after them twice a day, and make them come through."

This note so referred to, which fell due on August 22, 1910, for \$2,868.15, was not paid, and the appellant was required to take it up at the bank. On September 21, 1910, the appellant notified all its stores in Kern county that the bankrupt was privileged to buy only supplies for emergency requirements, not exceeding \$50 in any one order, and that, if it wanted anything in excess thereof, the matter was to be communicated to the head office at Los Angeles. On October 18, 1910, the general manager wrote his district manager at Taft as follows:

"The Cleveland Oil Company owe us considerable money. They are not in a position to supply the ready cash. Their stock is almost worthless from a stock market view, the last sales being passed at 2¾ cents. They are endeavoring to arrange the company on a good financial basis, but that will take some time."

The letter refers to the offer of the bankrupt to return to the appellant certain casings which had been purchased, and which the appellant agreed to receive as secondhand goods and credit on the account less 25 per cent. of cost price.

At the time when the cash payment of \$2,000 was made, which the court and the referee found to have been a preference payment, the bankrupt was unable to meet the payment of its debts. It owed the appellant about \$20,000. Its promissory notes to the appellant had been dishonored, and had been paid by the appellant and had been returned to it by the bank at which they had been discounted. Before that payment of \$2,000 was obtained, according to the undisputed testimony, the appellant made repeated and urgent demands upon the bankrupt for money, and the latter had made promises of payment thereof for several weeks prior thereto. Under all the circumstances as shown by the testimony and the correspondence, we find no ground for disturbing the decision of the referee and of the court, or for holding that the facts that came to the knowledge of the appellant were insufficient to show that it had reasonable ground to believe that the bankrupt was insolvent at the date of the first payment, and that the effect of that payment was to give a preference. The facts were sufficient to put a reasonably prudent man upon inquiry to ascertain the financial condition of the debtor. In *re Dorrr*, 196 Fed. 292, 116 C. C. A. 112; In *re Thomas Deutsche & Co.* (D. C.) 182 Fed. 435. That no such inquiry was made in this case is explainable by the fact that, at the beginning of the dealings between the appellant and the bankrupt, the former demanded and obtained from the president of the latter his individual guaranty of the payment of all the debts that might be incurred by his corporation in its dealings with the appellant.

The judgment is affirmed.

WILLINGHAM v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. October 13, 1913.)

No. 2,400.

1. INTERNAL REVENUE (§ 47*)—SALE OF LIQUOR—REGULATION—ENFORCEMENT OF LOCAL LAWS.

The United States is not concerned with the enforcement of local laws regulating or prohibiting the sale of liquor; it being the policy of the government to collect its special taxes, if possible, rather than to inflict punishment for technical violations of the revenue laws.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144-150; Dec. Dig. § 47.*]

2. INTERNAL REVENUE (§ 47*) — INTOXICATING LIQUORS — SPECIAL REVENUE TAX—OFFENSES—COMPROMISE—CRIMINAL PROSECUTION—DEFENSES.

Rev. St. § 3229, provides that the Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws. *Held* that, where a Deputy Collector, finding that accused was selling liquor without having paid the special tax, agreed that, if defendant would pay the tax and penalty, the collector would not institute criminal proceedings, and defendant complied with such request, whereupon the Collector turned over the payment to his superior and issued the certificate required by law, it would be presumed that the Collector disclosed the offer of compromise and that the same was accepted, the money having been retained by the Treasury Department; and hence, in a subsequent criminal proceeding for selling liquor in violation of the law, accused was entitled to an instruction that, if defendant was promised immunity in consideration of the tax and in consideration thereof he did so, the jury should find him not guilty.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 47.*]

Shelby, J., dissenting.

In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Will Willingham was convicted of selling whisky without paying the special government tax, and he brings error. Reversed and remanded for a new trial.

Erwin J. Smith, of Denison, Tex., for plaintiff in error.

J. B. Dailey, Asst. U. S. Atty., of Paris, Tex.

Argued before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

FOSTER, District Judge. The plaintiff in error in this case, to be hereafter designated as the defendant, was indicted for unlawfully carrying on the business of retail liquor dealer without having paid the special tax required by law. On the trial of the case, Davis, a Deputy Internal Revenue Collector of the United States, testified in substance that on the 24th day of October, 1911, he saw the defendant sell a half pint of whisky, told him he was a Revenue Collector, and that he owed a special tax to the government, and that if he did not

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pay such tax for one year from July 1, 1911, to June 30, 1912, together with a penalty of 50 per cent. for failure to make his return on form 11, he would swear out a complaint against him before the United States Commissioner, but if he did pay the tax and penalty he would not swear out such a complaint. On the following day the defendant paid him \$37.50 and he gave him a receipt for the tax of \$25 and the penalty of \$12.50 and sent the money to P. B. Hunt, Collector of Internal Revenue for the Fourth district, with the request that a government stamp be issued to the defendant. The defendant testified that before making the payment he told Davis he would pay the back tax and penalty if it would keep him out of trouble, and Davis told him it would, and, relying upon Davis' statement, he made the payment. The special stamp was subsequently issued to him. At the close of the evidence defendant requested the court to give the following special instruction:

"If you believe from the evidence in this case that the witness Davis, acting for the government, made a trade with the defendant in substance that, if the defendant paid the yearly tax of \$25 and in addition a penalty of \$12.50, he would not swear out a complaint before the Commissioner and by thus doing promised the defendant immunity for having sold liquor without having paid the tax required by law, then you will find defendant not guilty."

The court declined to do so and in the course of his general charge gave the following instructions:

"Certain papers and receipts have been introduced by defendant in evidence showing that, the next day after the alleged sale testified to by the witness J. B. Davis, defendant paid the special tax required by law for one year from July 1, 1911, to June 30, 1912, and a penalty of 50 per cent., and evidence was introduced to the effect that, when said taxes and penalty were paid, Davis represented that if they were not paid he would swear out a complaint against the defendant, and that if they were paid he would not do so. I charge you that the payment of these taxes and the penalty constitute no defense, if you believe from the evidence that prior to the payment thereof defendant was engaged in carrying on the business of a retail liquor dealer without having paid the special tax required by law."

The defendant seasonably excepted to the action of the court in declining to grant the special request above set out and also to that part of the general charge above quoted. The defendant was found guilty by the jury, and the court imposed a fine of \$100 and sentenced him to imprisonment for the maximum term of two years. Defendant assigns as error the refusal of the court to give his special request and the inclusion in the general charge of the language above quoted.

From the extreme severity of the sentence imposed, we might infer that the defendant is an old offender, but nothing to that effect is disclosed by the record, and from the facts before us the offense was of a minor character.

[1] The United States is not concerned with the enforcement of local laws regulating or prohibiting the sale of liquor, and it has always been the policy of the government to collect its special taxes, if possible, rather than to inflict severe punishment for technical violations of the revenue laws.

[2] The Commissioner of Internal Revenue has the power and authority by virtue of section 3229 of the Revised Statutes (U. S. Comp. St. 1901, p. 2089), with the advice and consent of the Secretary of the Treasury, to compromise any civil or criminal case arising under the internal revenue laws, instead of commencing suit thereon, and even to compromise such a case after the institution of proceedings, on the recommendation of the Attorney General in addition to that of the Secretary of the Treasury. If the defendant in good faith made the payment of the tax and penalty for the purpose of compromising the impending criminal action, he is entitled to the full effect and benefit of it regardless of whether or not he followed any technical rules of procedure laid down by the Internal Revenue Department. And, if his offer of compromise was accepted, no criminal proceeding could thereafter be had for his failure to pay the tax before commencing business. There could be no doubt under the uncontradicted evidence in the record that he made the payment to prevent being prosecuted criminally, and the Deputy Collector certainly led him to believe it would have that effect.

The Deputy Collector undoubtedly had the authority to at least transmit the offer of compromise, and when he turned over the payment to his superior it was his duty to disclose to him that it was an offer in compromise. It is to be presumed that he did so, and the fact that the money was retained by the United States and the stamp issued to defendant would raise the presumption that the offer of compromise had been accepted. Under this state of facts it was the duty of the District Court to submit the question to the jury and to grant the special instruction requested by the defendant or to substantially instruct the jury to the same effect in the general charge.

The judgment of the District Court will be reversed, and the case remanded for a new trial.

SHELBY, Circuit Judge (dissenting). I am of the opinion that the Deputy Internal Revenue Collector had no authority under R. S. U. S. § 3229 (U. S. Comp. St. 1901, p. 2089), or otherwise, to make "a trade" with the defendant, granting him immunity from prosecution on the payment of the tax and penalty, and that the trial judge ruled correctly in refusing the special instruction requested. And I think that the court was right in its general charge that the payment by the defendant of the tax and penalty, after he was detected in the commission of the offense, constituted no defense against the indictment. I find no evidence in the record to show that the case had been compromised by the Commissioner of Internal Revenue, with the advice and consent of the Secretary of the Treasury. Whenever such compromises are made, the section cited provides for a written record which would prove it. I am constrained, therefore, to dissent from the judgment of reversal.

MUENTER, Collector of Internal Revenue, v. BLISS.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1913.)

No. 2,034.

INTERNAL REVENUE (§ 8*)—LEGACY TAX.

Testator bequeathed certain property to trustees to hold for his daughter so long as she continued to be the wife of H., and to pay over to her the rents annually, the income thereof, after deducting the expenses of managing, the trust to terminate whenever she ceases to be the wife of H., and if the daughter ceased to be the wife of H. before her death then the trust property should vest in her in fee simple, and if not it should vest in fee in such of her children as should survive her. The corpus of the legacy was not vested prior to the repeal of the War Revenue Act (Act June 13, 1898, c. 448, § 29, 30 Stat. 464, as amended by Act March 2, 1901, c. 806, § 10, 31 Stat. 946 [U. S. Comp. St. 1901, p. 2307], and supplemented by Act June 27, 1902, c. 1160, § 3, 32 Stat. 406 [U. S. Comp. St. Supp. 1911, p. 983]), and the court found that the income of the bequest had not amounted to \$10,000 at the date of such repeal. *Held*, that the daughter did not have a vested interest in the life estate, her interest in the income being subject to a contingency that she might cease to be the wife of H.; but nevertheless, it appearing that her interest in the income did not amount to \$10,000, it was not taxable.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 11, 12; Dec. Dig. § 8.*]

Internal revenue tax on legacies, inheritance, and transfers, see note to Ward v. Sage, 108 C. C. A. 417.]

In Error to the District Court of the United States for the Northern District of California; William B. Gilbert, Judge.

Action by George D. Bliss, as executor of the will of George D. Bliss, deceased, against August E. Muentner, as Collector of Internal Revenue of the United States for the First Collection District of California. Judgment for plaintiff (Muentner v. Union Trust Co., 115 C. C. A. 390, 195 Fed. 480), and defendant brings error. Affirmed.

John L. McNab, U. S. Atty., and Earl H. Pier, Asst. U. S. Atty., both of San Francisco, Cal., for plaintiff in error.

Marshall B. Woodworth and Edward Lande, both of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. A rehearing was ordered in this case upon the question whether the income payable to Harriet L. Hermann under a bequest of \$14,872.26 in trust for her benefit was of such value as to be taxable under the provisions of the Act of Congress of June 13, 1898, c. 448, § 29, 30 Stat. 464, as amended by Act March 2, 1901, c. 806, § 10, 31 Stat. 946 (U. S. Comp. St. 1901, p. 2307), and supplemented by Act June 27, 1902, c. 1160, § 3, 32 Stat. 406 (U. S. Comp. St. Supp. 1911, p. 983). The value of the legacy thus left in trust, the income whereof was payable to Mrs. Hermann, was assessed by the Collector of Internal Revenue at its face value, and a legacy tax of \$111.54 was imposed thereupon and collected. The court below

entered a judgment in favor of the executor for the repayment of that sum. The provisions of the will by which the bequest was made are as follows:

"(1) To hold the same in trust for my daughter, Harriet L. Hermann, so long as she continues to be the wife of said George Hermann. (3) To pay over to my said daughter annually, the rents, issues, profits and income thereof, after deducting the expenses of managing, controlling and operating the same. Said trust shall terminate whenever my said daughter ceases to be the wife of said George Hermann. If my said daughter shall cease to be the wife of said George Hermann before her death, then, and in that event, the property embraced in said trust, shall vest in fee simple absolute to my daughter Harriet L. Hermann. In case my said daughter dies while she is the wife of said George Hermann, then, and in that event, the property embraced in said trust shall vest in fee simple in such children of my said daughter as shall survive her, share and share alike."

The corpus of the legacy had not vested prior to July 1, 1902, the date of the repeal of the War Revenue Act, and so far as the record shows it has not yet vested, and Harriet L. Hermann is still the wife of George Hermann. It was the finding of the court below that the income of the bequest had not amounted to the sum of \$10,000 at the time of the repeal of the War Revenue Act, and, indeed, in the absence of such a finding, this court may properly take judicial notice that in the ordinary course of business no such income could have resulted from the sum invested. In *United States v. Fidelity Trust Co.*, 222 U. S. 158, 32 Sup. Ct. 59, 56 L. Ed. 137, it was held that a legacy to pay over net income to a legatee during her life, and on which she has received several payments, is not a contingent beneficial interest but a vested life estate and taxable on its value as such. We do not think it can properly be said, however, that the legatee in the case at bar had a vested interest in a life estate. Her interest in the income was subject to the contingency that she might cease to be the wife of George Hermann. But, assuming that she had a vested interest in what is equivalent to a life estate in the income from the legacy, and applying to the case the aid of mortuary tables as was suggested by *United States v. Fidelity Trust Co.*, it still does not appear that her vested interest in the income would amount to the sum of \$10,000 so as to be taxable under the War Revenue Act.

The judgment of the court below is affirmed, with costs in favor of the defendant in error and against the plaintiff in error.

ATLANTIC COAST LINE R. CO. v. REAVES.

(Circuit Court of Appeals, Fifth Circuit. October 6, 1913.)

No. 2,348.

COURTS (§ 299*)—INTERSTATE COMMERCE—PLEADING.

A declaration alleged that at the time of decedent's injury defendant owned and operated a railroad as a common carrier in interstate commerce, and among other things conducted a station and freight yard at or near Lakeland, in Florida; that on May 27, 1910, decedent served defendant as a switchman in such yard, and was required by defendant, in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

discharge of his duty in the moving of certain cars in the yard, to uncouple the cars attached to an engine operated by defendant's employes; and that the engine was kept and employed at such point in the switching and movement of intrastate and interstate cars as circumstances required. *Held*, that the declaration sufficiently alleged that at the time of decedent's injury both he and defendant railroad company were engaged in interstate commerce, within Employer's Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322).

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 841; Dec. Dig. § 209.*]

In Error to the District Court of the United States for the Southern District of Florida; James W. Locke, Judge.

Action by Fannie C. Reaves, as administratrix, etc., against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. A. Carter, of Tampa, Fla., for plaintiff in error.

Hilton S. Hampton, of Tampa, Fla., for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. The declaration charges:

"That at the time of the grievance hereinafter mentioned the defendant was the owner of and operated a line of railroad as a common carrier in interstate business, its cars being propelled by means of steam, and operating, among other things, a station and freight yard at or near the town of Lakeland, in the state of Florida, and on the 27th day of May, 1910, one F. C. Reaves was an employe and servant of the defendant in the capacity of switchman in said yard; that he was required by the defendant, in the discharge of his duty in the moving of certain cars in said freightyard at Lakeland, Fla., to uncouple certain cars attached to an engine operated by employes of the defendant; that said engine was kept and employed at said time, at said point, in the switching and movement of intrastate and interstate cars, as circumstances required."

A majority of the judges being of opinion that the foregoing is a sufficient allegation that at the time the plaintiff's intestate received his injury both the defendant company and the plaintiff's intestate were engaged in interstate commerce, within the purview of the Employer's Liability Act of 1908, we find that the demurrers to the declaration were properly overruled.

In the rulings on instructions to the jury we find no reversible error.

On the merits a majority of the judges are of opinion that the evidence was sufficient to warrant the jury in finding that at the time plaintiff's intestate received his injury both he and the defendant railroad company were engaged in interstate commerce. See *Martin Pedersen v. Delaware, Lackawanna & Western Railroad Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125; *St. Louis, San Francisco & Texas Railway Co. v. Maude Seale et al.*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129; *Railroad Commission of Louisiana v. Texas & Pacific Railway Co. et al.*, 229 U. S. 336, 33 Sup. Ct. 837, 57 L. Ed. 1215.

The judgment of the District Court is affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

BECHARIAS v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 15, 1913. Rehearing Denied July 1, 1913.)

No. 1,872.

1 BRIBERY (§ 1*)—IMMIGRATION OFFICERS—"OFFICER."

Under the law and regulations of the Department of Commerce and Labor, an immigration inspector is an "officer" of the United States, and his act in recommending a rehearing for an alien under order of deportation is an act in the line of his duty, so that the offering of a bribe to him to induce the making of a recommendation for a rehearing constitutes an offense against the United States.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 2, 3; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 6, pp. 4933-4951; vol. 8, p. 7737.]

2. ALIENS (§ 54*)—DEPORTATION—"PENDING PROCEEDING."

Until an alien has been actually deported, and while it is within the power of the Department of Commerce and Labor to grant a rehearing, the proceeding is "pending" within the law.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*

For other definitions, see Words and Phrases, vol. 6, p. 5279.]

In Error to the District Court of the United States for the Northern District of Illinois; Kenesaw M. Landis, Judge.

George Becharias was convicted of offering a bribe to an immigration inspector, and he brings error. Affirmed.

Haynie R. Pearson and Charles H. Soelke, both of Chicago, Ill. for plaintiff in error.

James H. Wilkerson, U. S. Atty., Robert W. Childs and Walter M. Krimbill, Asst. U. S. Attys., and Lin W. Price, all of Chicago, Ill., for the United States.

Before BAKER and KOHLSAAT, Circuit Judges, and HUMPHREY, District Judge.

HUMPHREY, District Judge. Plaintiff in error was indicted, convicted, and sentenced to the penitentiary for offering and giving \$150 as a bribe to one Plumly, an immigration inspector, to induce him to make a recommendation based on false testimony for a rehearing in the case of one Kosmos, then under order of deportation by the Secretary of Commerce and Labor; said order being addressed to the Commissioner of Immigration.

[1, 2] Under the law and the regulations of the department, which have the force of law, Plumly was an officer of the United States, and to make recommendation for or against a rehearing for an alien under order of deportation was in the line of his official duty. Until the man was actually deported, and while it was in the power of the de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

partment to grant a rehearing, the proceeding was "pending" within the meaning of the law.

We find no error in the rulings of the trial court either on the sufficiency of the indictment or in the admission or rejection of evidence. Affirmed.

TALBOTT v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. October 6, 1913. Rehearing Denied October 29, 1913.)

1. NEUTRALITY LAWS (§ 2*)—CONTRABAND GOODS—EXPORTATION—JOINT RESOLUTION—VALIDITY.

Joint Resolution No. 10, March 14, 1912, 37 Stat. 630, making it unlawful to export arms or munitions of war from the United States to an American country in which the President has proclaimed that he finds conditions of domestic violence exist, which are promoted by the use of arms or munitions of war procured from the United States, is valid.

[Ed. Note.—For other cases, see Neutrality Laws, Cent. Dig. § 3; Dec. Dig. § 2.*]

Object and scope of neutrality law, see note to *Hart v. United States*, 28 C. C. A. 622.]

2. CRIMINAL LAW (§ 622*)—SEVERANCE—DISCRETION.

Under federal law severance in criminal cases is within the discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1380-1383, 1385, 1386, 1388-1390; Dec. Dig. § 622.*]

3. WITNESSES (§ 52*)—HUSBAND AND WIFE—COMPETENCY OF WIFE.

At common law the wife of one of several defendants on trial at the same time cannot be called as a witness for or against any of them.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 124, 126-136, 165, 415-417, 419, 424; Dec. Dig. § 52.*]

In Error to the District Court of the United States for the Western District of Texas; Waller T. Burns, Judge.

John S. Talbott was convicted of violating the Neutrality Laws, and he brings error. Affirmed.

J. A. Gillett and C. C. McDonald, both of El Paso, Tex., and Wm. L. Evans, of Ft. Worth, Tex., for plaintiff in error.

Chas. A. Boynton, U. S. Atty., of Waco, Tex.

Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. [1] We are compelled to affirm the judgment in this case. The validity of the joint resolution No. 10, of March 14, 1912, 37 Stat. 630, as a criminal statute, has been recognized by the Supreme Court in *United States v. Chavez*, 228 U. S. 525, 33 Sup. Ct. 595, 57 L. Ed. 950, and *United States v. Mesa*, 228 U. S. 533, 33 Sup. Ct. 597, 57 L. Ed. 953.

[2] Under federal law severance in criminal cases is a matter within the discretion of the court. *United States v. Marchant & Col-*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

son, 12 Wheat. 481, 6 L. Ed. 700. See *United States v. Ball*, 163 U. S. 672, 16 Sup. Ct. 1192, 41 L. Ed. 300.

[3] Under the common law the wife of one of several defendants on trial at the same time cannot be called as a witness for or against any of them. 1 Greenleaf's Ev. § 334; *Lucas v. Brooks*, 18 Wall. 436, 453, 21 L. Ed. 779; *Bassett v. United States*, 137 U. S. 496, 11 Sup. Ct. 165, 34 L. Ed. 762.

For a case directly in point, see *Reg v. Thompson*, 12 Cox's Criminal Cases, 202.

The judgment of the District Court is affirmed.

PENNSYLVANIA R. CO. v. CARBON COAL & COKE CO.

(Circuit Court of Appeals, Third Circuit. December 4, 1913.)

Nos. 1625-1629.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; James B. Holland, Judge.

Consolidated actions at law by John Langdon, by the Carbon Coal & Coke Company, by the Mt. Equity Coal Company, by J. Herbert Sweet and others, executors, and by E. Eichelberger & Co. against the Pennsylvania Railroad Company. Judgments for plaintiffs, and defendant brings error. Reversed.

See, also, 186 Fed. 237, and 194 Fed. 486.

John Hampton Barnes, of Philadelphia, Pa., for plaintiff in error.

Harry Cessna, J. W. M. Newlin, and Graham & Gilfillan, all of Philadelphia, Pa., for defendants in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. When these cases were called for argument, counsel agreed at bar that (in view of recent decisions by the Supreme Court upon the measure of damages in this class of cases) the instructions and rulings by the District Court upon that subject were erroneous.

It is therefore ordered that in each of the foregoing cases the judgment be reversed, upon this ground alone—no other question being considered or decided by this court.

JOHNSTON et al. v. SOUTHERN WELL WORKS CO. et al.

(Circuit Court of Appeals, Fifth Circuit. October 6, 1913.)

No. 2,363.

1. EVIDENCE (§ 174*)—BEST EVIDENCE—PROOF OF ASSIGNMENT OF PATENT—COPY OF RECORD.

Where complainant in a suit for infringement alleges title to the patent by assignment, which allegation is denied, it cannot be proved by an abstract showing the record of an assignment in the Patent Office, but either the original instrument or a proved copy should be produced.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 561-564, 566-569; Dec. Dig. § 174.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 208 F.—10

2. PATENTS (§ 202*)—SUIT FOR INFRINGEMENT—TITLE TO SUSTAIN.

An assignment of a patent does not convey the right to recover for past infringements.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 281-289; Dec. Dig. § 202.*]

Appeal from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Suit in equity by Horace G. Johnston, Charles Rittersbacher, and Emlin H. Akin, copartners as the American Well & Prospecting Company, against the Southern Well Works Company, the Southern Car Manufacturing & Supply Company, the Parker Forge Works, and James A. Wiggs. Decree for defendants, and complainants appeal. Affirmed.

F. D. Minor, of Beaumont, Tex., and L. L. Morrill, of Washington, D. C., for appellants.

Wm. G. Henderson, of Washington, D. C., for appellees.

Before PARDEE and SHELBY, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. The complainants sue for the infringement of patent No. 779,285, issued January 3, 1905, to Horace G. Johnston, for an improvement in well-sinking apparatus, and they allege that on November 11, 1908, said Johnston assigned to them his right, title, and interest in and to said patent and in and to the invention disclosed therein.

The alleged assignment was specifically denied in the answer. The only evidence offered to prove the said assignment was an abstract showing the record of an assignment in the Patent Office; neither the original instrument nor a proved copy was offered in evidence. See *American Graphophone Co. v. Leeds & Catlin Co. et al.* (C. C.) 140 Fed. 981; *Eastern Dynamite Co. v. Keystone Powder Mfg. Co.* (C. C.) 164 Fed. 49.

The only infringement alleged or sought to be proved in the case was the sale by the Southern Well Works Company about May, 1907, to one S. H. Clement of a well-sinking apparatus advertised as "A Parker Rotary," antedating by over 20 months the alleged assignment of the patent to the plaintiffs. *Moore v. Marsh*, 7 Wall. 515, 522, 19 L. Ed. 37; *Jones v. Berger et al.* (C. C.) 58 Fed. 1006; *Superior Drill Co. v. Ney Mfg. Co.* (C. C.) 98 Fed. 734; *Canda Bros. v. Michigan Malleable Iron Co.*, 152 Fed. 178, 81 C. C. A. 420.

The decree of the District Court is affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r indexes

SIROCCO ENGINEERING CO. v. B. F. STURTEVANT CO.

(District Court, S. D. New York. October 8, 1913.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CENTRIFUGAL FAN.

The Davidson reissue patents, Nos. 12,796 and 12,797 (original No. 662,395), for a centrifugal fan or pump were not anticipated and disclose invention. The claim that the reissues are invalid because the claims are broader than those of the original patent and because the corporation to which they were issued was not an assignee of the original patentee but merely a licensee *held* not sustained. Both patents also *held* infringed.

In Equity. Suit by the Sirocco Engineering Company against the B. F. Sturtevant Company for alleged infringement of United States letters patents No. 12,796, reissued May 26, 1908, application for reissue filed March 16, 1908, and No. 12,797, reissued May 26, 1908, application for reissue filed March 16, 1908, original patent No. 662,395, dated November 27, 1900, both for "centrifugal fan or pump." On final hearing. Decree for complainant.

See, also, 173 Fed. 378.

Fraser, Turk & Myers and Arthur C. Fraser, all of New York City, and Frederick P. Fish, of Boston, Mass., for complainant.

Benjamin Phillips and Alfred H. Hildreth, both of New York City (Omri F. Hibbard, of New York City, of counsel), for defendant.

RAY, District Judge. These two reissue patents, No. 12,796 and No. 12,797, dated May 26, 1908, are spoken of as the Davidson reissue, as he was the alleged inventor, but same were issued to Sirocco Engineering Company as assignee. The original patent was issued to Samuel C. Davidson, of Belfast, Ireland, November 27, 1900, No. 662,395, on application filed September 21, 1898. About July 10, 1907, the Sirocco Engineering Company with Samuel C. Davidson brought suit against the B. F. Sturtevant Company, based on the original patent, but while that suit was pending the original patent, No. 662,395, was reissued as three separate patents, and this suit is on two of such reissue patents. The defenses are noninvention, anticipation, non-infringement, invalidity of the reissues because of unreasonable delay in applying therefor, unlawful broadening of the claims in scope, and invalidity of such reissues because granted to Sirocco Engineering Company as assignee when in fact it was a licensee only and therefore not entitled to the reissued patents.

Of patent No. 12,796, claims 1, 5, 7, 10, and 13 are in issue. Of patent No. 12,797, claims 1, 3, 4, 5, 10, and 14 are in issue. These read as follows (patent No. 12,796):

"(1) A centrifugal fan or pump, comprising a rotary member having numerous elongated blades arranged lengthwise in approximately axial direction and in substantially drum form, so as to inclose within them a relatively large and practically unobstructed intake-chamber, and in transverse section arranged, relatively to the axis and direction of rotation, to carry the fluid with them rotatively and discharge it tangentially, and a means for so mounting said rotary member as to permit the tangential escape of the fluid discharged from said blades. * * *

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"(5) A centrifugal fan or pump, comprising a rotary member having numerous elongated blades of a length approximating nine or more times their radial depth arranged lengthwise in approximately axial direction, and in substantially drum form, so as to inclose within them a relatively large and practically unobstructed intake-chamber, and in transverse section arranged, relatively to the axis and direction of rotation, to carry the fluid with them rotatively and discharge it tangentially, and a means for so mounting said rotary member as to permit the tangential escape of the fluid discharge from said blades. * * *

"(7) A centrifugal fan or pump, comprising a rotary member having numerous elongated blades of a length approximating nine or more times their radial depth, said blades arranged lengthwise in approximately axial direction, and in substantially drum form, so as to inclose within them a relatively large and practically unobstructed intake-chamber of a diameter approximating ten times the radial depth of the individual blades, and in transverse section arranged, relatively to the axis and direction of rotation, to carry the fluid with them rotatively and discharge it tangentially, and a means for so mounting said rotary member as to permit the tangential escape of the fluid discharged from said blades. * * *

"(10) A centrifugal fan or pump, comprising stationary and rotary members, the rotary member having numerous thin elongated blades arranged lengthwise in approximately axial direction, and in substantially drum form, so as to inclose within them a relatively large and practically unobstructed intake-chamber, and in transverse section arranged, relatively to the axis and direction of rotation, to carry the fluid with them rotatively and discharge it tangentially, the blades being approximately as narrow radially and as close together as set forth, and the stationary member having an eye through which the fluid is drawn coincident with said intake-chamber and of a diameter substantially equal to that of said chamber, and having means for so mounting said rotary member as to permit the tangential escape of the fluid discharged from said blades. * * *

"(13) A centrifugal fan or pump comprising stationary and rotary members, the rotary member having numerous elongated blades arranged lengthwise in approximately axial direction, and in substantially drum form, so as to inclose within them a relatively large and practically unobstructed intake-chamber, and in transverse section arranged, relatively to the axis and direction of rotation, to carry the fluid with them rotatively and discharge it tangentially, the blades being narrow radially in proportion substantially as set forth, and the stationary member comprising a casing adapted to permit the tangential escape of the fluid discharged from said blades."

The claims in issue of patent No. 12,797 read as follows:

"(1) A centrifugal fan or pump, comprising a rotary member having numerous elongated blades arranged lengthwise in approximately axial direction, and in substantially drum form, so as to inclose within them a relatively large and practically unobstructed intake-chamber, and in transverse section arranged, relatively to the axis and direction of rotation, to carry the fluid with them rotatively and discharge it tangentially, said blades being inclined forwardly in the direction of rotation and proportioned substantially as set forth, and a means for so mounting said rotary member as to permit the tangential escape of the fluid discharged from said blades. * * *

"(3) A centrifugal fan or pump comprising a rotary member having numerous elongated blades arranged lengthwise in approximately axial direction, and in substantially drum form, so as to inclose within them a relatively large and practically unobstructed intake-chamber having a diameter equal to at least four times, and an axial length exceeding three times, the radial depth of the individual blades, and said blades in transverse section arranged relatively to the axis and direction of rotation, to carry the fluid with them rotatively and discharge it tangentially, said blades being inclined forwardly in the direction of rotation and proportioned substantially as set forth, and a means for so mounting said rotary member as to permit the tangential escape of the fluid discharged from said blades.

"(4) A centrifugal fan or pump, comprising a rotary member having numerous elongated blades of a length approximating nine or more times their radial depth, said blades arranged lengthwise in approximately axial direction, and in substantially drum form, so as to inclose within them a relatively large and practically unobstructed intake-chamber of a diameter approximating ten times the radial depth of the individual blades, and in transverse section arranged, relatively to the axis and direction of rotation, to carry the fluid with them rotatively and discharge it tangentially, said blades being inclined forwardly in the direction of rotation and proportioned substantially as set forth, and a means for so mounting said rotary member as to permit the tangential escape of the fluid discharged from said blades.

"(5) A centrifugal fan or pump, comprising a rotary member having numerous elongated thin blades arranged lengthwise in approximately axial direction, and in substantially drum form, so as to inclose within them a relatively large and practically unobstructed intake-chamber, and in transverse section having their outer edges inclined forwardly, in the direction of rotation, to such effect that the outer or discharging width of the ports between them is not greater than their interior or inlet width, whereby to carry the fluid with them rotatively and discharge it tangentially. * * *

"(10) A centrifugal fan or pump comprising a rotary member having numerous elongated blades arranged lengthwise in approximately axial direction, and in substantially drum form, so as to inclose within them a relatively large and practically unobstructed intake-chamber, and said blades formed as curved plates having their outer edges turned forward in the direction of rotation, and arranged with a forward angle or lead, with their outer edges in advance of their inner edges, so that the outer or discharging area of the ports is less than their interior or inlet area. * * *

"(14) A centrifugal fan or pump comprising stationary and rotary members, the rotary member having numerous elongated blades arranged lengthwise in approximately axial direction, and in substantially drum form, so as to inclose within them a relatively large and practically unobstructed intake-chamber, and in transverse section arranged, relatively to the axis and direction of rotation, to carry the fluid with them rotatively and discharge it tangentially, said blades being inclined forwardly in the direction of rotation to such effect that the outer or discharging width of the ports between them is not greater than their interior or inlet width, and the stationary member having an eye through which the fluid is drawn coincident with said intake-chamber and of a diameter substantially equal to that of said chamber, and having means for so mounting said rotary member as to permit the tangential escape of the fluid discharged from said blades and the aggregate effective area of the ports between the blades of said rotary member at least equal to the area of said eye."

Patent No. 12,796 declares that the invention has reference to rotary fans or pumps in which the fluid operated on is taken in axially and discharged circumferentially; and it relates to centrifugal fans or pumps in which the blades carry the fluid with them in their rotation and thereby throw it outward by centrifugal force, as distinguished from propeller fans or pumps in which the blades act upon the fluid with a wedging action pushing it from them without materially rotating it. It also says:

"According to my invention the rotary member of the fan is constructed with numerous thin elongated blades arranged in substantially drum form being extended in approximately axial direction so as to inclose within them a relatively large and practically unobstructed intake-chamber and said blades in transverse section being arranged relatively to the axis and direction of rotation to carry the fluid with them relatively and discharge it tangentially, and said rotary member is so mounted as to permit the tangential escape of the fluid discharged from its blades."

These blades are the wings or vanes which impart motion to the air after it enters the intake-chamber, which is the space within the drum formed by these blades set up edgewise. The eye is an opening in the case inclosing these blades, wings, or vanes at and about the axis through which the air enters the drum. The ports are the spaces between these blades and through which the air passes from the intake-chamber and where it is taken up, so to speak, by the blades and carried forward by them and thrown off tangentially as the blades rapidly revolve. These blades are quite numerous; may be long or short but are narrow. It is essential to maintain a proper proportion between the eye, the intake-chamber, the ports, and the wings. The patent says:

"The blades are so numerous as to follow each other in close succession, being spaced apart preferably a distance approximating two-thirds of their radial depth."

The drum-like arrangement of the blades is such as to inclose within them an intake-chamber, which preferably is approximately cylindrical and which is of large dimensions as compared with fans heretofore existing. Its diameter in the preferred proportions is five-sixths of the external diameter of the series of blades, and its length or axial dimension approximates at least three times the depth of the individual blades and in the preferred proportions is approximately nine times such depth. The patent also says:

"The drum-like series of blades is supported in any suitable manner upon a shaft or spindle revolving in suitable bearings. A convenient supporting means consists of a disk mounted on a spindle, to which disk the blades are attached at their ends remote from the intake ends. A ring or annular support is preferably provided for the opposite or intake ends. The rotary member of the fan is suitably mounted to permit the tangential escape of the fluid discharged from its blades. If not incased, this fluid can freely escape from it in all directions. If inclosed in a casing, the latter must be so constructed as to permit the tangential escape of the fluid, as, for example, by forming the casing of the usual snail shape with a tangential outlet beyond the periphery of the rotary member. In the operation of my new fan the fluid flows in axial direction into the intake-chamber, in which it expands without preceptibly revolving until it is caught by the blades and drawn into the ports between them, whereby the fluid in these ports is converted into a whirling shell of fluid, whereby it is thrown outward by centrifugal force and discharges from the outer sides of the ports as a whirling and expanding shell of fluid, the individual particles of which move in tangential direction. The blades are so narrow and so close together that no eddy-currents are caused in the ports between them, thus avoiding the loss of efficiency and the whirring or beating noise accompanying the operation of centrifugal fans as heretofore made."

The patent also says:

"It is essential to my invention that the fan-blades shall be adapted to carry the fluid with them rotatively, so that it shall be thrown outward by centrifugal force and be discharged tangentially, in contradistinction to merely exerting a wedge-like action upon the fluid, tending to thrust it outward in radial direction unaccompanied by any material rotation or whirling of the fluid. In a true centrifugal fan it is almost solely the rear surface of the blade which acts upon the fluid, drawing it around by suction, whereas in blades which thrust the fluid outward by a wedge-like action it is the front or advancing side of the blade which is the active face. Blades of the latter

kind require to be inclined or curved rearwardly to a considerable angle, especially at the outer edge which follows behind the middle or major portion of the blade. I use the expression 'in transverse section arranged, relatively to the axis and direction of rotation, to carry the fluid with them rotatively and discharge it tangentially' to exclude such wedging blades and include generically any form of blade adapted to act upon the air by rotating or whirling it, thus including blades which are substantially radial, as well as those which incline forwardly, and either flat, curved, or angled. The operation of my fan when propelling air is accompanied by the existence of a thin shell or film of rapidly-whirling air immediately surrounding the drum-like series of blades, which air is apparently compressed, and outside of this shell the air discharging from the fan escapes tangentially. Whether the fan is provided with a casing, or not, the construction must be such as to permit the whirling fluid discharged from the blades to escape tangentially therefrom in outward direction."

Claim 1 of reissue No. 12,796 covers a centrifugal fan or pump having the following elements: (1) A rotary member having (a) numerous elongated blades, (b) arranged lengthwise in approximately axial direction, and (c) in substantially drum form, (d) so as to inclose within them a relatively large and *practically* unobstructed intake-chamber, and (e) in transverse section arranged relatively to the axis and direction of rotation to carry the fluid with them rotatively and discharge it tangentially; and (2) a means for so mounting said rotary member as to permit the tangential escape of the fluid discharged from said blades. I discover nothing at all new or novel in the means for mounting the rotary member. In the light of the specifications, we are to ascertain the meaning and significance of "numerous elongated blades" and "relatively large and practically unobstructed intake-chamber." This claim (1, No. 12,796) is so broad in and of itself as to include any and every fan having "numerous" blades "elongated" arranged lengthwise in approximately axial direction and substantially drum form so as to inclose a relatively large and practically unobstructed intake-chamber and so arranged in transverse sections as to carry the fluid rotatively and discharge it tangentially. So far as the language of this claim is concerned, the intake-chamber may be twice as large as a barrel and three times its length, or the size of a lamp chimney, and there may be 6 or 60 of the elongated blades. In short, no proportion whatever is suggested. But all this is found in the specifications. Claim 5 of this patent differs from claim 1 in that it specifies numerous elongated blades "of a length approximately nine or more times their radial depth" arranged, etc. Claim 7 of this patent differs from claim 5 in that it specifies an intake-chamber "of a diameter approximately ten times the radial depth of the individual blades." Claim 10 differs from claim 1 in that it specifies "thin" elongated blades, and that the blades are "approximately as narrow radially and as close together as set forth, and the stationary member having an eye through which the fluid is drawn coincident with said intake-chamber and of a diameter substantially equal to that of said chamber." Claim 13 differs from claim 1 in that it specifies "the blades being narrow radially in proportion substantially as set forth, and the stationary member comprising a casing adapted

to permit the tangential escape of the fluid discharged from said blades." The words in claims 10 and 13 "as set forth" must refer to the dimensions set forth and stated in the specifications.

The Fournier and Cornu patent (1896, French) and the Levet patent (1890, French) are relied upon as anticipations. The ventilator of Fournier and Cornu consists of a wheel having curved iron blades and is mounted centrally on a disc-shaped casting. The blades are $\frac{14}{100}$ in width of the exterior diameter of the wheel carrying the blades and are connected at their ends by circular sheet metal bands of the same exterior diameter as the wheel and having an interior diameter equal to $\frac{72}{100}$ of their exterior diameter. To illustrate, if the exterior diameter of the wheel carrying the blades is 100 inches, the blades will be 14 inches wide, and 28 inches of the diameter of the wheel or drum formed by the blades, etc., will be occupied by the blades leaving an air chamber 72 inches in diameter, and the opening into this air chamber (*J, J'* of the drawings) is of course 72 inches in diameter, unless otherwise obstructed, and it is here that the air or other fluid is intended to enter. All this is shown by the following in connection with the drawings, which cannot be reproduced here, viz.:

"The disc-shaped casting *C* is splined upon the shaft *F* of the wheel *A*. The total width of the paddle wheel may vary but should equal at least two-thirds of the exterior diameter. The blades *B* are in the shape of an arc of a circle, the tangent *G* to a blade at the point *H* where it meets the outer circumferences of the turbine and the tangent *G'* of said circumference at the same point and directed in the direction of rotation intersect at an angle of 115 degrees. The wheel *A* rotates in a casing *I* which may be a casting or consist of iron, and the lateral walls of which are provided with circular openings *J, J'* whose centers are on the axis of the shaft *F* of the wheel *A* and whose diameter is equal to the diameter of the circle formed by the inner edge of the circular bands *D, D'*. The two openings constitute the suction orifice of the ventilator. A single exhaust opening is formed at *K* in the cylindrical wall of the casing *I*, having a width equal to that of the interior of the casing, and a section less than the sum of the sections of both the suction openings *J, J'*."

The patent says:

"The wheel *A* turning with the desired speed, the blades *B* throw out the air between them and draw in the air contained in the middle portion *L* (air chamber of Davidson), which in turn draws in the air at the outside of the casing *I* through the openings *J, J'* (above referred to), said air thus entering naturally the central portion *L* and passing through the spaces *M* between the wings *B* and out freely by the exhaust opening *K*."

Nothing is said in this patent as to the number of blades or as to the width of the opening between them. However, the drawings show numerous blades curved forward; that is, in the direction of rotation. In some respects Davidson is a reproduction of this patent, but it is different in many respects and an improvement. Davidson has advanced and made discoveries. Both have a wheel with numerous blades mounted thereon which are comparatively narrow, and this wheel is made to revolve to set the air in motion, draw it in, and force, push, or draw it out. Whether these blades in rapid revolution push the air before them or cause a vacuum behind into which the air rush-

es and so is in a way drawn along a short distance before it is expelled tangentially as mud is thrown off by a wagon wheel in rapid revolution, to an extent the Fournier and Cornu patent operates in the same manner and on the same general principle as Davidson. Both have numerous narrow blades; both have substantially the same intake-chamber; in both the air is drawn in axially (that is, at a large opening about the axis, as large as the construction will permit); and in both the air passes out between the blades and in rapid motion passes off generally into space or into and through a conduit to some desired point or place. In similar devices the blades have stood out straight from the axis or have projected forward or have leaned backward, and some have been straight blades and some curved. All this has more or less to do with the effectiveness of the fan or pump. I think invention was involved in devising an improved construction with proper and improved proportioning of parts or elements so as to draw in and force out the greatest amount of fluid in a given time with the same amount of motive power and a fan or pump of the same size. Whether the purpose be to pump foul air out of a room or to force fresh air in, the smaller the fan, if it will do the same work with the same power applied, the better. A proportioning of parts of the device is therefore all-important to secure the greatest possible efficiency, and, while these French patents referred to have given some proportions for some elements, they have not covered the same ground as has Davidson. I have carefully studied the Hotchkiss patent of 1863, No. 40,482, "improvement in blowers," but fail to find anticipation there. The proper proportioning of the parts to secure the best and most efficient and economical results is absent, as are some of the details of construction. It would be a waste of time to describe the whole of the prior art or enter more into detail. In regard to the Hotchkiss patent of 1863, it seems plain that it operates and was intended to operate on a different principle from that of the patent in suit. He rotates the air but very little, if any, and avoids doing so, and so states, but compresses it in the air chamber. I have read with interest the evidence of all the experts and that as to tests made and am satisfied that the reissues A and B in controversy here disclose patentable invention in view of the prior art. It is at least an improvement in producing a greater volume, in compactness, in giving a higher pressure and in economy. It has the advantage of "silence"; that is, it reduces noise. He has discovered and defined the proportions so as to get results.

As to the point raised that complainant Sirocco Engineering Company was a mere licensee of Davidson and not entitled to the reissued patents, Judge Holt has passed on the question on demurrer. *Sirocco Engineering Co. et al. v. Monarch Ventilator Co.* (C. C.) 184 Fed. 84. Judge Holt said:

"But, assuming the reservations to have been covered by the reissued patent, I think that the instrument, although called a license, was in legal effect an assignment. It was a grant of the patent, with the reservation of a license to the grantor. *Littlefield v. Perry*, 88 U. S. 205, 22 L. Ed. 577; *Frankfort v. Pepper* (C. C.) 26 Fed. 336; *Pope v. Clark* (C. C.) 46 Fed. 792."

I will follow Judge Holt.

As to the claim that there was an unlawful broadening of the claims in scope on reissue, I am not at all satisfied that such is the case, and I do not see that it would be wise to enter here into a detailed discussion of the question. Such discussion would involve voluminous quotations and an interpretation of the language of the specifications. The complainant's brief states:

"In July, 1907, a suit was brought against the defendant under the original patent, No. 662,395, by S. C. Davidson, the patentee, and the Sirocco Engineering Company. While testimony in this (that) was in progress, the defendant discovered an unprinted French patent of Fournier and Cornu, dated 1896. Thereupon, through excess of caution and probably unnecessarily, the Davidson patent was reissued in three divisions."

The main ground of reissue was that so much was included in the one patent that confusion and misunderstanding was liable to arise, and that, while the invention had been made by Davidson, he, not having this prior art referred to before him, had used language which was too broad, and it was the purpose to narrow the claims and specifications so as to include the invention of Davidson only, excluding everything covered by the prior art, and so framing the language of the reissue as to leave no room for doubt. All this is shown by the application for reissue, etc. On careful examination and consideration I fail to discover any unwarranted broadening of the claims or of the scope of the same. It was the purpose to make the reissue more narrow and yet more definite, certain, and specific but not to broaden the claims. The omissions, additions, and changes were made for this purpose and, I think, were proper and within legitimate bounds.

After considering the voluminous record and briefs, I am of the opinion that the patents in suit disclose invention and are valid.

Infringement.

The main contention of the defendant on the issue of infringement is that defendant's fan does not have "a relatively large and practically unobstructed intake-chamber" which is an element of the claims of the patents in suit. I do not think this contention can be sustained. The defendant supports its blades on spokes or spider arms, which as matter of fact pass through the intake-chamber, but they are not a material obstruction to the ingress and egress of air, and it seems to me that under the proof the intake-chamber of the defendant's fan is not only "relatively large" but "*practically* unobstructed." *Practically* there is no detriment to the operation of the fan, and defendant does not claim there is. These spider arms in defendant's intake-chamber which do no harm, which do not impair the effectiveness and usefulness of the fan or chamber, leave the chamber "*practically* unobstructed." For practical purposes and usefulness they do not obstruct. It is not at all certain they do not add to the effectiveness of the fan. I think infringement is clear. It is not considered necessary to go into the English and German litigations and decisions all in favor of the patentability of Davidson's discovery and the validity of these

claims. I have not overlooked the contention that there was such great delay in applying for the reissue that same is invalid. Under all the circumstances shown, I am of the opinion there was no undue delay. The motion to expunge testimony is denied. It has all been considered and given such weight as the court thought it entitled to.

There will be a decree for the complainant as prayed, with costs.

20TH CENTURY MOTOR CAR & SUPPLY CO. v. HOLCOMB CO.

(District Court, D. Connecticut. October 2, 1913.)

No. 1,361—In Equity.

PATENTS (§ 328*)—INFRINGEMENT—WIND SHIELD FOR AUTOMOBILES.

The Williams patent No. 1,011,892 for a double sash wind shield for automobiles, limited as it must be to the precise construction shown, *held* not infringed.

In Equity. Suit by the 20th Century Motor Car & Supply Company against the Holcomb Company. On final hearing. Decree for defendant.

Offield, Towle, Graves & Offield, of Chicago, Ill., for complainant.
Newton, Church & Hewitt, of New Haven, Conn., for defendant.

MARTIN, District Judge. The complainant alleges that it is a corporation duly organized having its principal place of business at the city of South Bend, state of Indiana; that one Martin L. Williams, a citizen of said South Bend, was the inventor of a double sash wind shield for use on automobiles; that the said Williams obtained a patent therefor, dated December 12, 1911, No. 1,011,892; that said patent was duly assigned to the complainant; that the defendant, a citizen of the state of Connecticut, knowingly and willfully manufactured and sold a large number of wind guards made in accordance with and containing the improvements and inventions described and claimed in said letters patent. It is unnecessary to state the allegations. The usual prayers are made.

The complainant alleges that its wind shield comprises—

“an upright lower sash, supporting brackets connected with the upper portions of the sash at each side and extending laterally therefrom, an upper sash, links connecting the side of the upper sash with said supporting brackets at points remote from the lower sash, means for locking said upper sash either in alignment with the lower sash, or in tilted relation to the lower sash with its lower edge offset and spaced away from the upper edge of said lower sash, and means for supporting the lower end of said upper sash when lowered into position alongside of, and approximately parallel with the lower sash.”

The objects of the invention, in the language of the specifications—

“are to provide a construction in which the upper sash may be lowered out of the way when not in use, or may be shifted to an intermediate position to permit of the driver seeing ahead without looking through the upper glass, and at the same time affording him the protection of the latter.”

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

All the evidence in this cause was taken by the plaintiff. The defendant was notified, but did not attend. It was stated by counsel on hearing that no request would be made for an accounting, as they were unable to prove any sales by the defendant that would make it worth while.

Wind shields for automobiles, constructed of two sashes divided near the center, adjustable for an opening that the driver might view the road between the two sashes, in case of storm, and also an adjustment for dropping the upper sash down by the side of the lower sash, were patented and used before the Williams patent in suit was granted. The Williams patent devised a new way of handling the sash as to the opening between the sashes, holding the upper sash in place and dropping the upper sash down beside the lower sash. This patent may come within the range of invention, yet it is self-evident that there are many different devices for the handling of the upper sash of a wind shield resulting from mechanical genius; the Williams patent showing the result of the work of one mechanic and the defendant's that of another. The Williams patent has a set of rods on each end of the shield which are called "links"; it has a spring clasp to hold them, and a horizontal bracket, described in the letters patent as "a bracket extending laterally," and it has a device for dropping the top sash. The defendant in constructing his wind shield used rods and brackets, and the top sash may be dropped, but they are constructed differently, and upon different principles from those of the plaintiff.

Had the patent in suit been a pioneer as to an adjustable opening between the two sashes, or the dropping of the top sash, the defendant's device might have infringed, but the plaintiff is limited in this case to a particular way of doing it that differs from inventions preceding his. His patent comes as near imitating or infringing the prior art as the defendant's device does to infringing or imitating the plaintiff's device.

Again, in my opinion, the complainant's invention is not a useful one. The width of the opening between the sashes cannot exceed three inches in the clear, and such a narrow opening is not practical, while the defendant's device provides for a much wider space, better adjustment for service, and is more useful. My conclusion is that the complainant is not entitled to a decree.

Let judgment be entered for the defendant.

SALT'S TEXTILE MFG. CO. v. TINGUE MFG. CO.

(District Court, D. Connecticut. October 4, 1913.)

No. 1,379, in Equity.

PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—PLEADING.

Rule 30 of the new equity rules (198 Fed. xxvii, 115 C. C. A. xxvii), which requires the answer to state any counterclaim arising out of the transaction which is the subject-matter of the suit, should be liberally and not narrowly construed, and a counterclaim set up in the answer is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

an infringement suit setting out a transaction arising out of complainant's claim of infringement from which defendant alleges he suffered damages is within the rule.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*]

In Equity. Suit by the Salt's Textile Manufacturing Company against the Tingue Manufacturing Company. On motion to strike out counterclaim. Motion denied.

Gifford & Bull, of New York City, for complainant.

Baird, Cox & Scherr, of New York City, for defendant.

MARTIN, District Judge. This action was brought upon an alleged infringement of the plaintiff's patent, which relates to a particular manner of making cloth. The defendant concedes the issuing of letters patent but denies infringement and avers that it has been engaged in the use of the complainant's method of making cloth for many years antedating the plaintiff's patent.

The defendant also undertakes to make use of equity rule 30 (198 Fed. xxvii, 115 C. C. A. xxvii), which reads in part as follows:

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit and may without cross-bill set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claim."

The defendant alleges that it has a counterclaim against the plaintiff in that the defendant gave the plaintiff a sample of the fabric which it used long prior to the plaintiff's patent and that said sample was substantially the same as the cloth manufactured under the patent in suit, and further alleges that the plaintiff admitted that it was an answer to the alleged infringement, but thereafter brought this suit and caused the defendant damages in advertising to the trade the pendency of the suit, etc.

It is now moved that this answer be stricken out as not coming within the provision of said rule 30. In support of said motion counsel for the plaintiff cites the opinion of Judge Dodge in *Terry Co. v. Sturtevant Co.* (D. C.) 204 Fed. 103. The language quoted in the plaintiff's brief from Judge Dodge's opinion aptly applies to the case he had in hand, for there the defendant attempted to make use of rule 30 by charging the plaintiff with infringement of a patent which the defendant had become the owner of. Nothing of that sort appears in this answer.

The language from the opinion of Judge Hazel in *Williams Co. v. Kinsey Co.* (D. C.) 205 Fed. 375, is also referred to. I am not sufficiently familiar with the equities of the case that the learned judge had before him to discuss this opinion.

As I understand, the object and purpose of these new rules in equity, including rule 30, is to lessen costs for litigants in the court of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

equity, bring about more speedy and effective relief to the parties therein, do away with technical questions that may be a hindrance to speedy justice, and settle all matters in controversy between the parties that may fairly arise from the allegations of the complaint. To meet these demands, rule 30 should be construed liberally, not narrowly. The language of the rule is:

"The answer must state (not may state) any counterclaim arising out of the transaction which is the subject-matter of the suit and may, without cross-bill, set out any set-off or counterclaim against the plaintiff," etc.

This is to afford an opportunity for the defendant, by answer only, to assert any wrong which he claims to have suffered arising from the matters alleged in the bill.

The answer in the case at bar sets out a transaction that grew out of the plaintiff's claim of infringement of his patent and, in my opinion, is within the rule.

The motion to strike out is denied.

LIGHT v. TOLEDO, ST. L. & W. R. CO.

(District Court, N. D. Ohio, W. D. February 15, 1913.)

No. 2,293.

1. TRIAL (§ 63*)—RECEPTION OF EVIDENCE—REBUTTAL.

Where testimony offered in rebuttal was a substantive part of plaintiff's main case, the fact that as offered it would tend to contradict defendant's evidence, which in turn contradicted the testimony in chief, did not make it competent in rebuttal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 151-153; Dec. Dig. § 63.*]

2. TRIAL (§ 62*)—RECEPTION OF EVIDENCE—REBUTTAL—IMPEACHMENT.

Impeachment, to be competent in rebuttal, must be something more than a mere contradiction of the same character as the evidence in chief, to which the testimony in defense is offered in contradiction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 148-150; Dec. Dig. § 62.*]

3. TRIAL (§ 63*)—RECEPTION OF EVIDENCE—REBUTTAL—"INADVERTENT OMISSION"—"UNEXPECTED CONTEST."

That plaintiff failed to introduce certain witnesses in chief whose testimony was a substantive part of plaintiff's main case, because it was assumed that defendant would call the witnesses, such failure was not an "inadvertent omission," or an "unexpected contest," sufficient to move the court to permit plaintiff to introduce the witnesses in rebuttal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 151-153; Dec. Dig. § 63.*]

At Law. Action by Maryetta Light, as administratrix, etc., against the Toledo, St. Louis & Western Railroad Company. On motion for new trial. Denied.

A. F. Hanson and James H. Southard, both of Toledo, Ohio, for plaintiff.

Brown, Geddes, Schmettau & Williams, of Toledo, Ohio, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

KILLITS, District Judge. [1] We propose to notice particularly the position of counsel for plaintiff that the court erred in excluding the testimony of the two Pratts, offered by plaintiff in rebuttal. It is very plain, and in fact not disputed by counsel for plaintiff, as we understand them, that this testimony was competent in chief. In our judgment, it went beyond the fact of mere competency; it became, considered in the light of the allegations of the petition, a substantive part of the plaintiff's case in chief. The fact that, as it was offered to be testified to, it would tend to contradict the evidence of the defendant does not make it proper rebuttal under the circumstances, because the testimony which it was offered to contradict was itself contradictory of the testimony in chief. The authorities cited to us are principally cases in which the court's discretion in admitting testimony in rebuttal, which was competent in chief, was not criticized.

[2] We do not think that there is any soundness in the proposition that this alleged rebuttal testimony was competent by way of impeachment. Impeachment, to be competent in rebuttal, must be something more than a mere contradiction which is of the same character as the affirmation in chief to which the testimony in defense is offered in contradiction.

The case cited to us from *Ankersmit v. Tuch*, 114 N. Y. 51, 20 N. E. 819, was a case in which the rebuttal testimony was pure impeachment, and is no authority for the position taken by counsel under the facts of this case.

Wigmore on Evidence, vol. 3, § 1873, says:

"It is perfectly clear that the orderly presentation of each party's case would leave the proponent nothing to do, in his case in rebuttal, except to meet the new facts put in by the opponent in his case in reply. Everything relevant as part of the case in chief would naturally have been already put in; and a rebuttal is necessary only because, on a plea in denial, new subordinate evidential facts have been offered, or because, on an affirmative plea, its substantive facts have been put forward, or because, on any issue whatever, facts discrediting the proponent's witnesses have been offered."

These three tests, applied successively to plaintiff's offer in this case, show that the evidence in question was not proper in rebuttal. It does not meet any new, subordinate evidential facts offered by the defendant in denial. It does not meet any substantive facts offered by the defendant in support of any affirmation in the answer. It does not meet any facts offered to discredit plaintiff's witnesses. In the section quoted from Wigmore the learned author proceeds:

"The principle involved is clear. Moreover, practical disadvantages that would result from abandoning the natural order of evidence are: First, the possible unfairness to an opponent, who has justly supposed that the case in chief was the entire case which he had to meet; and, secondly, the interminable confusion that would be created by an unending alternation of successive fragments of each case which could have been put in at once in the beginning. Accordingly, it is well settled that, while the occasional difficulty of discrimination, and the frequency of inadvertent omissions and unexpected contests, add emphasis to the general principle of the trial court's discretion, yet the usual rule will exclude all evidence which has not been made necessary by the opponent's case in reply.

The last sentence quoted suggests another criterion. It cannot be said that the testimony offered in rebuttal was made necessary by the defendant's case as attempted to be made in the testimony.

It has been well argued to the court that to hold that this testimony, so competent in chief, must be received in rebuttal would be to hold that there might be, as phrased by Wigmore, an "unending alternation of successive fragments" of testimony.

[3] Neither is there here the excuse of an "inadvertent omission" or an "unexpected contest," each of which circumstances appeal to the favorable exercise of the court's discretion. It was manifest to the court at the time that these witnesses were not used in chief by the plaintiff, because it was assumed by plaintiff's counsel that defendant would use them.

We think that the jury was warranted on the facts of this case to find the verdict that it did, and that no substantial error has occurred to the prejudice of the plaintiff, and the motion for a new trial will therefore be overruled.

In re GINSBURG.

(District Court, E. D. Tennessee, S. D. August 9, 1913.)

No. 1,582.

BANKRUPTCY (§ 484*)—RECEIVERS—COMPENSATION—STATUTE—CONSTRUCTION.

Bankr. Act July 1, 1898, c. 541, § 48d, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3439), as amended by Act June 25, 1910, c. 412, § 9, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1501), provides that receivers shall receive for their services such compensation as the court may allow, not exceeding 6 per cent. on the first \$500, 4 per cent. on moneys in excess of \$500 and less than \$1,500, etc., provides that, when the receiver acts as a mere custodian and does not carry on the business of the bankrupt, he shall not receive nor be allowed in any form or guise more than 2 per cent. of the first \$1,000, and one-half of 1 per cent. on all moneys above \$1,000. *Held*, that the limitations of the proviso in clause "d" does not extend to cases other than those where the receiver is a mere custodian; and hence, where the receiver took charge of the bankrupt's goods and had them inventoried, an appraisalment made, and later advertised and sold them for much more than their appraised value, he was more than a mere custodian, and, though he did not carry on the business of the bankrupt, he was entitled to receive such reasonable compensation as the court might allow for his entire services within the limits fixed by the general provisions of clause "d," to wit, not exceeding 6 per cent. on the first \$500, etc.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 895, 896; Dec. Dig. § 484.*]

In the matter of bankruptcy proceedings of Sam Ginsburg, bankrupt. On petition of John S. Fletcher, as receiver, to review an order of the referee making an allowance of \$38 for services as such receiver. Modified and reversed.

Strang & Fletcher, of Chattanooga, Tenn., for receiver.

SANFORD, District Judge. It appears that the petitioner was appointed receiver of the estate of the bankrupt, took charge of its stock

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of goods, had them insured, and an inventory and appraisal made; and that later, on the petition of one of the creditors for an immediate sale of the goods, he, the receiver, was instructed by the referee to sell the goods, and in accordance with such order advertised the sale in the newspapers, communicated with prospective purchasers and later made the sale for \$4,600.00 in cash, although the appraised value was only \$3,970.00, and made reports of the sale and of his work as receiver at creditors' meetings. The receiver asked for an allowance of \$100.00, but the referee, being of opinion that under section 48 (d) of the Bankruptcy Act a receiver who does not carry on the business of the bankrupt cannot be allowed more than two per cent on the first thousand dollars and one-half of one per cent on all above one thousand dollars, allowed him only \$38.00. I am of opinion that this was error.

Section 48 (d) of the Act, as amended by the Act of June 25, 1910, provides that receivers appointed pursuant to section 2 (3) of the Act shall receive for their services such compensation as the court may allow, not exceeding six per cent of the first five hundred dollars, four per cent on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per cent on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per cent on moneys in excess of ten thousand dollars; provided, that when the receiver "acts as a mere custodian and does not carry on the business of the bankrupt," as provided in section 2 (5) of the Act, he "shall not receive nor be allowed in any form or guise" more than two per cent of the first thousand dollars and one-half of one per cent on all moneys above one thousand dollars. Section 48 (e) further provides that where the business is conducted by receivers the court may allow them additional compensation for such services by way of commission, on the basis of certain per centages specified in this clause.

The referee states in his certificate that "it is conceded that the receiver was more than a mere custodian," but was of opinion that the limitation of the proviso in clause (d) applies in all cases where the receiver does not carry on the business of the bankrupt. I am of opinion that this construction of the clause was erroneous, and that the limitation of this proviso only applies in cases where two conditions exist: first, that the receiver is a "mere custodian," and, second, that he does not carry on the business of the bankrupt.

In 3 Remington on Bankruptcy, § 390½, p. 105, it is said that "doubtless there may be instances arising where a receiver or marshal who does not 'carry on the business of the bankrupt', may yet be more than a 'mere custodian.' The proviso limiting the compensation of the custodian was meant to cover cases where the services performed were merely those of a 'keeper.'" This, I think, is a sound construction of the Act, which as I view it, provides for different rates of compensation to the receiver in three classes of cases, as follows: 1st, where he discharges general duties as receiver, not limited to those of a custodian, he may be allowed compensation within the limits specified in the general provision of clause (d), that is, six per cent on the

first five hundred dollars, etc.; 2nd, where however he is merely a custodian and does not carry on the business, the *proviso* applies, and his compensation is limited to two per cent on the first thousand dollars, and one-half of one per cent on the excess; and 3rd, where he also carries on the business of the bankrupt he may be allowed the additional compensation provided by clause (e).

Since, therefore, the receiver was more than a mere custodian, I am of opinion that his compensation was not limited by the proviso but that he was entitled to receive such reasonable compensation as the court might allow for his entire services as receiver, within the limits fixed by the general provision contained in clause (d), that is, not exceeding six per cent of the first five hundred dollars, etc.

The petition for review will accordingly be allowed, the order of the referee limiting the receiver's compensation to \$38.00 reversed, and the cause remanded to the referee for further proceedings fixing the fee of the receiver in accordance with this opinion. The costs incident to the petition to review will be paid out of the general assets being administered in this cause. An order will be entered accordingly.

In re TERRY et al.

(District Court, M. D. Pennsylvania. September 29, 1913.)

No. 2,262.

BANKRUPTCY (§ 68*)—PERSONS SUBJECT TO ACT—PERSONS ENGAGED CHIEFLY IN FARMING.

Persons who reside upon and cultivate land as partners, on which they raise fruits and vegetables of the value of several thousand dollars a year, which constitutes by far the greater part of their income, are engaged chiefly in farming or the tillage of the soil within the meaning of Bankr. Act 1898, c. 541, § 4, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), and are not subject to adjudication as bankrupts, although they may realize a few hundred dollars each year from other and incidental occupations.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 18, 86, 87; Dec. Dig. § 68.*]

In Bankruptcy. In the matter of James Terry, W. H. Terry, and James Terry, Jr., as partners and individuals, alleged bankrupts. On exceptions to report of special master. Report confirmed, and petition dismissed.

C. M. Culver and D. E. Kaufman, both of Towanda, Pa., and C. B. Little, of Scranton, Pa., for petitioners.

Stone & Brooks, of Canton, Pa., for bankrupts.

WITMER, District Judge. A creditors' petition was filed, to which the alleged bankrupts made answer, and requests that the petition be dismissed, claiming the benefit of the exemption extended to persons "engaged chiefly in farming or the tilling of the soil," as provided by section 4b of the Bankruptcy Act. The referee, to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

whom the matter was referred, reported as his conclusion, from the testimony taken, that the alleged bankrupts are persons engaged chiefly in farming or the tillage of the soil, and therefore are within the exception noted. It appears from the evidence that the alleged bankrupts are the owners of two parcels of land, one in Canton borough, where they reside, containing 20 acres, and another in Canton township of about 12 acres, upon which they raise all kind of vegetables, yielding them an annual income of from \$6,000 to \$7,000. Upon one of these properties is also a greenhouse in which are produced many thousand young plants of numerous variety for "setting." A fractional part of these plants are sold, but the great bulk thereof are used by them to propagate their crops. Upon one of these lots is a small pond, from which some ice is harvested, yielding them about \$50 annually in actual sales; they also own a press where cider is made, consuming an aggregate time of about two men for two weeks. An old dilapidated gristmill is also upon one of the lots. This mill was formerly operated for custom grinding, a toll being retained as compensation, but less than 50 bushels were thus ground in the last three years. For the purpose of furnishing their own supply potato crates were manufactured during rainy days upon shares, the patron furnishing the raw material. Some of these crates, not exceeding 250, were sold at 15 cents, the cost of manufacture. A portion of the products from their land is sold at wholesale, and the balance is sold at retail on the premises, or by carting it from door to door along the highway and streets of the town; and, to keep their customers supplied, during such season of the year as they are unable to furnish their own product in sufficient quantities, a small supply of fruit and vegetables are purchased and sold for this purpose. These purchases are not extensive, however, and extend each year only over a period of a month or two.

The petitioners have introduced some evidence tending to prove the averment that respondents are not chiefly engaged in farming or the tillage of the soil, and though the burden of proof may have been shifted to respondent, however, there seems to be no doubt that the burden in this case has been fully met. The alleged bankrupts have clearly shown that by far the major portion of their time and energy has been employed in advancing the fruits of the soil, that the income arising from this vocation alone amounts to several thousand dollars annually, and that derived from all other sources only a few hundred dollars, at most. The diversions principally complained of are merely adjuncts to farming or the tillage of the soil. It must be conceded that the tiller is expected to dispose of the product of his industry, and by accomplishing this he will not change the nature of his vocation, for the very apparent reason that his rightful compensation is derived from converting into cash the harvests repaid by his own efforts. Therefore, because a man who produces food products by cultivating the soil markets these products by carting the same from door to door, or by selling to merchants at wholesale, or at retail upon his own premises, he cannot be said to be a huckster and not a tiller of the soil. Neither will the fact that a tiller of the soil engages so ex-

tensively in cultivating plants for "setting" as to require the aid of a greenhouse for said purpose change the nature of his vocation, for it is then a necessary part of the business.

The other acts complained of by the exceptants are of little moment, and it cannot be seriously contended that, combined or severally, they constitute the principal business of the debtors. The question at issue is almost entirely one of fact; and, upon examination of the evidence, we see no reason why the findings of the referee should not be affirmed, as there was certainly sufficient testimony upon which to base his conclusion.

The creditors' petition is dismissed at the cost of the petitioners.

In re JOHNSON.

(District Court, N. D. Ohio, W. D. June 27, 1913.)

No. 2,081.

1. BANKRUPTCY (§ 140*)—PROPERTY—OWNERSHIP.

Where goods are sold to a buyer in the ordinary course of business and are not stopped in transitu because of the buyer's insolvency, his title becomes absolute.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

2. BANKRUPTCY (§ 140*)—PURCHASE OF GOODS—FINANCIAL REPORTS—FRAUD.

Where a seller of goods to a bankrupt on credit relied entirely on a rating given by a commercial agency, based on a totally false statement orally made by the bankrupt to the commercial agency's representative, the seller was entitled to recover the goods from the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Thomas E. Johnson, bankrupt. On exceptions to the findings of the special master in proceedings by the Brauer Bros. Manufacturing Company and the Bostwick-Braun Company for the reclamation of merchandise sold to the bankrupt. Exceptions overruled in part.

Lewis B. Hall, of Toledo, Ohio, for Bostwick-Braun Co.

R. R. Zurmehly, of Lima, Ohio, for Brauer Bros.

B. F. Welty, of Bluffton, Ohio, for trustee.

KILLITS, District Judge. This case is before the court upon exceptions taken to the findings of the special master, to whom were referred the petitions of the Brauer Bros. Manufacturing Company and the Bostwick-Braun Company for reclamation of merchandise in the several petitions described. The court has considered the evidence and the arguments of counsel in both of these cases. Considering the petition of the Brauer Bros. Manufacturing Company, we are of the opinion that the master arrived at the correct conclusion and that the petition was rightfully denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] These goods seem to have been sold in the ordinary course of business to the bankrupt, and, not having been stopped in transitu, the latter's title became complete. The finding of the special master is therefore approved.

[2] The court, however, cannot follow the finding of the special master with reference to the petition of the Bostwick-Braun Company. The ground for reclamation in this instance is the fact of a false report of the bankrupt's financial condition to the mercantile agencies. There is no dispute but that the petitioner exercised diligence in endeavoring to ascertain, through the recognized sources of information, whether or not the bankrupt was a safe customer to deal with on credit, and it is likewise true that the rating given by R. G. Dun & Co. to the bankrupt was one which amply justified the extension of such credit as was given him by the petitioner. The statement upon which the rating was based was absurdly untrue. In behalf of the petitioner, it is definitely insisted that this statement, although not signed by Mr. Johnson, was taken down by the reporter accurately from the verbal statements of the bankrupt to him, made with knowledge that they were to be used in the revision of the ratings of Lima merchants by the mercantile agency. It is also in harmony with a statement signed by the bankrupt a year previous, which, we judge, was likewise false. In view of the shambling and equivocal nature of the bankrupt's replies to questions touching his relation to the making of this last rating, wherein he suffers a loss of memory, it is not difficult for the court to find that the more reliable testimony is that of the reporter for the mercantile agency, and that Mr. Johnson had a responsibility for the false rating upon which the petitioner relied. The bankrupt's own testimony of the condition of his business, as found by him through inventories, etc., shows also that he was chargeable with knowledge of his insolvency at the time he ordered the goods in question. In the judgment of the court, it is of no consequence that the report upon which the rating was based was oral or unsigned by the bankrupt. All that is necessary to be determined is responsibility on the part of the bankrupt for the rating in question, and that responsibility is chargeable in this case, we think, to Mr. Johnson.

The exceptions to the findings of the master with reference to the petition of the Bostwick-Braun Company are therefore allowed, and the trustee is directed to surrender the goods involved described in the petition so far as the same have come into his possession to the petitioner, which shall recover its costs expended in this proceeding, taxed at \$ ———.

UNITED STATES v. LEE YOU WING.

(District Court, S. D. New York. April 30, 1913.)

ALIENS (§ 32*)—DEPORTATION OF CHINESE—GROUNDS—LOSS OF MERCHANT'S CERTIFICATE.

Where it was shown without contradiction that a Chinese person applied for a merchant's certificate on the ground that the one on which he came to this country had been lost in the San Francisco fire, which was refused, and it fairly appeared from the evidence that he entered with such a certificate and had in fact been in business as a merchant both in San Francisco and in New Jersey, the fact that he afterward became a laborer does not authorize his deportation as a laborer without a certificate.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92, 93-95; Dec. Dig. § 32.*]

Proceedings for deportation by the United States against Lee You Wing. From an order of deportation, defendant appeals. Reversed.

James A. Donegan, of New York City, for appellant.

Henry A. Wise, U. S. Atty., and Frank M. Roosa, Asst. U. S. Atty., both of New York City.

HOLT, District Judge. This is an appeal from an order of deportation. The charge is that the defendant is a Chinese laborer without a certificate. The defense is that he was a merchant, and as such not required to have a laborer's certificate.

The evidence, as usual in Chinese cases, is incomplete and unsatisfactory. The evidence, upon the whole, shows, in my opinion, that the defendant was a merchant at Hong Kong; that he came to San Francisco with a merchant's certificate, and was a merchant there; that his certificate was burned in the fire following the San Francisco earthquake; that he came East after the earthquake with \$1,500; that in 1908 he bought an interest for \$1,000 in the firm of Wah Chong Lung & Co. in Newark, N. J.; that in 1910 he applied for a certificate that he was a merchant, which would entitle him to return to this country after a contemplated visit to China; that such certificate was refused; that he then bought a laundry, where he has worked since. He was arrested in this proceeding in 1912 on the ground that he was a laborer in this country without a certificate.

His own evidence is in some respects contradictory, but in my opinion it is natural that in testifying about dates of long past events such a witness should make errors. No members of the firm of Wah Chong Lung & Co. were called in his behalf, but they may be hostile to him. He left the firm several years ago. In the examination in 1910, on the defendant's application for a certificate on the eve of his contemplated departure for China, Mr. Wiley's questions show that the defendant claimed that the firm owed him \$350, and the manager claimed that the firm owed him nothing. The manager, Yee Lo, had apparently said to Mr. Wiley that the defendant had been a member of the firm; that he joined before Li Lip. Mr. Wiley did not examine Yee

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Lo, or Mr. Tirrell, or Mr. Smith, white witnesses, who, the defendant said, would prove his membership in the firm. Mr. Wiley refused to give the defendant a merchant's certificate, but he took no steps to have him deported as a laborer until two years after.

I think the fact that the defendant applied for such a certificate is entitled to considerable weight. He would probably not have dared to apply for such a certificate if he was a common laborer. The fact, too, that Mr. Wiley, although refusing to give it, took no action against the defendant for two years later, is of still greater significance. The government's counsel in his brief states as an explanation of this delay that Chinese persons employed in mercantile pursuits and ostensibly having an interest in the firm in which they are working, even if they have no certificates, are not usually molested, unless found actually engaged in laboring pursuits.

But a man is either a merchant or not a merchant. If a merchant is unfortunate in business, and is obliged to become a laborer, that is no reason for deporting him because he has no certificate. He was not obliged to have a laborer's certificate if he was a merchant. Upon this record, I think that, if the defendant had continued to occupy the same relation to the firm of Wah Chong Lung & Co. that he occupied in 1910, he would not have been proceeded against; and, if that is so, the fact that he has since become a laborer does not warrant his deportation.

On the whole case, I think the order of deportation should be reversed, and the defendant discharged.

HAGAR v. BALTIMORE & O. R. CO.

MASON v. SAME.

(District Court, N. D. Ohio, W. D. July 1, 1913.)

Nos. 2,409, 2,410.

RAILROADS (§ 274*)—STATIONS—INJURY TO LICENSEES—PLEADING.

Where the beneficiary in one action and the decedent in another were alleged to have been injured by a train plunging through defendant's station house, while such persons were present therein as guests of the station agent, and there was no allegation that they were in the station on business connected with the railroad company and the accident did not occur when the station house could be called a public place because of the imminence of some train stopping at the station, there was nothing to show privity between the injured persons and the railroad company sufficient to establish a cause of action.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 868-872; Dec. Dig. § 274.*]

At Law. Actions by Claude L. Hagar, by Samuel H. Fellers, his guardian, and by Harley W. Mason, administrator of the estate of Grant Mason, against the Baltimore & Ohio Railroad Company. On demurrers to petitions. Sustained.

Benjamin F. James, of Bowling Green, Ohio, for plaintiffs.

F. A. Durban, of Zanesville, Ohio, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

KILLITS, District Judge. These cases were presented together; the points raised by demurrers to the petitions being identical, the causes of action growing out of the same incident.

The beneficiary of the first action and the decedent named in the second action were, as appears by the averments of the petition, the friends or guests of the agent of the defendant company in its station or depot house at Hoytville, Wood county, Ohio, at 11 o'clock at night, at which time some rail derangement caused a train to plunge through the station house to the injury of the former and the death of the latter.

The clear inference from the averments of the petition is that they were there on business not connected with the business of the railroad company and not at a time when, because of the imminence of some train stopping at that station, the station house could be called a public place. In our judgment the demurrers should very clearly be sustained, on the authority of *Railroad Co. v. Bingham*, 29 Ohio St. 364, and authorities cited, and *Railroad Co. v. Cox*, Adm'x, 66 Ohio St. 276, 64 N. E. 119, 90 Am. St. Rep. 583. There is absolutely no allegation in the petition which suggests any privity between the injured persons and the railroad company or any other relationship of the former to the latter than that of mere licensees of the latter, wherefore the principles of these authorities very clearly apply.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.
 FARMERS' LOAN & TRUST CO. v. METROPOLITAN ST. RY. CO. et al. (two cases).
 GUARANTY TRUST CO. OF NEW YORK v. METROPOLITAN ST. RY. CO. et al.

(District Court, S. D. New York. September 23, 1913.)

Equity 2—9, 2—23, 2—149, 3—37.

1. RECEIVERS (§ 158*)—DISTRIBUTION OF ASSETS—CLAIMS ENTITLED TO PREFERENCE—OPERATING SUPPLIES.

A court of equity, in the distribution of the assets of an insolvent railroad or street railroad company, has full power to accord priority to claims, for operating supplies furnished within a reasonable period and to a reasonable amount, over the claims of general creditors for construction or for rental, out of cash on hand at the beginning of the receivership, or the proceeds of quick assets which are unmortgaged; and, to warrant such preference, it is not necessary that the creditor should have known of and relied on the right when he furnished the supplies.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 301-306; Dec. Dig. § 158.*]

2. RECEIVERS (§ 158*)—DISTRIBUTION OF ASSETS—CLAIMS ENTITLED TO PREFERENCE—SUPPLIES.

The fact that an order appointing receivers for an insolvent street railroad company authorized them to pay claims for operating expenses incurred within four months does not deprive the court of the power, in its discretion, to award preference to claims for operating supplies furnished prior to such four months; and where current accounts for such supplies, furnished from time to time as required, down to the time of the receivership, include items for deliveries made a short time prior to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the four-month period, the preference may properly be extended to and include such items.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301-306; Dec. Dig. § 158.*]

3. RECEIVERS (§ 158*)—DISTRIBUTION OF ASSETS—CLAIMS ENTITLED TO PREFERENCE.

In the distribution of the assets of an insolvent street railroad company, claims for rentals of leased lines accruing prior to receivership are not entitled to priority of payment over general claims, as included in the class of claims for current operating expenses, to which a preference is given in equity.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301-306; Dec. Dig. § 158.*]

4. RECEIVERS (§ 158*)—DISTRIBUTION OF ASSETS—CLAIMS ENTITLED TO PREFERENCE.

Tort claims for damages to individuals arising out of the operation of a street railroad system by a lessee *held* not entitled to priority over general claims, or over claims of the lessor for rentals in the distribution of the assets of the lessee in insolvency.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 301-306; Dec. Dig. § 158.*]

In Equity. This cause comes here upon exceptions to a report of William L. Turner, Special Master, filed by various parties in interest:

The order in this proceeding provides for the filing of type claims for preference by claimants, whose claims have heretofore been allowed, or are pending, against the New York City Railway Company, in the distribution of the assets of the estate of that company, and for the filing of similar claims for preference by the same claimants, and also by other claimants, whose claims have heretofore been allowed or are pending against the Metropolitan Street Railway Company in the distribution (1) of the assets of the estate of that company, or (2) out of the proceeds of the sale of any of its property, or (3) out of the income thereof, whether or not covered by mortgage or other lien. Discretion is given to hear and report on one or more claims so filed, as well as to allow to the claimant filing the distributive share payable out of either estate. Types of claims have been filed, and proof thereon taken accordingly, and they are intended to, and doubtless do, suggest all grounds of preference which may be urged by any claimant whose claim has been allowed or is pending against either estate. A reservation in the order protects claimants not filing preference demands whose claim comes within the type to which a preference may be accorded. A single report will be made, therefore, on all claims for preference against both estates now dated, and the way will thus be cleared for a final determination by the court of the principles upon which the claims against both estates are to be disposed of. None of the claimants so filing asks that his distributive share be now reported on, for the reasons, doubtless, that claims duly filed against each estate and against the receivers are still in process of adjustment, and because the assets belonging to each estate have not yet been fully ascertained by the accounting between the receiverships necessary for that purpose. It can be said, however, at this time that there is in possession of the receiver of the New York City Railway Company unmortgaged assets, consisting of cash on hand at the beginning of the receivership, materials and supplies of an ascertained value, for which the Metropolitan receivership has to account under the decree in the so-called "termination of lease" proceeding (198 Fed. 723, 117 C. C. A. 503), and its right to share under the decree in the apportionment proceeding in assets recovered in the action at law and suit in equity therein apportioned, which are not subject to the demands of a particular class of creditors (198 Fed. 778, 117 C. C. A. 560). It has, in addition, its right to a share in the proceeds of the action at law under the latter decree for ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

penditures for construction purposes prior to the receivership, subject to the claims of construction creditors under the decision of the court in the Hugh Thomas claim, which is now before the Circuit Court of Appeals. The general assets of the Metropolitan estate, with the exception of the proceeds of sale of certain unpledged bonds, consist wholly of the amount allowed the Metropolitan Company, by such decree and the amount, if any, to be allowed on its claim against the City Company for damages for breach of the covenants in its lease to that company. Other assets are the proceeds of sale of its properties, subject to such equities as may exist against them.

In addition to claims for preference against the City estate, of which the four claims of supply creditors and the four claims of tort creditors suggest the types relied upon by such classes of creditors as entitling to a preference in the distribution of the City estate, 11 claims for preference against that estate were filed under the order, and exhaust all claims so filed against it. They are: Metropolitan stockholders, claim which has been withdrawn (198 F. 761, 117 C. C. A. 503); Central Crosstown claim (198 Fed. 756, 117 C. C. A. 503); Montague as receiver of Fulton Street Railway Company; Guaranty Trust Company, as trustee under the mortgage made by the Fulton Street Railway Company; receiver of the Metropolitan Company; Farmers' Loan & Trust Company as trustee, successor of Morton Trust Company; Central Park North and East River Company; Metropolitan Express Company (198 Fed. 735, 117 C. C. A. 503); National Conduit & Cable Company (198 Fed. 747, 117 C. C. A. 503); City of New York (191 F. 216); and New York Railways Company as holder of bonds of Metropolitan Street Railway Company.

The claims for preference filed against the Metropolitan estate find their types in the identical four claims of supply creditors above mentioned, and in three of the four claims of tort creditors so mentioned. In addition three other claims for preference are urged by tort creditors, of which one is asserted in the proceeds of the refunding foreclosure of the junior Metropolitan mortgage, and one in the proceeds of the Guaranty Trust Company foreclosure of its senior mortgage, both based on torts committed by the City Company, the third being based on a tort committed by the Metropolitan Company prior to its lease to the City Company. The other claims for preference against this estate are a construction supply claim and the claims of the Central Park North & East River Railroad Company, the Central Crosstown Company and the receiver of and trustee under the mortgage of the Fulton Street Railroad Company; these latter claims being for rent or payments in the nature of rent, and for waste arising out of breaches of its covenants in leases to the Metropolitan Company.

Except as to claims asserted by the four supply creditors to a preference in the distribution of the unmortgaged assets of the City Company it is clear that each and every other such claim above named must be denied. With reference to three of the claims for torts committed by the City Company prior to its receivership, suggested as types of claims entitled to a preference in such assets, it is sufficient to say that the court has said that they rank with general unsecured claims, and must be so classified. *Penn. Steel Co. v. New York City Ry.* (C. C.) 165 Fed. 457. Counsel for the tort creditors committee concedes this, reserving the contention for disposition by the Circuit Court of Appeals by appropriate exceptions. He does ask, however, that the fourth tort claim be accorded a preference over the Metropolitan receivers' claim against the city estate for breach of the Metropolitan city lease, and over so-called derivative claims based on the clause in such lease assuming liabilities of the Metropolitan Company under leases to it from the subsidiary companies above named, and all "subsequent" claims, which mean only the above-mentioned "Metropolitan Express" and "National Conduit" claims. This demand, it is said, is based on facts suggesting a legal conclusion not yet presented to the court for its decision, and it will be passed on after the disposition of the other questions suggested by the record has been indicated. It may be said of claims against the City estate other than the Metropolitan and the so-called derivative claims that the New York Railways Company, while stated on the record to be such, is not even a claimant for a preference, as it has filed no claim; that the claim of the city of New York for

preference has already been decided adversely to it by the court itself ([C. C.] 191 Fed. 216); that the National Conduit claim is based on an award of damages for breach of an executory contract to take cable, which was never delivered nor accepted before or after the receivership, and which did not contribute to the operation of the demised system of street surface roads in either period, and that it therefore does not come within the reason of the rule according preference to claims for supplies essential to operation; and that the Metropolitan Express Company claim, not being for such supplies, but for damages for failure to continue to accord to it the privilege of moving its freight over tracks and in cars furnished by the Metropolitan or City Companies, likewise fails to come within those rules, since a failure to furnish such facilities to this particular claimant did not of necessity tend to prevent their enjoyment by the public.

The remaining claims for preference against the City estate are claims of the Metropolitan receiver and the Farmers' Loan & Trust Company as successor to the Metropolitan mortgagee, the Morton Trust Company, for damages for waste and failure to make payments, such as taxes, arising under the Metropolitan City lease (both of which are regarded by counsel for these claimants as claims for rent), and the so-called derivative claims on behalf of the subsidiary companies, to wit, the Central Crosstown, the Fulton street and the Central Park companies for payments of taxes or interest which were undoubtedly rentals due from the Metropolitan Company under leases and contracts with it which the City Company became liable to pay by that lease. As counsel for the Metropolitan receiver insists that this claim is entitled to preference in payment out of any operating revenue of the City Company in the hands of its receiver as an operating claim *pari passu* with other such claims, and as such a principle also affects these claims of subsidiary companies, it may conveniently be disposed of in this connection, since supply creditors are insisting that it must be determined as a fact that a very considerable sum in the hands of the City receiver represents such operating revenue. The cases cited in support of the principle asserted are *St. Louis R. Co. v. Cleveland R. Co.*, 125 U. S. 658, 8 Sup. Ct. 1011, 31 L. Ed. 832, *Fordeyce v. Omaha R. R. Co.* (C. C.) 145 Fed. 544, *Savannah R. Co. v. Jacksonville R. Co.*, 79 Fed. 35, 24 C. C. A. 437, and *Manhattan Trust Co. v. Sioux City & N. R. Co.* (C. C.) 102 Fed. 710. The cases cited in support of the opposite proposition that neither rentals nor taxes payable under leases accruing before receiverships may be preferred as current operation claims are: *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663; *St. Louis Merchants Bridge Terminal Co. v. Continental Trust Co.*, 111 Fed. 671, 49 C. C. A. 529; *Gregg v. Trust Co.*, 109 Fed. 220, 48 C. C. A. 318; *Louisville & Nashville R. R. Co. v. Central Trust Co.*, 87 Fed. 500, 31 C. C. A. 89; *N. Y. P. & O. R. R. Co. v. N. Y. L. E. & H. R. I. Co.* (C. C.) 58 Fed. 268. Support is, of course, to be found in the cases cited for each proposition. Mr. Justice Matthews' opinion in 125 U. S. 658, 8 Sup. Ct. 1011, 31 L. Ed. 832, does contain statements to that effect, but a careful reading of the opinion suggests that an assumption was there made which would not have been made if it had been vital, for the purpose of showing that it availed nothing—a familiar device in arguing. However that may be, they are not to be reconciled with the decision of the court in 149 U. S. (Thomas Case) by which Judge Lurton, in the Louisville & Nashville Case (87 Fed. 500, 31 C. C. A. 89), and the Gregg Case (109 Fed. 220, 48 C. C. A. 318), felt bound. In this later case, as here, lessee companies were bound to keep in repair, and to pay taxes, assessments, and rentals, but the court said that the forfeiture clause in the leases, present here as there, showed that the lessor did not rely upon its rentals as constituting an equitable charge upon the current income of the lessee company, and it further said that, "aside from this provision for its security, the very character of the claim prevents its inclusion among that class of claims for materials or supplies proper and reasonable for the current maintenance of the railroad as a going concern, in favor of which a special equity exists." I am referred to no case in this circuit covering this subject, and shall adopt this latter view in the recommendation to be made to the court. I do not, of course, think that the cases, of which *Mercantile*

Trust Co. v. F. L. & T. Co., 81 Fed. 254, 26 C. C. A. 383, is a type, that hold that rentals accruing under leases adopted by receivers during a receivership are part of operating expenses which must be deducted from gross operating revenues before anything accrues to the trust estate have any bearing on this question.

The remaining claims for preference against the City estate are suggested by the demands of the four supply claimants who also claim against the Metropolitan estate, and out of the proceeds of sale of any of its property or income, whether or not covered by mortgage or other lien, which latter demand necessarily affects the present New York Railways Company as purchaser on the foreclosure sale of the two Metropolitan mortgages, since it has agreed to pay any claims for which a preference is established against the corpus sold. These are claims of the Hugh Thomas Company, the Smith of New York Company, the Haggerty Refining Company, and the Berwind White Coal Mining Company, each based on contracts with the City Company. It will be necessary to describe them with some particularity.

The claim of the Hugh Thomas Company is for track sand used on the entire Metropolitan system as leased to the City Company. It was furnished between May 24, and September 24, 1907, the date of the appointment of the City receivers, its agreed value being \$1,399.50. The purpose for which it was used was to sand the tracks so that the cars, in starting and stopping, might not slip. Additional sand or gravel delivered by the same company between such dates of a value of \$869.09 was used for a different purpose, viz., as gravel for repairing in connection with the reconstruction of the First avenue line, and with the first amount makes the total of \$2,268.59 allowed this claimant. It suggested the type of construction claim recently before the court, which has decided that it is payable out of a special fund for construction purposes represented in certain of the proceeds of the two actions, which were divided in the apportionment proceeding. As I read the briefs no contention is made that the construction claims of which this latter sand is a type have any preference over other claims in either estate, and of course to such claims the law accords no preference. Lackawanna Co. v. F. L. & T. Co., 176 U. S. 298, 20 Sup. Ct. 363, 44 L. Ed. 475.

The claim of the Smith of New York Company, allowed against the City Company for \$117.25, is for lanterns used upon track work, burners, and wicks used in such lanterns, and globes, burners, and wicks used in lighting horse cars. These materials were furnished between September 14 and September 24, 1907, on two deliveries, one on September 14th and the other on September 24th; the goods delivered on the 14th being received at the general storeroom and placed in stock, and those on the 24th being received at the same place to be used for stock.

The Haggerty Refining Company's claim for preference is based on the claim allowed against the City Company for \$1,920.85, for lubricating oil supplied for use in connection with the operation of the cars and power houses operated by the City Company. It was furnished in small quantities from time to time, in each month, from May 21, to and including September 11, 1907. A barrel of dynamo oil was furnished to the City Company at the Third avenue depot at Sixty-Sixth street and Third avenue on March 8, 1907, of the value of \$9.18, which is included in this claim. A small part of this claim consists of kerosene and gasoline, and all of the material furnished was used in the operation of the Metropolitan system covered by the lease.

The claim of the Berwind White Coal Company, allowed against the City Company, for \$110,540.74, is for coal delivered between the 30th day of March, 1907, and September 24th of that year. Coal of the value of \$19,345.95 was day by day delivered to the Kingsbridge station, and of the value of \$91,013.78 to the Ninety-Sixth street and First avenue power house by similar deliveries; it being stipulated that such deliveries were made for daily consumption into bunkers which held only two days' supply. The Ninety-Sixth street power house was owned by the Metropolitan Company and leased to the City Company, and it supplied power to the Metropolitan system and its subcompanies. The Kingsbridge power house was owned by the Third Avenue Company, leased to the City Company, and used as part of the

Metropolitan system. About 40 per cent. of the power developed at this latter station was transmitted directly, and charged at a fixed rate, to certain subcompanies of the Metropolitan and Third avenue systems, and the balance was turned in as alternating current on the various substations of the Metropolitan system, where it was indistinguishably intermingled in the generation of direct current for use in the operation of the Metropolitan system, including the Third and Amsterdam avenue lines with others.

Certain general contentions affecting the status of claims as supply claims, of which the foregoing are the types, which are urged by counsel for both receivers and the Mortgage Trust Companies, may be taken up before considering contentions respecting possible funds in which preference may be accorded. The first relates to the time within which such a claim must have accrued prior to the receivership, and is suggested by the barrel of oil above mentioned as delivered at the Third avenue depot on March 8, 1907, more than four months before the city receivers were appointed. It affects the claim of the Degnon Contracting Company, plaintiff in these suits, which is for snow removal in the early part of January and in February and March, 1907. The order appointing the city receivers contains a provision usual in this circuit, authorizing them "to pay and discharge all claims arising from the previous operation of said properties as in their judgment on examination are proper to be paid as expenses of operation and the current and unpaid pay rolls and vouchers incurred in the operation of said railroad system at any time within four months prior hereto." The power thus conferred was extended to the Metropolitan receivership by the order of October 1, 1907. In other jurisdictions three, and still others six, months are periods prescribed, and I agree with counsel for the Guaranty Trust Company that the insertion of such provisions is not to be regarded as the condition upon which such claims are allowed preference, or as an exercise of discretion, but as a recognition of a pre-existing right given without regard to such a discretion. The court will determine from all the circumstances whether a claim outside the period is equitably entitled to rank with those within it, as I think that the demand for the value of the barrel of oil here involved clearly should. The books are full of cases according claims accruing outside of the period prescribed rank with those within it. Some of them, with the date of accrual prior to the receivership, are these: *Southern Railway v. Carnegie Steel Co.*, 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458, 8 to 11 months; *Hale v. Frost*, 99 U. S. 389, 25 L. Ed. 419, 33 months; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596, 11 months; *Va. & Ala. Coal Co. v. Central R. R. & Banking Co. of Ga.*, 170 U. S. 355, 18 Sup. Ct. 657, 42 L. Ed. 1068, 8 months; *Central Trust Co. v. St. Louis Ry. Co. (C. C.)* 41 Fed. 551, 1 year; *Farmers' Loan & T. Co. v. Kansas City Ry. Co. (C. C.)* 53 Fed. 182, 18 months. Moreover when foreclosure follows an insolvency receivership, as some of these cases show, the time is not reckoned from the appointment of receivers in the foreclosure proceedings, but from the prior appointment. Of the many hundreds of thousands of dollars of claims of the types under examination which have been allowed against the City to date, it is to be noted that probably not more than \$50,000 accrued prior to the beginning of this four-month period, and that these, like the claim of the barrel of oil, accrued within a very short time before that beginning, which was May 24, 1907.

The next contention is that the sale of materials and supplies must have been made upon the understanding, tacit or expressed, that current earnings would be appropriated to the payment therefor, and that they were for operating purposes. It is in effect urged that the burden is on the claimant of establishing this, and that this they have not done. The truth is, however, that where materials such as oil, coal, lamp wicks, lanterns, and sand are delivered to a railroad company on its order at such times, in such quantities and at such places as those here were, there can be but one inference, and that is not only that they were intended for operating purposes, but that they were ordered on the faith or the security that the law accords to claims for such materials so ordered, and delivered in the absence of anything to indicate a contrary intent. The case of the *Southern Railway Co. v. Carnegie Steel Co.*, 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458, admits of no other

conclusion, and whatever expressions there may be in opinions in the cases cited in support of the proposition, that case must be accepted as establishing the rule which every federal court is bound to follow, and which, as here applied, is not in any way limited or qualified by the result reached in *Gregg v. Metropolitan Trust Co.*, 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717, but is on the contrary expressly recognized and reaffirmed. The *Carnegie Case*, it may be noted, decides, then, two matters: First that a claim for rails, ordered at times and in quantities which suggested an intention to use them for repairs as distinguished from construction work, fixed the creditor's status as an operating supply claimant, and without any express agreement to that effect, entitled it to assert an equity as such in current earnings *even though it accepted a note and a renewal of the note before the receivership*; and, second, that it made no difference that the rails purchased were used on the leased or controlled lines of the insolvent lessee. These propositions also answer in favor of the claimants any suggestion, based on the record, that the claim for coal transmuted into power sold to a controlled line, or for oil delivered to a leased line, or the lantern or sand that might possibly have been used in connection with construction work, deprives the claimant of status as an operating supply creditor. The record shows that the Metropolitan system devised was operated by the City Company as a unitary system, free transfers being given from lines of the system to each of the other lines, whether owned, leased, or controlled by the Metropolitan Company.

The final contention of a general nature affecting the supply claimant's status as an operating creditor is suggested by the sale to the City Company by the Smith Company of supplies on the day the receivers were appointed, which went into store and were then on hand. It is said that claims for materials on hand when receivers are appointed are not entitled to preference. It is sufficient to say as to this that the opinions in *Virginia & Alabama Coal Co. v. Central R. & B. Co.*, 170 U. S. 355, 18 Sup. Ct. 657, 42 L. Ed. 1068, and the same case below sub nom *Clark v. Central R. & B. Co.*, 66 Fed. 803, 14 C. C. A. 112, are to the contrary. There claims for supplies purchased by the lessor company, and on hand when receivers were appointed of a lessor road, and thereafter used by them, were accorded a preference. Claimants for supplies on hand when the City receivers were appointed, even though used by Metropolitan receivers, are therefore on the authority of this case and of the *Southern Railway Case*, 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458, operating supply creditors.

According, then, to the claimants, whose claims suggest the four types above described, the status of operating supply creditors, there is left for determination the funds in which the preference which the law gives them may be asserted. Among all the railroad receiverships involved in the numerous cases cited in the briefs the New York City receivership is unique in this respect: That there are no mortgage or other bonds outstanding, and that the receiver has in his possession a large amount of assets on which there are no liens, unless a lien attaches in favor of claimants such as these. These creditors assert in their own behalf and in behalf of similar creditors that they have an absolute and unqualified preference in these assets over all the other general creditors, the nature of whose claims has been indicated. This is vigorously denied, not only by the mortgage trustees under the Metropolitan mortgages, but by counsel for the receivers themselves, and they are able to point to one authority (*Whelan v. Enterprise Transportation Co.* [C. C.] 175 Fed. 212) which does hold that claims of operating supply creditors are to be preferred only over the vested liens of mortgage creditors, where operating income has been diverted for the benefit of the mortgaged property or its lienors, and not over general creditors at all. If it were not for this case I should have supposed that it had been asserted expressly or by implication in every case in the Supreme Court, from *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, to *Gregg v. Metropolitan Trust Co.*, 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717, that the court had full power to apply cash on hand at the beginning of a receivership or the proceeds of quick assets thereafter turned into cash in payment of such claims to the exclusion of general creditors for construction items or rental claims, and that such power was be-

yond question. That such is the view in this circuit has, I think, been determined in these very proceedings, in an opinion to which the attention of counsel is invited. When application was made to the court for leave to issue receiver's certificates, after pointing out that the necessity for the issue was due to the fact that the City Company had allowed the property to deteriorate, that its betterment, if confined to the properties covered by the two mortgages, would inure to the benefit of the mortgagees, and that the Metropolitan Company had a claim against the City Company under the lease for waste for such deterioration which is in the nature of rent. Judge Lacombe, in refusing the extension of the lien asked, said: "What the Metropolitan interests now ask is to make the lien of the certificates fall in the first instance on all property of the New York City Railway, and on all the earnings and income realized from the operation of the property by receivers since their appointment on the original creditors' bill against the lessee road. The natural result would be to give this claim for waste (i. e., against the City Company) a priority over all other claims, *even those of creditors for materials and supplies furnished within four months of receiver's appointment, a class of claim which is accorded priority in every federal jurisdiction.*" There is nothing in the modification which the Circuit Court of Appeals ordered, nor in its opinion, which in any way qualifies this statement of the law, and it is clearly a declaration that the supply creditors are preferred over unsecured claims for waste and those in the nature of rent which, apart from construction claims for which no preference is asserted, constituted by far the larger claims in amount against these assets.

In the Whelan Case Judge Lowell says in effect that it may seem anomalous that a claim superior to a mortgage debt is not preferred over general creditors, but that the priority rests on the duty of the mortgagee to contribute, and not upon priority in general distribution. In that case, in which the affairs of an insolvent steamship company were adjusted by the court, preference over general creditors was denied to a traffic balance due a connecting steamship line accruing prior to the receivership—a debt necessary to the business of the company, which even under the narrowed rule laid down in *Gregg v. Metropolitan*, 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717, by a sharply divided court, is with claims for labor held entitled to go against the corpus without proof of diversion of current income for its benefit. It was a claim superior even to claims for supplies necessary to current operation, which emphasizes the anomaly. But surely the fact that by the slow process of judicial development there has been evolved a doctrine which displaces vested liens in favor of supply creditors does not mean that the duty which lienors may be under is exclusive, and that general creditors who have contracted solely on the personal credit of the company are in a superior position. It implies the contrary. It is impossible to read the cases cited in the prevailing and dissenting opinions in the *Gregg* Case without concluding that their necessary implication is that unmortgaged assets not only may, but must be, resorted to before any attempt by supply creditors to displace liens created long prior to their debts can be made. The reason for the preference lies in the necessity of fulfilling a duty to the public by keeping a railroad in operation, and that necessity is as present and as urgent in the case of the railroad company with a large unsecured indebtedness as in the case of a company whose property is wholly covered by liens. If the doctrine in the *Whelan* Case is to be applied to railroad receiverships, a court charged with a duty to the public of keeping the railroad of an insolvent company in operation might be wholly unable to discharge it, for it would be unable to use the cash and quick assets of the insolvent in payment of old and new debts for supplies, which are as essential to operation as labor itself. The opinion in the *Whelan* Case points to a possible distinction between a steamship and a railroad company receivership without deciding it. Since that decision the court in the same circuit has decided that supply creditors are preferred over general creditors and has done it in a steamship receivership, but without referring to the prior decision, and it has been affirmed on appeal. *Berwind White Coal Co. v. Metropolitan Steamship Co. (C. C.)* 183 Fed. 250; *American Trust Co. v. Same*, 190 Fed. 113, 111 C. C. A. 376.

The next contention of the supply claimants respecting City assets is that to the extent of their claims they are in any event preferred in such of the assets of the City Company as are attributable to income or earnings before the receivership. That they are so preferred as matter of law does not seem to be questioned by any one, but it is as vigorously denied on the one side as it is asserted on the other that the cash on hand at the beginning of the receivership, amounting to \$683,898, can be attributed to operating receipts. The only other possible source is the advances from the Metropolitan Securities Company, and the undisputed evidence shows that these were intended for interest and rentals, among which I include taxes. Adopting the principle that such advances when intended prior to deposit for a particular purpose, though mingled with other funds, are, when withdrawals from the common funds are made for such purpose, to be deemed to have been applied to that purpose, I have no hesitation in concluding from Contract Claimant's Exhibits 119 to 124, taken in connection with the testimony of Mr. Warren, City Company's treasurer, and that of the auditors of the two receivers, that by no possibility can more than \$21,898 of the said \$683,898 of cash on hand be attributed to Security Company advances. The analyses of the accounts contained in the brief of counsel for the Berwind Coal Company, which it will not be necessary to summarize, is convincing as to this, and I do not understand from a careful reading of the briefs that it is disputed if the principle of tracing adopted is legally applicable. It is denied that it is so applicable; one contention being that all the assets in the hands of the City receiver must be regarded as the unexpended residue of the capital of the City Company. But the principle of tracing funds in bank accounts intended for a particular purpose is now firmly established (*Knarchbull v. Hallett*, 13 Ch. D. 696; *Empire Surety Co. v. Carroll County*, 194 Fed. 593, 114 C. C. A. 435; *Board of Commissioners v. Strawn*, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100; *Importers' & Traders' National Bank v. Peters*, 123 N. Y. 272, 25 N. E. 319. The equity in favor of supply creditors in earnings constitutes them a quasi trust fund; and, where it can be made to appear that assets of the insolvent are immediately derived from that source, any presumption that they are the unexpended residue of capital disappears as against operating supply creditors. In the *St. Louis & Alton Case*, 125 U. S., *supra*, under circumstances not unlike those here involved, the court points to advances made by the Pennsylvania and Ft. Wayne Companies, owners of the lessee's bonds, as a possible source of the payment of interest on the senior securities, and it did it for the purpose of indicating that earnings had not been used for that purpose.

The evidence in the case at bar goes much further, and shows why the advances made were borrowed, and indicates that they were used for the purposes intended. I conclude that of the cash on hand \$662,000 was derived from earnings, and suggest a sum in which these four supply claimants have a superior equity.

Counsel for claimants point to a further possible fund to be added to this cash on hand, which on the evidence they say cannot be less than \$621,689.10, which represents income expended for construction purposes between April 30th down to the receivership. I do not at this time determine that of the amount expended during this period for such purposes under article xv of the lease, which it is stipulated was \$1,008,505.87, this sum of 600 odd thousands of dollars, was made from income, but I hold, on the authority of the *Virginia & Alabama Coal Co. Case*, 170 U. S., *supra*, that to the extent that any part of this stipulated sum may hereafter be determined to have been made from income, such part is to be regarded as income on hand at the date of the appointment of the city receivers when restoration has been made of these stipulated expenditures under the decree in the apportionment proceeding, in which operating supply creditors have a special equity. To the extent of such sum, if and when determined, the amount of cash derived from operation available for meeting preferred operating claims against the city estate will be increased accordingly.

The supply creditors point to still further funds which, unlike the foregoing, belong to the Metropolitan estate or its lienors, on which they claim

rights, and which suggest possible sources of payment in the event that they may not be entitled in funds indicated—a possible contingency which makes it necessary to consider them. It is to be regarded as established law that the equity of the supply creditor in income is a continuing one, attaching to net income earned after, as well as to income earned before, an insolvency receivership, even though followed by a receivership in foreclosure, and that such equity is in the nature of a right in rem and not in personam, which entitles him to follow this surplus or net income of the receiverships against all persons, including the lessor and its bondholders, who can be said to have been benefited by the diversion. This doctrine must, I think, be regarded as determined by the *Virginia & Alabama Coal Company Case*, 170 U. S. 355, 18 Sup. Ct. 657, 42 L. Ed. 1068, and reaffirmed and extended in the *Southern Railway Case*, 176 U. S., supra, and not qualified by anything decided in *Gregg v. Metropolitan Trust Co.*, 197 U. S., supra. In the termination of lease proceeding (198 Fed. 723, 117 C. C. A. 503) it was decided that after September 24, 1907, the receivers were operating for the benefit of the Metropolitan estate and of its two mortgagees. Claimants insist on the strength of the receivers' accounts that during their period of operation from September 25, 1907, to December 31, 1911, sums were expended from surplus earnings for the betterment of the properties covered by the two mortgages, which constitute a diversion of that income in which claims for these supplies have a continuing equity, and which to the extent of the diversion must be restored out of the corpus. These accounts were admitted over the objection of the mortgage trustees and the purchaser on foreclosure that they are incompetent and hearsay, but I hold that the accounts of the receivers as officers of the court, appointed, as here, at the instance of the objecting trustees, are prima facie evidence of the facts therein stated, and even of such conclusions as that given expenditures were for betterments in favor of any party to the cause as against any other party. The opposite ruling would amount to a practical denial of justice. Objecting parties have, of course, the right to show that facts and conclusions from facts are otherwise, but it has been stipulated here that the question as to whether during this period there was a diversion of surplus earnings by the receivers to betterments shall be reserved. As to the question of law involved, which is not reserved, I hold again on the authority of the *Virginia & Alabama Case* (170 U. S., supra, and same case sub nom *Clark v. Central R. & Banking Co.*, 66 Fed. 803, 14 C. C. A. 112), that if there were surplus earnings of the receivership devoted to betterments of the corpus of the mortgaged estates, restoration must be made to supply creditors who were such prior to the receivership out of such corpus to the extent of the diversion. I regard that case as determining that the contracts were made with the lessee railroad company, and that as they were for supplies for use on lines of the insolvent lessor road operated as a unitary system, whether owned, leased, or controlled, they suggest a continuing equity in income before the receivership and in surplus income after the receivership, and that diversions of such income either before or after for betterments must be restored from the corpus of properties of the lessor to the extent of the diversion. By mandate of the Circuit Court of Appeals (163 Fed. 242, 90 C. C. A. 188) receivers' certificates there authorized are a primary lien upon these surplus earnings, if such there be, and the court directs that of the funds named they shall be first applied to the redemption of the \$3,500,000 of certificates authorized. As, however, the proceeds of those certificates were to be applied solely to the equipment and betterment of the properties covered by the lien of both mortgages, the redemption of the certificates will constitute a diversion of surplus income, if any, for the benefit of the corpus, which the bondholders or purchasers will be required to restore.

Further alleged diversions of income for the benefit of the two mortgaged estates which must, if from income, be restored from the corpus, are suggested by two payments of interest, one on August 30, 1907, within the four months' period of \$312,500 on the general and collateral trust bonds of the Metropolitan, secured by the first mortgage to the Guaranty Trust Company, and the other just after the receivership of \$332,080 on September 30, 1907, for interest on the refunding bonds secured by the second mortgage to the

Morton Trust Company. It will not be denied that even within the narrow rule laid down in the *St. Louis & Alton Case*, 125 U. S. 658, 8 Sup. Ct. 1011, 31 L. Ed. 832, which holds that payments out of income of interest on a senior mortgage do not benefit the estates of junior mortgages in such a sense as to require restoration from such estates to supply creditors, these payments benefited the estates of these Metropolitan mortgages, and must, if made from income, be restored from the corpus. It is denied that it can be said that they were made from income, but I think that it must be decided that the whole of the first payment, and at least \$200,000 of the second, was made from that source. The first payment was made from banks in which only income receipts were deposited, and if I am right in supposing that moneys obtained from the Securities Company, the only other source of funds disbursed, are to be regarded as disbursed for the special purposes for which they were obtained, this payment was clearly made from income. Cash on hand on September 30th was all derived from income except a possible item of \$125,000 from a controlled road (the Forty-Second street) for power furnished by the Metropolitan power houses, which might possibly be regarded as a restoration of income, but as it is deducted by claimant to avoid a question, it is not here considered. The conclusion that these payments were made from income results from the application of the principle adopted by Judge Lurton in *Gregg v. Metropolitan Trust Co.*, 124 Fed. 721, 59 C. C. A. 637. There supply creditors were permitted to show that moneys derived from outside sources were used in the payment of general debts to rebut any inference, from the commingling of such funds in the common treasury with other company funds, that there had been a restoration of income diverted in favor of bondholders to betterments or interest payments. The argument made here that moneys, though deposited in several banks, from whatever source derived, are to be regarded as in a common treasury, was made in the case cited, and conceded, but supply creditors were, nevertheless, permitted to show the facts.

Claimants make the further contention that certain payments, within four months prior to the receivership, for interest on underlying bonds—by which is meant bonds of the constituent companies of the Metropolitan—and on bonds of its leased companies, as well as for rentals to its leased lines, were made out of income, and that, if so made, constitute diversions for the benefit of the general and refunding mortgagees, which must be restored from the corpus of the property mortgaged to these latter. Of the interest and rentals thus paid, a certain amount is said to have been paid for rentals, \$409,750, and interest, \$112,500, on properties covered by both mortgages, the balance of \$449,962 being for rentals on lines covered by the refunding or second mortgage only, a total of \$914,212. That these amounts were paid from income rather than from the moneys borrowed from the Securities Company again rests on what I understood to be the fact that they were paid by checks on banks in which only income was deposited, Security Company moneys being deposited in still other banks for the special purposes for which they were used. Counsel for the mortgagees and purchaser, and of the receivers as well, insist that the *St. Louis & Alton Case*, 125 U. S. 658, 8 Sup. Ct. 1011, 31 L. Ed. 832, holds flatly that payments such as these do *not* constitute a diversion for the benefit of junior mortgagees, which these latter, or the purchaser, if he had agreed to, can be compelled to restore from the proceeds of foreclosure of their mortgages. This that case undoubtedly does decide. Claimants urge, however, that a different result was reached in *Southern Railway Co. v. Carnegie Co.*, 176 U. S., *supra*. There the Carnegie Company sold rails to the Richmond & Danville for use on its congeries of owned, leased, and controlled lines for repairs, and they were used indifferently on such lines for that purpose. The contract of purchase was shortly followed by an insolvency receivership, which was extended in foreclosure proceedings to properties covered by a mortgage of the owning company junior to one other of the same company, as well as to mortgages of constituent companies and lessor companies, the final decree in which directed the purchaser to pay into court such sums as should be adjudged to be prior in equity to the mortgage foreclosed, which the Carnegie Company claimed the price of the rails

to be. Its claim was adjudged in accordance with its prayer. During both receiverships large sums were paid for rentals, interest, and dividends out of net earnings. That the Circuit Court of Appeals decided that these payments constituted diversions for the benefit of the mortgage foreclosed is clear beyond question (cf. 76 Fed. 492, 507, 22 C. C. A. 289). I do not understand that that is disputed. It seems clear that the Supreme Court approved, not only the conclusion of the court reviewed, but its reasons, based on the same facts that suggested it. After referring to payments of interest not only on underlying bonds, but on bonds of lessor roads payable as rent, the prevailing opinion states that such payments, with others specified, "were all for the benefit of mortgage creditors" (i. e., of the Danville Company), and that "it is a clear case of a diversion of income from the payment of current debts in the interest of mortgage creditors" (see 176 U. S. 294, 20 Sup. Ct. 347, 44 L. Ed. 458). In this Southern Railway Case the court clearly was impressed by the facts that the payments in question, which were of a nature precisely similar to those in the case at bar, were essential to the preservation of the unity of the system which, as here, was of vital importance to the mortgage bondholders, so that not only morally, but in the strictest legal sense, those bondholders were benefited by diversions of income for such a purpose. That the court referred to the St. Louis Case without disapproval does not alter the effect of what it said on the facts before it, which were such as to appeal strongly to its conscience, just as in the St. Louis Case the facts there involved were such as to control the conscience of the court and fully justify the conclusion that it reached. Careful reading of the opinion of Mr. Justice Matthews shows two facts which deprived the claim there considered of any merit. One was that the alleged diversion was in fact a possible payment out of borrowed moneys, and not out of income at all; the other was that the total rent paid the claimant lessor by the insolvent lessee under the peculiar reservations of the lease exceeded the total net earnings of the line from the inception of the lease. Expressions, arguendo, based on assumptions suggested by the claimant and adopted for the purpose of reducing the claim to an absurdity, should be considered in the light of such facts, and not as necessarily controlling in cases in which the facts suggest superior equities. That the majority of the court felt this as to the St. Louis Case is indicated by the fact that, while they cite it without disapproval, it is the sole basis for the directly opposite conclusion reached by the Chief Justice in his dissenting opinion. Accordingly I shall report to the court that these payments of interest and rentals, to the extent that they were made from income, should be restored from the corpus of the mortgaged estate, if it should be necessary to do so in order to pay these supply claimants in full.

The Pennsylvania Steel Company makes a further contention that supply creditors have a preference over claims, particularly of the Metropolitan Company in assets of the City estate on account of income diverted for interest and rentals. Though based on an equity on income, which it cannot be claimed that tort creditors possess, it results in a demand that to the extent of the payments from income of interest on lines owned or leased and of rentals on the latter which are treated as diversions for the benefit of the Metropolitan Company, supply creditors are entitled to be paid out of any distributive share in City assets to which the Metropolitan Company may be adjudged entitled by reason of breaches of covenants in its lease to the City Company, and is in effect the same demand as that made by tort creditors, to be presently disposed of, that the Metropolitan claim be deferred to theirs, though based on different and perhaps stronger grounds. It is admittedly an extension to lessors of the doctrine of restoration of diverted income as developed in respect to mortgages, its conceded novelty being attributed to the unusual fact that the insolvent lessee here is in possession of a large amount of unmortgaged assets. In view of the possible funds in which the preference accorded supply claimants may be asserted, it is not thought necessary to express an opinion concerning it, but as the record is in a shape to suggest it, it is here mentioned for the purpose of bringing it to the attention of the court.

Finally one general assertion in opposition to supply claims, based on the time of the diversion, may be disposed of. It is said that a diversion of income to mortgage creditors, in order to entitle a supply creditor to priority, must have been made after the creation of the supply debt; the cases cited being *Central Trust Co. v. East Tenn. R. Co.*, 80 Fed. 624, 26 C. C. A. 30, *Kansas Loan & Trust Co. v. El Revay* (C. C.) 108 Fed. 702, and *Fordyce v. Omaha R. Co.* (C. C.) 145 Fed. 544. In the case first cited the claims accrued considerably more than six months prior to the receivership, after which there was no diversion, and in the record the master reported diversions for a period of nearly two years, the amount of which he was unable to tell. The third case follows the other two without discussion. While the facts of these cases may justify the conclusions there reached, it seems clear that the fair rule to follow as to claims accruing within a reasonable time before the receivership, such as a four or six months' period, is that suggested by Judge Lurton, though not perhaps speaking ex cathedra, on the point in *Gregg v. Metropolitan Trust Co.*, 124 Fed. 721, 59 C. C. A. 637. Referring to a supply creditor who was within the six-month period the court said: "If his rights are to be dealt with separately and apart from other creditors of his class, he would have no standing, for there is no pretense of a diversion after his debt was made. We must also treat 'gross earnings' * * * as a single fund, and all debts made for current operating expenses during that time as equally payable out of that fund before any part of it is justly applicable for other purposes." I agree with counsel for claimant that the application of the other rule to claimants within the period would put a premium on slothfulness—for the longer the creditor left his claim unpaid the more likely would it be that diversions would occur and the less likely that the vigilant creditor could assert his equity.

The last question is the claim of the tort creditors that claims of the Metropolitan arising under its lease with the City Company, and possibly the so-called derivative claims of its lessors in the assets of the City estate, should be deferred to their demands, which is another way of asserting a preference over those claims. It is not at this time claimed, as has been said, to rest on any equity in income which tort creditors possess, but on an alleged control for a long time prior to the receiverships of the City Company by the Metropolitan, which is charged with diverting the income of the City Company by the exercise of such control to the payment of dividends not earned upon its stock, to say nothing of unearned rentals to lessors, and interest by way of rent on underlying bonds and the bonds of lessor companies leaving tort claims, which it is urged are in railroad practice regarded as operating claims, wholly unpaid. The assertion, however, that the Metropolitan Company controlled the City Company is not strictly accurate. For considerably more than a year prior to the receivership the Interborough-Metropolitan Company controlled a very large majority of the share stock of the Metropolitan Company, and through its ownership of a controlling interest in the stock of the Security Company, which in turn owned all of the stock of the City Company, controlled that company too. The two companies were therefore in a common ownership, and under a control which was manifested in an identity of directors and officials and of administration generally. In other words, as the Court of Appeals said on the appeal on the action at law, they were departments of one great corporate enterprise. There was, of course, a considerable minority interest in the stock of the Metropolitan Company not subject to this control. The Circuit Court of Appeal has said in the "Invalidity Proceeding" (198 Fed. 767, 117 C. C. A. 503), respecting the lease between the two companies which it adjudged to be valid, and respecting contentions of the tort creditors which are in effect those urged here, that it perceived "no reasons urged in their behalf upon which the court could declare the lease invalid, nor the claims based thereon illegitimate." What we have then is a contention that the payment of claims arising under the lease which have been adjudged to be legitimate demands is to be regarded as fraudulent because lessor and lessee were under a common control, and that tort claimants have not been paid. It may be matter of regret that a legal basis cannot be found in statutes or decisions for the contention, but I

am unable to find one. Railway corporations are not controlled by the statutory rules applicable to other bankrupts, and the law in the absence of express provision does not make the payment of one lawful demand rather than another fraudulent as to the latter, even though the debtor be insolvent. And it is to be noted that dividends, though paid by the City Company direct to the Metropolitan stockholder under the lease, were strictly a rental payment, and, as the court has held, a legitimate demand.

The contract creditors will prepare a report in accordance with the foregoing, to which objections may be made and amendments proposed at a hearing on June 23, 1913, at 11 a. m.

O'Brien, Boardman & Platt, of New York City (George N. Hamlin, of New York City, of counsel), for John D. Crimmins et al., as a committee of contract creditors of N. Y. City Ry. Co.

Byrne & Cutcheon, of New York City (C. M. Travis, of New York City, of counsel), for Pennsylvania Steel Co. and Degnon Contracting Co.

Curtis, Mallet-Prevost & Colt, of New York City (F. Kingsbury Curtis, of New York City, of counsel), for Berwind White Coal Mining Co.

Charles Benner, of New York City (Benjamin S. Catchings, of New York City, of counsel), for committee of tort creditors of N. Y. City Ry. Co.

Harold C. Mitchell, of New York City, for J. P. Sjoberg Co.

Robert R. Howard, of New York City, for Atlantic Cement Co.

Parsons, Closson & McIlvaine, of New York City (Hiram Barney, of New York City, of counsel), for Eggleston Bros.

Johnson & Galston, of New York City (Clarence Galston, of New York City, of counsel), for National Conduit & Cable Co.

Page, Crawford & Tuska, of New York City (William H. Page and G. H. Crawford, both of New York City, of counsel), for Metropolitan Express Co.

Satterlee, Canfield & Stone, of New York City (K. T. Frederick, of New York City, of counsel), for Loraine Steel Co. and others.

John R. Abney, of New York City, for Mollie L. Latta, as administratrix.

Masten & Nichols, of New York City (Arthur H. Masten and William M. Chadbourne, both of New York City, of counsel), for Douglas Robinson, as receiver of Metropolitan Street Railway Co.

Dexter, Osborn & Fleming, of New York City (Matthew C. Fleming, of New York City, of counsel), for William W. Ladd, as receiver of New York City Railway.

Davies, Auerbach & Cornell, of New York City (Brainard Tolles and Charles H. Tuttle, both of New York City, of counsel), for Guaranty Trust Co. of New York and others.

Geller, Rolston & Horan, of New York City (Charles T. Payne, of New York City, of counsel), for Farmers' Loan & Trust Co., as trustee.

Choate & Larocque, of New York City (Gilbert H. Montague, of New York City, of counsel), for Gilbert H. Montague, as receiver of Fulton Street Railroad Co.

Richard Reid Rogers, of New York City (J. Tufton Mason, of New

York City, of counsel), for New York Railways Co. and Central Crosstown Railroad Co.

Strong & Mellen, of New York City (Chase Mellen of New York City, of counsel), for Central Park, North and East River Railroad Co.

Archibald Watson, of New York City, Corp. Counsel (Frank Pierce, of New York City, of counsel), for the city of New York.

Simpson, Thacher & Bartlett, of New York City (Graham Sumner, of New York City, of counsel), for John I. Waterbury and others, as a committee of stockholders Met. St. Ry. Co.

LACOMBE, Circuit Judge. The report so fully states the facts and the contention of the several parties, and its citation of authorities is so exhaustive, that it would needlessly incumber the record to do more than briefly state the conclusions reached here.

[1] The first claims to be considered are the four type claims, that of the Hugh Thomas Company and three others, referred to as operating supply claims. They are for materials and supplies, bought by the City Company, shortly before receivership, for use in operating the road. The objections urged to the master's findings that they were all of them in fact operating supply claims are unpersuasive, and the exceptions to those findings are overruled.

Claims of that character against bankrupt railroad companies have for years been accorded in the federal courts a special equity, which has entitled them to a certain priority of payment. Various theories for the creation of this special equity have been suggested, but the most satisfactory one finds its basis in public policy. A railroad is a peculiar sort of property; the public interest requires that its operations shall not cease. Whoever is undertaking to operate it, owner or lessee, must continue to do so, even at loss to itself, or the public will suffer. The operation may be so unprofitable, the operator may become so embarrassed, and its credit so impaired that it might not be able to purchase the supplies absolutely necessary for such continued operation on its own credit; dealers might be unwilling to part with their materials on the chance that the purchaser will manage in some way to pay for them before it fails. In order, then, that embarrassed railroad operators may be able to obtain the supplies necessary to keep the road running, the courts have held that persons who sell supplies of that character, for that purpose, in quantities not in excess of the requirements of the road for a brief period, shall be entitled to some security better than the personal obligation of a failing corporation. That security is found in priority of payment; the individual whose materials keep the road running for the last few weeks or months before bankruptcy has the first claim to what there may be found out of which payment can be made. Equities of a somewhat similar nature have been known to the admiralty law for a long time. In the case of a bankrupt railroad the courts have even, in some cases where the circumstances made it equitable to do so, allowed this special equity to displace the lien of a prior mortgage on the corpus of the property. Here, however, there is no question of any prior mortgage; none was ever made by the City Company, and all of its assets which

came into the hands of receivers were wholly unmortgaged. From a careful study of the authorities, it does not seem to this court that the peculiar and special circumstances which must be shown to justify according to an operating-supply claim a priority over the holder of a mortgage covering the property from which the claimant seeks payment need be shown when the latter asks to displace no prior lien, and to be paid only from unmortgaged assets. Practically all the authorities bearing on this question of priority in payment of supply claims are found in the master's opinion, and will be fully discussed, no doubt, upon appeal. To review them here would be a duplication. The master says:

"If it were not for this case (*Whelan v. Enterprise Transportation Co.* [C. C.] 175 Fed. 212), I should suppose that it had been asserted expressly or by implication in every case in the Supreme Court from *Fosdick v. Schall*, 99 U. S. 235 [25 L. Ed. 339], to *Gregg v. Metropolitan Trust Co.*, 197 U. S. 183 [25 Sup. Ct. 415, 49 L. Ed. 717], that the court had full power to apply cash on hand at the beginning of a receivership or the proceeds of quick assets thereafter turned into cash in payment of such claims (for operating supplies within a reasonable period and to a reasonable amount) to the exclusion of general creditors for construction or for rental claims, and that such power was beyond question."

In this statement of the law, as deduced from the authorities, this court fully concurs.

It is contended that there should be affirmative proof, direct or circumstantial, as to each claim that the claimant did not rely on the personal credit of the purchasing company, but parted with his goods in the expectation that, in the event of failure, he would be paid for them out of the unmortgaged assets. Reference is made to *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950, 34 L. Ed. 379, where the claim was not for labor or supplies furnished for current operation. But, if the above quotation correctly expresses the law, such proof seems unnecessary. Every one is assumed to know the law, however ignorant he may really be of its provisions. That assumption has resulted in many cases of great hardship to the individual; there is no reason why it should not be applied when the result will give him a benefit. If as matter of public policy claims of this character are accorded a special equity, they should have it whether the vendor at the time of sale did or did not know that he was entitled to it.

[2] The conclusions of the master that all of these type claims are, under all the circumstances, within the time limitation approved by controlling authority are also concurred in.

Having reached the conclusion that these four type claims should be first paid out of the general unmortgaged assets of the City Company's estate in the hands of the court, the master quite properly made findings and conclusions as to the existence of certain specific funds, out of which on one theory or another, it was contended that they were entitled to priority in payment. It is not thought necessary to take up this branch of the case, for these reasons: When receivers were appointed the court came into possession of over \$600,000 in cash and materials and supplies on hand, valued at over \$1,150,000. The estate

of the City Company loaned the cash and sold the supplies to receivers to enable them to operate the system. Receivers have also collected for the same estate, on bills receivable, insurance prepayments and similar items over \$400,000. The amount of credits resulting from the loan of the cash and the sale of the materials has been reduced by payments made on account of the City Company's estate by an amount concededly less than \$600,000. That estate, therefore, has about \$1,500,000 from these sources, and upwards of \$2,000,000 as proceeds of a chose in action (the so-called "Equity Suit")—all of these assets are unmortgaged. Since the total amount of all claims against the city estate of the kind represented by the four type claims is considerably less than \$1,000,000, it is unnecessary to search for any fund from which to pay them other than these same unmortgaged assets. Such an inquiry will become necessary only should the Court of Appeals reverse the holding of this court as to the special equity of such claims in these unmortgaged assets. In order, however, that the whole case may be before the appellate court, all the findings and exceptions should be disposed of in some way; this can be done by a pro forma disposition of such of them as this court does not find it necessary to consider. Such disposition will prejudice nobody, since it expresses no opinion as to the questions thus disposed of, and it makes no difference which interest appeals, as the expense of preparing the record will, as it has heretofore been, be borne by the estate.

[3] The next claims to be considered are for rent, dividends, and taxes covenanted to be paid under some lease or leases. Prior decisions in this litigation classify all such claims as in substance for rental. The court concurs in the master's conclusion that such claims are not of a character which admits of their inclusion among that class of claims for materials and supplies proper and reasonable for the current maintenance of a railroad as a going concern, in favor of which a special equity has been created by controlling decisions.

[4] The next claims are those for tort; that is, for damages resulting to individuals from the operation of the road before receivership. It is contended that because such damages are the usual and natural result of running a railroad, they are to be considered as much an operating expense as are the various materials and supplies used in such operation. The question of priority in payment of tort claims of this sort has been frequently before the courts; the decisions clearly indicate that they rank with general unsecured claims. It may be that in some case, where shocking injustice would result from thus classifying them, a court of equity might be inclined to extend the rule as to operating-supply claims so as to cover them. But that is not the situation here. It has been repeatedly remarked that this receivership presents unique features, mainly because the road was operated by a lessee which issued no mortgage; the title to the corpus of the property—lands and buildings, tracks and equipment—remaining in the lessor with whom none of these claimants had any direct relations. The supplies were sold to the City Company; the damages resulted from its operations; it, not the lessor, the owner of the corpus, was the one to respond therefor. In the course of the litigation foreclosure suits

against the owner of the corpus were prosecuted to a final conclusion, and the property, as is usual in such cases, was sold for a sum which represented, not its value, but approximately the amount of securities held by the bidders. This proceeding is peculiar also in the circumstance that, at no expense to themselves, with no assessment laid against them, the holders of these tort claims were permitted and invited to come in and share in this acquisition of the corpus, to which their debtor had no title, on the same basis as the holders of first mortgage bonds. Out of \$1,900,000 of such claims proved, \$1,465,000 availed of this unique opportunity. Those of the claimants who neglected or rejected such opportunity seem hardly in a position to insist that new law should be made in this case, in order to classify them with operating supply claimants. The court concurs fully in the disposition made by the master of the contention made by the tort claimants that claims of the Metropolitan Company arising under its lease to the City Company should not be *deferred* in payment to the tort claims.

It is unnecessary to add anything to this concluding part of his opinion.

As to all other claimants for preference the decision of the special master is affirmed.

To the findings of fact numbered 3, 4, 5, 8, 9, 10, 12, 14, 15, 16, 17, 20, 21, 22, 23, 24, 25, and 59 to 81, both inclusive, no exceptions have been filed; they therefore stand confirmed.

The exceptions to findings numbered 6, 11, 18, 26, and 51 are overruled, and the findings confirmed.

The exception to the last paragraph of finding No. 19, touching a payment of interest on October 1, 1907, is sustained for the reason that it is not in accord with the opinion of the Court of Appeals in the so-called "Termination of Lease Proceeding."

Subsequent to September 24, 1907, no payments were made for interest out of the estate of the City Company. As already stated its cash on hand and cash collections were loaned, and its materials and supplies were sold to receivers; such loan will be repaid, and such materials paid for when accounting between the City estate and receivers determine the proper amount due.

The remaining exceptions to finding No. 19, and the exceptions to findings numbered 1, 2, 7, 13, 27 to 50, both inclusive, 52, 53, 54, 55, 56, 57, and 58, are pro forma overruled, and the findings confirmed.

The exceptions to the conclusion of law numbered I down to the end of subdivision (a) are overruled, and so much of the conclusion is confirmed. The exceptions to the remaining parts of the conclusion are pro forma overruled, and the conclusion confirmed.

The exceptions to conclusions of law numbered II and III and VI are pro forma overruled, and the conclusions confirmed.

The exceptions to conclusion of law numbered IV are overruled and the conclusion confirmed.

There being no exception to conclusion of law numbered V, the same stands confirmed.

As modified by this opinion, the report of the special master is confirmed.

UNITED STATES v. MOUNDAY et al.

(District Court, D. Kansas, First Division. October 11, 1913.)

No. 1,456.

1. SEARCHES AND SEIZURES (§ 7*)—UNREASONABLENESS.

Where a marshal, on going to arrest defendants for misuse of the mails in furtherance of a scheme to defraud, was accompanied by certain inspectors, who, without a warrant, remained after the arrest and took possession of defendants' books, papers, and documents found in their office and carried them away, the inspectors were guilty of an unreasonable search and seizure, in violation of Const. art. 4, providing that the people shall be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. § 7.*]

2. SEARCHES AND SEIZURES (§ 7*) — UNREASONABLENESS — PROPERTY SEIZED — SURRENDER TO OWNER.

Certain inspectors, having accompanied a marshal to serve a warrant on defendants, arresting them for misuse of the mails in furtherance of a scheme to defraud, remained and searched their office and seized their books, papers, letters, and documents, removing the same to their office, whence they were ordered delivered to the clerk of the court and sealed. *Held* that, such material having been secured as the result of an unconstitutional search and seizure, defendants were entitled to have the same returned to them, though such documents might contain incriminatory evidence which the district attorney desired to submit to the grand jury and use against them.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. § 7.*]

Don A. MounDay and another, having been charged with using the mails in carrying into execution a scheme to defraud, were arrested, and after the arrest, post office inspectors having searched their office and obtained books and papers which were turned over to the court, defendants applied for an order requiring the surrender of such books and papers to them as having been unlawfully seized. Motion granted.

Fred Robertson, U. S. Atty., of Topeka, Kan.

Bone & Briggs, D. R. Hite, and A. B. Quinton, all of Topeka, Kan., for petitioner.

POLLOCK, District Judge. The facts as pleaded are: On application of the district attorney a commissioner's warrant was issued commanding the marshal of the court to arrest defendants on the charge of using the mails of the country in carrying into execution a scheme by them devised to defraud, in violation of section 215 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1911, p. 1653]). This warrant was executed by the marshal by taking defendants into custody. The arrest of defendants was made by the marshal in the office or place of business of the defendants in the city of Topeka. At the time the arrest was made two post office inspectors in the service and employes of the government, accompanied the deputy marshal, who actually made the arrest, to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

office or place of business of defendants. After the making of the arrest the inspectors made search of the office of defendants for the purpose of securing, if possible, books, papers, letters, and other writings which would tend to prove defendants' guilt of the offense for which they had been arrested. This search resulted in the taking and carrying away by the inspectors from said office of defendants a large volume of letters, writings, and documents, the private property of defendants, or private property of others in possession of defendants. Thereafter defendants were bound over to await the action of the grand jury. Meanwhile, pending such action, defendant D. A. MounDay presented to this court his application for a rule on the district attorney to appear and show cause, if any he had, why he should not be ordered to restore such private property of defendants so taken by the inspectors to their possession. A show cause order was issued on this application. The district attorney appeared thereto and filed his response. The issues so framed, coming on for hearing, in the interests of time, it was by the court suggested the papers, writings, and documents so secured should be sealed in the presence of counsel for the respective parties and deposited with the clerk of this court for safe-keeping; any one thereafter desiring to use or obtain possession of such papers and documents should apply to the court for an order on the clerk for the same. This suggestion was adopted by counsel for the respective parties, and a consent order to this effect was entered. The papers were sealed and deposited in pursuance of this order with the clerk. Thereafter defendants, deeming themselves entitled to the return of said papers as a matter of right, applied to the court for an order on the clerk to this effect. In response to this application the district attorney appeared and filed his response, first, denying generally the matters and things charged and stated in the verified application of defendant D. A. MounDay; second, making cross-application, praying the court to inquire into the matter in advance and determine if there should be found among such papers matters material to present to the grand jury to secure an indictment against defendants, or material in the prosecution of defendants if they shall be indicted, and if such matter be found, to further inquire and determine whether such matters, letters, writings, etc., so secured from the possession of the defendants, should be received in evidence on account of the manner in which they were seized by officials of the government. To this cross-application defendant D. A. MounDay has interposed a motion to strike out, based on the ground that, conceding the papers and documents to contain matters material in the presentment and prosecution of defendants, yet the same should be returned to the defendants, and not by the court be permitted to be used by the government in evidence against the defendants.

In view of the fact that the grand jury to which defendants are to be presented meets within the course of a few days from this date, on the suggestion and at the request of the district attorney representing the government, and the defendant, I shall proceed to determine the question presented at this time, assuming for the purposes of decision of the matters presented the manner in which the letters, papers, docu-

ments, and writings were obtained is truly stated as detailed in the verified application of defendant D. A. MounDay in this case, and that such papers, letters, etc., are the private property of defendants.

The question thus presented is, Can the plaintiff in a criminal prosecution such as this be permitted to use evidence so obtained for the purpose of securing the indictment and conviction of defendants, where such evidence is in the custody of the court, as in this case, and the question is presented and inquired of, as here, in advance of investigation by the grand jury, or indictment returned? The answer to this question must be found in the effect which shall and must be given the fourth and fifth amendments to the Constitution as applied to the particular facts of this case. The fourth article of amendment to the Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The fifth article provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

That the action of the officials of the government in searching the premises of defendants and seizing their private papers without warrant to so do, as charged in the verified application filed herein, was sanctioned by no law, and constituted an unwarranted invasion of defendants' private rights guaranteed to them by the above-quoted provisions of our national Constitution there can be, and is, no doubt whatever. However, the question here presented is, may the fruits of such unwarranted invasion of defendants' constitutional rights, now in the custody and under the control of this court, in so far as material, be employed by the government to secure an indictment against, or a conviction of defendants? That is to say: Where it is conceded evidential matters material to the inquiry made have been seized, as in this case, may or should the court, on being inquired of, permit such use of such matters as is desired by the representative of the government, as is shown by his application in this case?

[1] As has been seen from the statement made, it is alleged the search of defendants' premises and the seizure of their private property and personal effects made was done by no one authorized by law to arrest defendants, or to execute a search and seizure warrant had one been regularly applied for and granted. In other words, to support the search and seizure made, there was no lawful authority or right of any kind or nature. Hence the entire proceedings, in so far as the search and seizure in this case is concerned, is sanctioned by no law, but was such an unauthorized, unlawful, and void proceed-

ings on the part of those engaged therein as beyond all question constitutes an *unreasonable search and seizure* within the prohibition and condemnation of article 4 of the Constitution above quoted.

[2] How, therefore, can the rights of defendants "to be secure in their persons, houses, papers and effects" be asserted by and granted to them, as the Constitution guarantees, in this court? Can it be done by placing in the hands of the government officials charged by law with the prosecution of defendants as offenders against its laws the fruits of this unlawful invasion of constitutional rights of defendants by the agents of the government, and this in the very teeth of that provision of article 5 above quoted, which declares "no person * * * shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law"? As yet, defendants stand charged with the commission of no criminal offense in this court. Even if so charged, this court must and will presume their innocence until the contrary is proven beyond reasonable doubt. In order to secure such proof and assist the government in overcoming the presumption of innocence which attends upon defendants and all other citizens until lawful conviction had, shall this court wink at the unlawful manner in which the government secured the proofs now desired to be used, and condone the wrong done defendants by the ruthless invasion of their constitutional rights, and become a party to the wrongful act by permitting the use of the fruits of such act? Such is not my conception of the sanctity of rights expressly guaranteed by the Constitution to a citizen.

The question here presented has, in principle, been ruled in other jurisdictions, and by the Supreme Court. In some cases it has been ruled, on the ground of expediency—that is to say, on the ground those guilty of the commission of crime should not go unwhipped of punishment—that evidential matters in the custody of the court, or in the possession of prosecuting officers, tending to show the guilt of defendant may be offered in evidence against them almost regardless of the means employed for its procurement. See *United States v. McHie* (D. C.) 196 Fed. 586; also, the reasoning employed by the court in *United States v. Wilson* (C. C.) 163 Fed. 338. However, it was thought by the framers of our Constitution, and the amendments thereto above quoted, the individual citizen is entitled to and should have protection afforded him and his rights against unlawful invasion by legally constituted authority, or those assuming to act under the guise of such authority. While I neither doubt nor deny the duty of all good men, and courts as well, to uphold the lawful enforcement of the criminal laws of our country, to the end that justice may be done and the guilty not go unpunished, yet, it is my belief the constitutional safeguards, deliberately framed for the purpose of protecting the rights of the individual citizen, are of equal, if not more, concern than the conviction of any one accused of the commission of a criminal act, no matter how guilty in fact he may be. No one, under our Constitution and laws may be adjudged guilty until the presumption of his innocence is overcome by evidence lawfully offered and

lawfully received against him in open trial in a court of justice, as provided by and in accordance with the Constitution and laws of our country. Such is the holding of the Supreme Court, Mr. Justice Bradley writing the opinion, in the leading case of *Boyd v. United States*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, which holding has never been departed from by that court in so far as I am advised. True, it has been held by the Supreme Court, in the face of powerful dissent, the constitutional guaranty above quoted may be lawfully dispensed with by an act which provides immunity from punishment for the commission of the offense which the evidence procured from a defendant tends to establish. *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, and other cases. But such is not this case. Here there is no immunity which is either offered or which can be afforded defendants by way of protection against the use of the evidential matters in controversy. In this case it is the object of the government to cause defendants to be punished, if convicted, and to use such evidence now in the custody of the court to aid in securing such conviction. Surely such a flagrant violation of defendants' conceded constitutional rights should not in justice be permitted to be used to their prejudice. One wrong plus another does not make a right.

It follows the motion of defendant to strike out the cross-application of the district attorney, if it shall be either proven or conceded the papers now in the custody of the clerk were secured by representatives of the government in the manner charged in the application of defendant MounDay, must be sustained, and the use of said papers against the protest of defendants be denied to the government, either for use before the grand jury or at the trial if defendants shall be indicted, on the ground of their illegal and unlawful manner of procurement.

It is so ordered.

MILLER v. A. D. BAKER CO

(District Court, N. D. Ohio, W. D. Oct. 11, 1912.)

No 2,334.

EVIDENCE (§ 455*)—WRITTEN CONTRACT—PAROL PROOF—AMBIGUOUS WORDS—"CAPITAL STOCK."

Where plaintiff sued for breach of a written contract to pay him additional compensation if his efforts resulted in an additional profit of 15 per cent. of the capital stock of the employing corporation, the words "capital stock" construed in connection with Gen. Code Ohio, §§ 8667-8671, making preferred stock of an Ohio corporation substantially a liability, with rights only inferior to general debts because subordinate thereto, was so ambiguous as to authorize proof that it was orally agreed that only the corporation's common stock should be considered in determining whether plaintiff's efforts had resulted in an additional 15 per cent. profit, to entitle him to the additional compensation (citing *Words and Phrases*, vol. 1, pp. 959-967; vol. 8, p. 7595).

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2104, Dec. Dig. § 455.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Anson R. Miller against the A. D. Baker Company. On motion to strike out certain paragraphs of the petition involving an alleged oral understanding on the ground that it would be at variance with the written contract sued on. Overruled.

King, Tracy, Chapman & Welles, of Toledo, Ohio, for plaintiff.

Frank S. Ham, of Wauseon, Ohio, and Brown, Hahn, Sanger & Froehlich, of Toledo, Ohio, for defendant.

KILLITS, District Judge. Plaintiff pleads for breach of a written contract whereby he was to have certain compensation in addition to the sum stipulated in the contract provided his efforts in behalf of the defendant resulted in an additional profit of 15 per cent. upon the "capital stock of the company." He charges that his services resulted in profits of more than 15 per cent. upon the common stock of the company but not 15 per cent. upon the combined common and preferred stock, but avers that at the time of the making of the contract it was represented to him by the officers of the defendant that its preferred capital stock was considered as a loan and that the capital stock referred to in the contract should include only the common stock of the company.

Defendant moves to strike out all the paragraphs of the petition involving this alleged oral understanding on the ground that they tend to bring about a variance through oral evidence of a written document.

Apparently the motion is vital to the plaintiff's case, and, if his allegations are true, and the motion is granted, he is defeated, through the application of a technical rule, in a meritorious claim and becomes thereby the victim of an injustice.

The rule that a written instrument, unambiguous in its terms, may not be varied by testimony of contemporary oral agreements, is too well established to be disregarded. Any one of average experience in the practice has discovered that its operation is often attended with hardship, but nevertheless it may be said to be a salutary rule. The tendency to limit its operation is to work through a determination of the clarity of the terms of the instrument under consideration, and we are required, in considering this motion, to question whether or not the words "capital stock" have such an unambiguous, clearly established meaning as that the rule should operate.

The Supreme Court, in *Nash v. Towne*, 5 Wall. 699, 18 L. Ed. 527, suggests that:

"Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described."

It is pleaded in one of the paragraphs moved against in the motion before us that defendant's officers, in executing the contract, said that they regarded their preferred stock as a mere loan. If one will pick up the first volume of *Words and Phrases Judicially Defined*,

and consider the title "Capital Stock," which seems to require for its definition 16 columns of that work, or will read sections 3404 et seq., Thompson on Corporations, on the same subject, he will come to the conclusion that there is no lack of ambiguity and indefiniteness about the meaning of these words and will agree with Judge Thompson that courts themselves are wont to use the words as applicable to many distinct things and with much lack of clear definition.

Of course, strictly speaking, preferred stock is part of the capital stock of a corporation, but it is, especially in states like Ohio, generally regarded as an obligation, a liability. In Ohio (General Code, §§ 8667-8671, inclusive) preferred stock is made by statute so distinct and of such different qualifications from those of common stock that it does operate as a liability against the corporation. The amount of the issue and the amount of the dividend are both limited. Its holders may be restricted in their power over the corporation. They may be compelled to withdraw from the corporation as stockholders upon the tender of the par value of their stock at a time fixed in the certificate. They are excused from liability for the debts of the corporation until after the common stock has been exhausted. In short, preferred stock in Ohio is substantially a liability with rights only inferior to general debts because subordinate thereto.

There is some improbability from the terms of the contract pleaded, even eliminating these averments as to the oral understanding of the meaning of the terms, that preferred stock was included, because the plaintiff was required to increase the net profits of the company by 15 per cent., whereas by law it could not pay a dividend of more than 8 per cent. on preferred stock.

We do not feel inclined to look too closely to the application of a rule which, however salutary, is liable to work hardship. The case is very much like *McCulsky v. Klosterman*, 20 Or. 108, 25 Pac. 366, 10 L. R. A. 785, wherein there was under consideration a contract containing this provision:

"On the said 19th day of November, 1889, an account of stock shall be taken, and from" the amount of "the outstanding accounts of the firm there shall be first deducted 5 per cent. thereof to cover losses and bad accounts; and then there shall be paid to the said A. E. McCulsky the share of net profits after said deduction to which he is entitled under this agreement."

The question was over the meaning of the words "from the amount of the outstanding accounts of the firm there shall be first deducted 5 per cent. thereof to cover losses and bad accounts." On their face, these words do not seem to be ambiguous. The words "outstanding accounts" have a reasonably definite meaning, but it was contended on the part of the firm that this meaning should be limited to the accounts outstanding after a deduction therefrom of all those estimated to be bad and uncollectible. The court says:

"The argument for the plaintiff is that the language of the contract cited plainly means that 5 per cent. is to be deducted or allowed for bad accounts from the outstanding accounts whether the bad accounts in fact amounted to that much or not, and that it was so plainly fixed for the purpose of easily liquidating the amount of bad accounts as losses to be deducted in computing

the net profits on account of the relation of the parties and to avoid the controversy which might otherwise arise by charging bad accounts to profit and loss, as is usually the custom."

The defendant claimed it was justified by usage of trade to charge all accounts considered uncollectible to profit and loss, and that such usage ought to be considered in determining the meaning of the words in controversy. The court held (quoting the syllabus):

"Where the subject-matter of a contract is the ascertainment of the net profits of a firm for the purpose of paying in cash the value of a one-third share, the term 'outstanding accounts,' unless it otherwise appear, has a particular meaning, different from the common or ordinary meaning."

See, also, *Barrett v. Allen*, 10 Ohio, 426, where, to prevent injustice, the words "at a fair wholesale factory price" were submitted to the definition of parol evidence to show that a certain scale of prices was intended different from the actual wholesale prices in the market. In some features the case is not unlike *Atlantic Terra Cotta Co. v. Masons' Supply Co.*, 180 Fed. 332, 103 C. C. A. 462.

It is needless to multiply authorities. The motion will be overruled, with exceptions.

In re CAHILL.

(District Court, N. D. Ohio, W. D. July 22, 1912.)

No. 1,551.

1. BANKRUPTCY (§ 161*) — PREFERENCES BY A BANKRUPT — TIME — RECORD OF DEED.

Deeds placed in the possession of the grantee with the understanding that the grantor should pay his indebtedness to the grantee and have the deeds returned to him were not delivered so as to become effective until they were recorded, for the purpose of determining whether the transaction amounted to a preference to the grantee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261-263; Dec. Dig. § 161.*]

2. BANKRUPTCY (§ 311*)—UNSECURED CLAIMS—PROOF—PARTICIPATION IN ESTATE.

Where claims of a bank's assignee against the bankrupt's estate were filed as unsecured within 60 days after an order declaring that certain deeds executed by the bankrupt to the bank to secure the claims were preferences had been passed, the fact that the claimant attempted unsuccessfully to secure a preference and took advantage of the security was no answer to his right to prove the claims as unsecured, though more than a year had passed from the bankruptcy adjudication, as provided by Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497-500; Dec. Dig. § 311.*]

In Bankruptcy. In the matter of bankruptcy proceedings of R. W. Cahill, bankrupt. Objection of certain creditors to the allowance of the claim of the Citizens' State Banking Company. Overruled.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 208 F.—13

J. R. Linthicum, of Napoleon, Ohio, for trustee.
Donovan & Warden, of Napoleon, Ohio, for bankrupt.

KILLITS, District Judge. The question before the court in this case is the aftermath of the decision reported in 189 Fed. 138. Acting upon the order made in that case, the assignee of the Citizens' State Banking Company of Napoleon surrendered the real estate of the bankrupt which the court held had been conveyed to it by way of preference. Opposition is made by other creditors to the allowance of the bank's claim as creditor upon the notes discussed in that case, to secure which it attempted to hold the real estate, and the matter is before the court on exceptions both by Donovan, assignee of the bank, and by creditors of the estate, to the finding of the referee making a partial allowance of the bank's claim.

[1] As will be seen by the recitation of facts in the opinion referred to and the court's reasoning thereon, the deeds were held to effect no result whatever until they were filed for record. It was the opinion of the court, under the peculiar circumstances of the case, that delivery of the deeds to the bank was not complete until the cashier filed them with the county recorder, because up to that instant they were papers subject to the recall of the grantor, and it was on that theory, in part at least, that the court held the avoidable preference to be timed as of the date of filing. During the five years intervening between the making of the deeds and the filing for record, they were ineffective for any purpose, because the transaction of which they were part was incomplete. Hence it is that those who dealt with the bankrupt, Cahill, during that period, in faith that he was the owner of the lands described in these deeds, were not misled, for he was the owner in fact, and, as to them, the holder of an absolute title. The preferences as of the date of the filing of the deeds were also in favor of a debt valid in its creation and created long antecedent thereto. No one is disputing but that in fact the bank's claims are valid debts of the bankrupt.

It is the position of counsel for the assignee that these claims, filed within 60 days after the order entered in *Ragan v. Donovan* (D. C.) 189 Fed. 138, were "adjudicated" as unsecured by that case and come within the authority of *Powell v. Leavitt*, 150 Fed. 89, 80 C. C. A. 43; *In re Lange* (D. C.) 170 Fed. 114; *In re Clark* (D. C.) 176 Fed. 955; *Page v. Rogers*, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332; *Keppel v. Tiffin Savings Bank*, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790; and that there was a right to file them for proving after that decision, although more than one year had passed from the adjudication in bankruptcy, under the provisions of section 57n of the Bankrupt act.

[2] On behalf of objectors it is principally urged that these claims cannot be received upon the theory that they are tainted with bad faith on the part of the bank growing out of its attempt to take these preferences, and reliance is had upon the case of *In re Hurst* (D. C.) 188 Fed. 707.

In the judgment of the court this case does not sustain the objection. In the Hurst Case the court holds that the debt from Hurst to the Tearney estate, which was represented by the consideration for the deeds avoided by the trustee, was tainted with the fraud involved in the making of the deed. The making of the deed and the creation of the debt were contemporaneous with the fraud. On page 711 of 188 Fed. the court says:

"Will Tearney be allowed to prove and secure pro rata payment of the \$14,000 which he paid for the properties? I think not, for this debt, if it be considered such, arose from fraudulent intent and designs, and courts will leave parties guilty of fraud without remedy. But will a court of bankruptcy go farther, and punish the fraudulent grantee by refusing him the right to participate, with an honest and undisputed debt in the funds collected by the trustee for the equal benefit of all honest debts of the bankrupt, properly proven? I think not."

So, notwithstanding the finding of the court that Hurst and Tearney were engaged in a fraud upon the creditors of the bankrupt, out of which accrued the existence of the \$14,000 debt and the execution of the deed, the Tearney estate was allowed to prorate equally with other creditors on another claim held by it in which there was no taint of fraud. This case seems to have been affected somewhat by the laws of the state of West Virginia. Subsequently, Judge Dayton, who decided it, had a case very similar to the case at bar (*In re Elletson Co.* [D. C.] 174 Fed. 859), in which he avoided a conveyance to the Ritchie County Bank as a preference under circumstances very similar to those in the case of *Ragan v. Donovan*. Following Judge Dayton's decision in the case of *In re Hurst*, the referee in the Elletson bankruptcy proceedings appears to have rejected the claim of the Ritchie County Bank when it sought to prove as unsecured its debt theretofore attempted to be secured by the voided conveyance. This action of the referee gave rise to the case of *In re Elletson Co.* (D. C.) 193 Fed. 84, on page 87, in which the decree of the referee rejecting the claim was reversed and the claim ordered to take its standing with other unsecured debts; the court saying:

"In considering this question, a distinction is to be recognized, it seems to me, between a fraudulent and void debt and a fraudulent and void conveyance executed to secure a valid debt. Generally speaking, in the first instance no remedy is afforded the creditor to collect the debt. In the second instance, under the laws of this state, the valid debt, by reason of the taking of a fraudulent conveyance to secure it, will not be denied payment, but will be postponed in payment to at least all the debts existing at the time of such fraudulent conveyance. *The Bankruptcy Act recognizes no principle whereby a valid debt may be postponed in payment of another, both being unsecured.*"

As we have seen, the notes presented by the assignee represent valid debts of the bankrupt to the Citizens' Bank. By no process known to the administration of the bankruptcy law, whatever may be the holdings in different state jurisdictions, were these claims affected by the transactions of the deeds. No creditor has lost anything. Every one has the same right of participation in the estate of the bankrupt that he would have had had these deeds never been made.

We are unable to see any reason why the authorities cited for the

claimant do not control the court's judgment in this case, or any reason why the assignee's claim upon these notes should not be allowed as valid claims against the bankrupt's estate, to participate in the distribution on parity with all other unsecured claims.

The order of the referee is reversed on the objection of the claimant, and an order will be entered directing that these claims be allowed.

POTTSTOWN HOSPITAL v. NEW YORK LIFE INS. & TRUST CO.

(District Court, S. D. New York. March 28, 1913.)

1. WILLS (§ 70*)—VALIDITY OF BEQUESTS—LAW GOVERNING.

When by the law of the domicile of the testator a will has all the formal requisites to pass title to personalty, the validity of particular bequests will depend on the law of the domicile of the legatee, except in cases where the law of the domicile of the testator in terms forbids bequests for any particular purpose or in any particular manner, in which case the bequests would be void everywhere.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 184-186; Dec. Dig. § 70.*]

2. WILLS (§ 14*)—CHARITABLE BEQUESTS—VALIDITY—CONSTRUCTION OF STATUTE.

Sections 18 and 19 of the Decedents' Estates Law (Consol. Laws N. Y. 1909, c. 13), which provide that bequests to certain benevolent, charitable, and scientific corporations created under the laws of New York shall not be valid in any will which shall not have been executed at least two months before the death of the testator, apply only to the particular corporations described and do not affect the validity of a bequest to a charitable corporation of another state.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 35; Dec. Dig. § 14.*]

3. WILLS (§ 14*)—CHARITABLE BEQUEST—VALIDITY.

The provision of Act Pa. April 26, 1855 (P. L. 332) § 11, making void a bequest for religious or charitable uses except where made by a will duly executed at least one calendar month before the death of the testator, as construed by the courts of the state, imposes restrictions upon the donor and not upon the donee, and does not affect the validity of a bequest made to a charitable corporation of that state by the will of a citizen of another state and valid under the laws of such state.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 35; Dec. Dig. § 14.*]

Action by the Pottstown Hospital against the New York Life Insurance & Trust Company, as executor of the last will and testament of William Alexander Smith, deceased. Judgment for plaintiff.

Henry D. Buell, of New York City, for plaintiff.

Grenville T. Emmet, of New York City, for defendant.

HOLT, District Judge. This suit is brought by the Pottstown Hospital, a charitable corporation organized under the laws of Pennsylvania, maintaining a hospital at Pottstown, Pa., to recover a legacy of \$3,000, bequeathed to it in the will of William Alexander Smith. The testator was a citizen of New York residing and domiciled in Rockland county. He died May 31, 1911, leaving a will executed May 17,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

1911, which has been duly admitted to probate. The defense is that the legacy was void because of the provisions of sections 18 and 19 of the Decedents' Estates Law of New York (Consol. Laws 1909, c. 13), which provide that certain bequests to certain benevolent, charitable, and scientific corporations created under the laws of New York shall not be valid in any will which shall not have been executed at least two months before the death of the decedent, and also because of the provisions of section 11 of the Act of Pennsylvania of April 26, 1855 (P. L. 332), making substantially a similar provision in case of the death of the testator within one month after the execution of the will.

[1] The general rule of law is that the law of the testator's domicile controls as to the formal requisites essential to the validity of the will, the capacity of the testator, and the construction of the instrument; that, when by the *lex domicilii* a will has all the formal requisites to pass title to personalty, the validity of particular bequests will depend upon the law of the domicile of the legatee, except in cases where the law of the domicile of the testator in terms forbids bequests for any particular purpose, or in any particular manner, in which latter case the bequests would be void everywhere; that the existence of corporations organized under the laws of a sister state is recognized by the courts of this state, and they may take personal property under wills executed by citizens of this state, if by the laws of their creation they have authority to acquire property by bequest. *Chamberlain v. Chamberlain*, 43 N. Y. 424. It has been held that the purpose of sections 18 and 19 of the Decedents' Estates Act is the protection of heirs and next of kin from improvident dispositions by decedents of their estates when weak and in apprehension of death. *People's Trust Co. v. Smith*, 82 Hun, 494, 31 N. Y. Supp. 519; *Amherst College v. Ritch*, 151 N. Y. 334, 45 N. E. 876, 37 L. R. A. 305.

[2] I have no doubt that the state of New York might have made void any bequest made to any charitable corporation whether in this state or elsewhere, contained in a will executed within two months of the testator's death; but it is obvious that it has not done so by sections 18 and 19 of the Decedents' Estates Law. Those sections simply make void such bequests to corporations created by the state of New York. There is no claim in this case that the will is invalid by reason of any defect in its execution, and, as the laws of New York have not made a bequest to a foreign charitable corporation invalid because contained in a will executed less than two months before the testator's death, this legacy, in my opinion, is perfectly valid, so far as sections 18 and 19 of the Decedents' Estates Law of New York is concerned. It is well settled that these sections do not apply to foreign corporations. *Hollis v. Drew Theological Seminary*, 95 N. Y. 166; *Hope v. Brewer*, 136 N. Y. 126, 32 N. E. 558, 18 L. R. A. 458; *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. 407; *Matter of Prime*, 136 N. Y. 347, 32 N. E. 1091, 18 L. R. A. 713. Therefore whether the complainant is entitled to receive this legacy depends upon the question whether there is any law of Pennsylvania which prohibits it from receiving it. The general rule at common law was that a corporation was entitled

to receive a bequest of personal property. Angell & Ames on Corporations (10th Ed.) p. 146. This corporation therefore is entitled to receive this legacy unless it is prohibited from doing so by the laws of Pennsylvania.

[3] Section 11 of the Pennsylvania Act of April 11, 1855, is as follows:

"No estate, real or personal, shall hereafter be bequeathed, devised, or conveyed to any body politic, or to any person in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible, and, at the same time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary thereto shall be void and go to the residuary legatee or devisee next of kin, or heirs, according to law: Provided, That any disposition of property within said period, bona fide made for a fair valuable consideration, shall not be hereby avoided."

It was held in the case of *Kerr v. Dougherty*, 79 N. Y. 327, that a similar bequest by a citizen of New York to a Pennsylvania charitable corporation was void under this section, on the ground that the provision that the will must be executed one calendar month prior to the death of the testator was a limitation which related both to the power to dispose of the property and the right to take it. The contrary view was taken in Pennsylvania in the case of *Hildeburn's Estate*, 16 Pa. Co. Ct. R. 39, which held that the provision in question imposes restrictions upon donors and not upon donees. In that case a legacy was given by a citizen of Delaware to a charitable corporation of Pennsylvania, and it was held that the gift being valid under the laws of Delaware could be taken by the Pennsylvania corporation notwithstanding the provision in the act of 1855. This decision in Pennsylvania, although not the decision of its highest court, appears to have never been dissented from, and to have been accepted as the law of Pennsylvania ever since it was rendered. It is the duty of the federal courts passing upon the effect of state statutes to follow the decisions of the courts of the state in which the statutes were enacted. As there is nothing in the New York statute which prohibits this bequest, the real question in this case is whether the law of Pennsylvania permits the legatee to receive it. Upon that question this court is bound to follow the decisions of the courts of Pennsylvania rather than the courts of New York. I think therefore that the decision in the matter of *Hildeburn's Estate* is controlling instead of the decision in the case of *Kerr v. Dougherty*. Personally it seems to me that the reasoning of Judge Earl, in his dissenting opinion in *Kerr v. Dougherty*, is more satisfactory than that in the prevailing opinion; but, at all events, whatever view may be taken of the question on the merits, I think that this court should follow the decision of the Pennsylvania court construing the statute of Pennsylvania under the situation here presented.

My conclusion is that the claimant is entitled to a decree for the relief demanded in the complaint.

SPRINGER v. AMERICAN TOBACCO CO.

(District Court, W. D. Kentucky. October 13, 1913.)

No. 125.

REMOVAL OF CAUSES (§ 110*)—RIGHT OF REMOVAL—SECOND REMOVAL AFTER REMAND.

Where an action in a state court against two joint defendants one of whom was a citizen of the state, as was plaintiff, was removed by the nonresident defendant on the ground that its codefendant was fraudulently joined to prevent a removal, but was remanded, the petitioner's right of removal was thereby finally adjudicated, and the fact that on a trial on the merits in the state court at the close of plaintiff's case a verdict was directed for the local defendant on his motion did not give the nonresident defendant the right to again remove the cause, especially on the original petition.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 236; Dec. Dig. § 110.*]

At Law. Action by Fred. Springer against the American Tobacco Company. On motion to remand to state court. Motion granted.

Walter S. Mendel and O'Doherty & Yonts, all of Louisville, Ky., for plaintiff.

A. E. Richards, of Louisville, Ky., for defendant.

EVANS, District Judge. This action, in which the plaintiff seeks to recover damages from the defendant to the extent of \$20,000 for injuries alleged to have been inflicted upon him by the wrongful and negligent acts of the defendant and one Gunther jointly, was brought in the state court, and in July, 1912, was removed to this court on the petition of the American Tobacco Company. The petition for the removal presented to the state court showed that the American Tobacco Company was a citizen of New Jersey, and that the plaintiff was a citizen of Kentucky. Stated broadly, the petition for removal also showed that the defendant Gunther was a citizen of Kentucky and that the plaintiff had joined him as a defendant for the sole and fraudulent purpose of preventing a removal of the action to this court. The petition set out in detail the facts upon which this general conclusion was drawn. Though they were denied by the plaintiff, no testimony was offered in support of the allegations of the petition for removal, or, if offered, was held insufficient, and on October 15, 1912, after full argument, an order was made remanding the case to the state court. It was redocketed there and the issues formed by the pleadings came to trial before a jury. At the close of the plaintiff's testimony, the defendant Gunther moved the court to direct a verdict in his favor. This motion was sustained, and a verdict accordingly was returned and a judgment in Gunther's favor was entered. At that point, and before any other step was taken in the case, as between the plaintiff and defendant American Tobacco Company, the latter moved the court to remove the case to this court "on the petition heretofore filed." In support of this motion the tobacco company tendered a bond with

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

surety which was approved by the state court, and thereupon the motion to remove the case to this court was sustained; the action having then, by reason of the directed verdict in Gunther's favor, taken the form of one which was solely between the plaintiff, a citizen of Kentucky, and the American Tobacco Company, a citizen of New Jersey. The plaintiff has moved to remand the action upon the grounds: First, that the defendant has failed to file a petition for such removal; and, second, that the defendant has not filed a sufficient petition therefor.

Probably these grounds are sufficient, per se, to authorize the remanding of the case; but, in any event, the court must search the record and ascertain therefrom whether it has acquired jurisdiction of the action under the laws of the United States. Judicial Code, § 37 [Act March 3, 1911, c. 231, 36 Stat. 1098 (U. S. Comp. St. Supp. 1911, p. 146)].

It is difficult to escape the conclusion, and we must hold, that the judgment of this court on the motion to remand was a final and, because not appealable, was an uncontestable adjudication of the question of the right to remove the case upon the petition filed in July, 1912. Certainly it was so upon the case as then presented by the record, and we cannot see how the Removal Act of March 3, 1887, c. 373, § 1, 24 Stat. 552 (U. S. Comp. St. 1901, p. 509), or the Judicial Code has authorized a second petition for removal "upon the same grounds" any more than did the Removal Act of March 3, 1875, c. 137, § 2, 18 Stat. 470 [U. S. Comp. St. 1901, p. 509], as to which the Supreme Court expressed its judgment in *St. Paul & Chicago R. Co. v. McLean*, 108 U. S. 217, 2 Sup. Ct. 498, 27 L. Ed. 703.

In *Huskins v. Cincinnati, etc., R. Co.* (C. C.) 37 Fed. 504, 3 L. R. A. 545, and other cases where the plaintiff, after the time for answering in the state court had expired, amended his petition so as to cause, for the first time, the amount claimed by him to exceed the jurisdictional amount prescribed in the act, it was held that the defendant, who theretofore had no right to remove the case, might at once present his petition and obtain that relief.

It was held in *Powers v. C. & O. Ry. Co.*, 169 U. S. 92, 101, 102, 18 Sup. Ct. 264, 42 L. Ed. 673, that, if the plaintiff discontinues his suit against one defendant who has the same citizenship as the plaintiff, the other defendant whose citizenship is diverse to that of the plaintiff may file even a second petition to remove the case because theretofore the act and conduct of the plaintiff alone had kept the case from being one in which a removal was authorized. Such second petition would not be upon the same grounds as the first, but upon another. When the plaintiff voluntarily acts and himself eliminates the only obstacle to a removal of the case, and thereby for the first time leaves the case open to that remedy, there seems to be no doubt that the right to remove may be made available, and in such cases the plaintiff is estopped from insisting that the petition to remove comes too late.

Differing from those instructive cases, there was here, after the action was remanded, a trial on the merits, and by the judgment of

the court, upon Gunther's motion and not upon the motion of the plaintiff, Gunther, upon plaintiff's testimony, was adjudged not to be liable for plaintiff's demand, and we think this disposition of the case on the merits as between the plaintiff and Gunther did not give the American Tobacco Company the right again to remove the case to this court. This question seems to be expressly ruled in *Whitcomb v. Smithson*, 175 U. S. 637, 20 Sup. Ct. 248, 44 L. Ed. 303, and see to the same general effect *Kansas City, etc., R. Co. v. Herman*, 187 U. S. 63, 68, 69, 23 Sup. Ct. 24, 47 L. Ed. 76.

But if we are mistaken in this, we think the tobacco company could not have secured a second removal unless possibly upon a petition which showed the fact to be that the judgment of the state court had not been rendered upon the merits of the controversy between the plaintiff and Gunther, but upon the sole ground that the joinder of Gunther was shown by the testimony to have been fraudulent and made with the sole purpose of thereby preventing a removal—testimony presumably not admitted upon the trial on the merits inasmuch as that issue had been finally disposed of. No petition making any such showing was filed or tendered, and, as indicated, we hold that the question was a thing adjudicated by the judgment of this court in July, 1912, upon the first motion to remand.

It results that the present motion to remand must also be sustained.

In re KNOSCO.

(District Court, N. D. Ohio, W. D. April 2, 1913.)

No. 1,405.

BANKRUPTCY (§ 328*)—ESTATE—APPLICATION TO REOPEN—CLAIMS LIQUIDATED BY LITIGATION—TIME.

Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), providing that no claims, except such as are liquidated by litigation, shall be proved subsequent to one year after the adjudication, is not only a limitation of the time within which claims may be proved, but a prohibition against the allowance of claims subsequent to the expiration of one year, and hence a creditor, having failed to file proof of his claim while bankruptcy proceedings were in progress, was not entitled, after the year had expired, to have the proceedings opened that his claim might be proved; the creditor's default not having been induced by any act of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. § 328.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Frank Knosco. Application of William L. Campbell, an unsecured creditor, to reopen the estate. Denied.

John H. O'Leary, of Toledo, Ohio, for petitioner.
Stephen Brophy, of Toledo, Ohio, for bankrupt.

KILLITS, District Judge. We are asked to decide that William L. Campbell, one of the unsecured creditors of Frank Knosco, whose

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

petition in bankruptcy was filed May 15, 1908, and who was discharged the following fall as a bankrupt, may be heard on his application to reopen the estate of Knosco, although said Campbell failed to file proof of his claim while the bankruptcy proceedings were in progress.

If the circumstances set forth in Campbell's application to reopen the estate are true, and for the purpose of the matter before us they must be considered to be true, then if, as claimed in behalf of Knosco, no authority exists whereby on Campbell's initiative the estate may be reopened, there is a clear and serious defect in the Bankruptcy Act.

Section 57n of that act provides that no claims, except such as are liquidated by litigation, shall "be proved * * * subsequent to one year after the adjudication." A long line of decisions by the federal courts, district and of appeals, holds that this section is not only a limitation of the time within which claims may be proven, but that it is a prohibition upon the court to allow claims subsequent to the expiration of one year; and such is the judgment of the commentators on the Bankruptcy Act. The latest decision dealing extensively with the subject is that of *In re Meyer* (D. C.) 181 Fed. 904. See, also, *Loveland on Bankruptcy* (4th Ed.) § 331; *Remington on Bankruptcy*, § 723; *Collier on Bankruptcy* (9th Ed.) p. 747. Indeed, this seems to be the necessary conclusion, giving to the language of the statute its ordinary meaning. None of these authorities, however, nor the cases upon which they are based, refer to the case of *Bailey, Assignee, v. Glover et al.*, 21 Wall. 342, 22 L. Ed. 636, a case under the old Bankruptcy Act, in which it is contended the Supreme Court takes a position inconsistent with the construction so unanimously placed upon section 57n. We have read this decision two or three times, with sympathy for the proposition that the court, if possible, should so construe section 57n that the fruits of a fraudulent concealment of assets should not be realized upon; but we are unable to find in this case an answer to the great current of authority, which declares that the section under consideration should be construed as it reads. The section of the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) under consideration in *Bailey v. Glover* was simply a statute of limitation touching the maintainability of an action at law or in equity, in which any person claimed an interest adverse to the interest of the bankrupt estate in the property involved. The court holds this statute to be substantially section 5057 of the Revised Statutes, modified to suit the aim of the bankruptcy law to secure a speedy disposition of the bankrupt's assets, and applies to the statute the principle which is common to most statutes of limitation that in case of fraud they begin to run only when the cause of action is known. A little thought, it seems to us, will show the distinction between the statute of limitation and the language of section 57n and the things with which it deals. The right to make a claim and the fact that a claim was held were matters of knowledge to Campbell when the Knosco proceedings were on. No act of the bankrupt affected in any way his right to prove his claim. There is, in our judgment, a distinct difference between one failing to assert a known claim because he was

deceived by the fraud of his debtor and one left ignorant of the fact that he had a claim because of the fraud of his debtor, which latter situation is that with which the act of 1867 dealt, which is construed in *Bailey v. Glover*.

However desirable it may appear to be that the construction asked for should be made, and that Campbell be permitted to press his application, we are clearly of the opinion that to do so would be such clear violence of the language of section 57n as to become judicial legislation on the part of the court, purely and simply. If legislation is necessary here, and it seems to be, it is the duty of Congress to supply it, and not the function of the court.

It follows that the motion to vacate the order of reference heretofore granted in this case should be granted, and the application of Campbell dismissed at his costs.

In re KRONBERG.

(District Court, E. D. Arkansas, W. D. October 21, 1913.)

No. 1,482.

INSANE PERSONS (§ 94*)—PROCEEDINGS BY NEXT FRIEND—CLAIM IN BANKRUPTCY.

Where a creditor of a bankrupt was non compos mentis but not actually insane, and had not been adjudged incapable by any court of competent jurisdiction, and had no guardian or committee, he was entitled to file and prosecute his claim against the bankrupt's estate by next friend.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 164, 165; Dec. Dig. § 94.*]

In the matter of bankruptcy proceedings of Isaac Kronberg. On petition to review a referee's order suspending proceedings on the claim of a creditor alleged to be non compos mentis until the appointment of a suitable guardian to act in his behalf. Reversed, with directions.

Herman Kronberg, who is alleged to be non compos mentis and incapable of taking care of his business affairs, but has never been adjudged so by any court of competent jurisdiction, and has no guardian nor committee to manage his affairs, has filed a claim by his next friend against the bankrupt estate. The referee in bankruptcy on objection of counsel for the trustee, has held that "until the claimant's status has been determined by a court of competent jurisdiction and a proper person, authorized by such court, appointed to represent his interests herein, no further steps can be properly taken in this matter," and therefore suspended action until that has been done.

Powell Clayton, of Little Rock, Ark., for claimant.
James A. Comer, of Little Rock, Ark., for trustee.

TRIEBER, District Judge. (after stating the facts as above). The only question involved in this proceeding is whether a person, not a lunatic but alleged to be non compos mentis, can maintain an action by his next friend although he has never been adjudged to be non

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

compos mentis by any court of competent jurisdiction, and no guardian or committee has been appointed to act for him.

While there are some few decisions which hold that when one is a lunatic or insane person he cannot sue by next friend, all the authorities, English as well as American, hold that when the person is not actually insane, but only incapable through weakness of mind, an action may be maintained by *prochein ami* or next friend. Some of the English cases to that effect are *Light v. Light*, 25 Beav. 248; *Beall v. Smith*, 43 L. J. Ch. N. S. 245, L. R. 9 Ch. 85, 29 L. T. N. S. 625; *Rock v. Slade*, 7 Dowl. P. C. 22; *Cardwell v. Tomlinson*, 54 L. J. Ch. N. S. 957, 53 L. T. N. S. 746; *Nelson v. Duncombe*, 9 Beav. 211; *Daniell's Chancery Practice* (4th Am. Ed.) p. 9, and authorities cited. The same rule has been followed by the American courts generally, as will be seen by reference to a few of the numerous cases on that subject. *Smith v. Smith*, 106 N. C. 498, 11 S. E. 188; *Reese v. Reese*, 89 Ga. 645, 15 S. E. 846; *Edwards v. Edwards*, 14 Tex. Civ. App. 87, 36 S. W. 1080; *Plympton v. Hall*, 55 Minn. 22, 56 N. W. 351, 21 L. R. A. 675; *Wager v. Wagoner*, 53 Neb. 511, 73 N. W. 937; *Whetstone v. Whetstone*, 75 Ala. 495; *Howard v. Howard*, 87 Ky. 616, 9 S. W. 411, 1 L. R. A. 610; *Collins v. Toppin*, 63 N. J. Eq. 381, 51 Atl. 933; *Denny v. Denny*, 8 Allen (Mass.) 311; *Appeal of Wentz*, 76 Conn. 405, 56 Atl. 625.

While most of the authorities hereinbefore cited were in equity, the same rule applies in actions at law. *Collins v. Toppin*, 63 N. J. Eq. 381, 51 Atl. 933; *Rankin v. Warner*, 2 Lea (Tenn.) 302; *Wilson v. Ansley*, 47 Ga. 278; *Chicago, etc., R. Co. v. Munger*, 78 Ill. 300; *Jetton & Farris v. Smead*, 29 Ark. 372, 381; *Peters v. Townsend*, 93 Ark. 103, 124 S. W. 255. The two last cases arose under the Code of Practice of the state of Arkansas now in force.

The statute of Arkansas provides:

"The action of a person judicially found to be of unsound mind must be brought by his guardian, or, if he has none, by his next friend." Section 6026, Kirby's Digest of Statutes of Arkansas.

In *Peters v. Townsend*, *supra*, it was held:

"The statute refers in express words only to persons judicially found to be of unsound mind; but it is not to be doubted that the Legislature intended to give equal protection to persons of unsound mind in actions by or against them, though not judicially declared to be such. The language of the statute warrants that construction."

And this rule seems to have been approved by the national courts in which this question arose. *Dudgeon v. Watson* (C. C.) 23 Fed. 161; *Florida, etc., Ry. Co. v. Bell*, 87 Fed. 369, 31 C. C. A. 9. Although the last-cited case was by the Supreme Court reversed (176 U. S. 321, 20 Sup. Ct. 399, 44 L. Ed. 486), the reversal was upon the question of jurisdiction and not on this point.

In *King v. McLean Asylum*, 64 Fed. 325, 12 C. C. A. 139, 26 L. R. A. 784, the next friend of an insane petitioner for a writ of habeas corpus was permitted to maintain the action.

In *Covington v. Neftzger*, 140 Ill. 608, 30 N. E. 764, 33 Am. St.

Rep. 261, it was held that an action by a lunatic could not be maintained by the next friend; but this case has since been overruled by that court. *Isle v. Cranby*, 199 Ill. 39, 64 N. E. 1065, 64 L. R. A. 513, and cases cited in that opinion.

In view of these authorities, the court is of the opinion that this action may be maintained by the next friend, especially as it is permitted in the courts of Arkansas, in which state this proceeding is pending and the cause of action arose. Whether an action on behalf of one actually insane can be maintained by a next friend need not be determined in this cause, as there is no such issue before the court. What the court does decide is that a person not actually insane, but non compos mentis, who has not been adjudged as incapable by a court of competent jurisdiction and who has no guardian or committee, may maintain an action in this court by his next friend.

The action of the referee will be set aside with directions to hear the claim on the merits.

SPERRY & HUTCHINSON CO. V. ASSOCIATED MERCHANTS' STAMP CO.

(District Court, S. D. New York. October 7, 1913.)

INJUNCTION (§ 147*)—SUBJECTS OF PROTECTION—INDUCING BREACH OF CONTRACT.

Evidence *held* to entitle complainant to a preliminary injunction restraining defendant from interfering with subscribers to complainant's trading stamp system and inducing them to break their contracts with complainant.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 320-322; Dec. Dig. § 147.*]

In Equity. On motion for preliminary injunction. Granted.

W. Benton Crisp, of New York City, for complainant.

Mark Goldberg, and Louis B. Boudin, both of New York City, for defendant.

LACOMBE, Circuit Judge. On many of the propositions of fact advanced by one side or the other, there is the sharpest sort of controversy—oath against oath. If the decision of all such disputed propositions were essential to a disposition of this motion, the usual course would be to carry such disposition over till the trial, when, with the affiants on the stand and subjected to cross-examination, one might with reasonable certainty determine which of them were lying and which were telling the truth.

Some facts, however, seem quite sufficiently established by these conflicting affidavits.

Complainant had and has contracts with a number of merchants, called subscribers, for the purchase of its trading stamps exclusively and for their use by such subscribers and their customers in a specified way. The form of contract has been set forth in so many reported cases that it is unnecessary to repeat it here. It has been repeatedly held to be a valid and proper contract.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Exactly what these contracts were, in what terms they were expressed, what they provided should be done and should not be done, was fully known to the defendant corporation, which has been organized and is practically managed and its business policy directed by one or more persons who prior to such organization were for some time in the employ of complainant.

Defendant, by its agents, has on several occasions solicited the purchase and use of its own trading stamps by merchants who had already entered into a contract for trading stamps with complainant. That defendant knew these merchants were using complainant's stamps there can be no reasonable doubt. There is nothing secret about such use; the stamps are given away to the great majority of customers; the fact that S. & H. green trading stamps are so given in that particular store is advertised so as to attract the attention of all who enter it.

So, too, there seems no reasonable doubt that defendant, which was familiar with the details of complainant's business, knew that these merchants who were giving S. & H. green stamps had entered into contract relations with complainant, and knew just what those relations were.

That in several instances merchants who were subscribers under contracts with complainant were induced to take defendant's stamps and thus to break their contract with the S. & H. Company is really not disputed. What was said to them by defendant's agents, what arguments were used to persuade them, is a matter vehemently controverted; but it must be assumed that something was said, or the result would not have been accomplished, such result being the taking of defendant's stamps while the merchant's contract with complainant was still in force.

I cannot resist the conclusion that defendant, with full knowledge of the situation, has in several instances successfully solicited subscribers of complainant to break their contracts. Under many authorities that is a trespass upon complainant's rights which a court of equity will enjoin.

A preliminary injunction may issue restraining defendant:

(1) From in any wise interfering with complainant's subscribers and from soliciting or inducing said subscribers to break their contracts with complainant; this, however, shall not be construed so as to interfere with a solicitation of such subscribers to contract for trading stamps with the defendant upon the termination of complainant's contract by lapse of time or by notice of the sort specified in such contract.

(2) From buying, selling, exchanging, trafficking, or in any wise dealing in complainant's trading stamps, its trading stamp books, and its other advertising materials.

There should be an early trial of this cause. A careful examination of the multitudinous affidavits which have been filed indicates that they reek with perjury. It seems impossible to reconcile many of these conflicting statements on any theory of misunderstanding; several persons on one side or the other have apparently lied under oath, knowingly and willfully. It seems quite important that these affiants should be put on the stand at the earliest date possible so that, in case their

examination should indicate the desirability of some action by the district attorney, he may be able to take the matter up while the affidavits are still recent.

In re THOMPSON.

(District Court, E. D. New York. September 23, 1913.)

1. BANKRUPTCY (§ 334*)—CLAIMS—LIABILITY OF INDORSER—STATUTES—"SECURED CREDITOR."

Under Bankruptcy Act July 1, 1898, c. 541, § 1, subd. 23, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3419), declaring that the term "secured creditor" shall include a creditor who has security for his debt on the property of the bankrupt of a nature to be assignable under the act, or who owns such a debt for which some indorser, surety, or other person liable for the bankrupt has such security on the bankrupt's assets, the security is limited to the property of the estate, and hence, where a bank was the holder of a note of a third person secured by corporate stock not belonging to the bankrupt who was liable as an indorser, the bank was not a "secured creditor," but was entitled to prove the note as an unsecured claim against the bankrupt's estate without liquidating or delivering the stock, as provided in cases of security from the bankrupt, by section 57h.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 501-507; Dec. Dig. § 334.*]

For other definitions, see Words and Phrases, vol. 7, p. 6385; vol. 8, p. 7796.]

2. BANKRUPTCY (§ 364*)—SECURED CLAIMS—PAYMENT—SUBROGATION—ADJUSTMENT OF RIGHTS.

Where the bankrupt was liable as an indorser on the note of a third person to a bank secured by certain corporate stock not belonging to the bankrupt, and the holder elected to prove the same against the bankrupt's assets to enforce the indorser's liability, the trustee would be subrogated to the indorser's rights as against the security, which rights should be adjusted before payment of a final dividend.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 485, 504; Dec. Dig. § 364.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Frederick Thompson. Application by a creditor to prove his claim after the expiration of a year from adjudication, the same having been previously rejected without notice. On appeal from a Referee's order denying the application. Reversed.

Frank M. Patterson, of New York City, for creditor.
Joseph E. Clark, of Brooklyn, N. Y., for trustee.

CHATFIELD, District Judge. In the above matter adjudication occurred on the 8th day of June, 1912, and the first and only dividend was declared on the 12th day of July, 1913. The Mechanics & Metals National Bank attempted to prove a claim at the first meeting, which it appears was rejected by the referee, but no notice of this rejection was given to the creditor and no inquiry was made by the creditor before the declaration of the dividend. Although the year has elapsed, the creditor has asked to be allowed to prove its claim (thus necessarily being included in the discharge), and this relief was ordered by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

court, without determining whether the creditor would be able to obtain any payment of his debt, even if the claim were allowed. The referee has rejected the claim and an appeal has been taken from his action to this court.

[1] The referee bases his rejection upon the fact that the bankrupt was an indorser upon a note held by the Mechanics & Metals National Bank and upon which they seek to base their claim. The maker of this note deposited certain shares of stock as collateral or security for his payment, and the creditor herein has not liquidated nor turned over this stock, under the provisions of section 57h of the statute. Act July 1, 1898, c. 541, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443). On the other hand, he has presented a claim as an unsecured creditor, and it is this claim which the referee has rejected.

The case of *In re Headley* (D. C.) 97 Fed. 765, is authority for the creditor's interpretation of the statute, chapter 1, § 1, subd. 23, and the case of *Gorman v. Wright*, 136 Fed. 164, 69 C. C. A. 76, decided by the Circuit Court of Appeals in the Fourth Circuit, approves of the same conclusion; it appearing that the words "secured creditor," for the purposes of the administration of the bankrupt's estate, are limited to security out of or against the estate. In this respect the referee's decision was incorrect and he should have allowed the claim in question.

[2] The payment of any dividend upon the claim would, under the ordinary laws relating to negotiable paper, subrogate the indorser to the payee's rights against the maker, and these matters would have to be adjusted by the trustee before final dividend. Section 57, subd. 1, would by analogy support this proposition also.

But the creditor has the right under the statute to prove the face value of his claim against the indorser, without the surrender or liquidation of his security against other parties. The appeal will be sustained, and an order will be entered directing the referee to prove the claim.

UNITED STATES v. KETTENBACH et al. (three cases).

(Circuit Court of Appeals, Ninth Circuit. October 21, 1913.)

Nos. 2,209-2,211.

1. APPEAL AND ERROR (§ 171*)—REVIEW—THEORY OF CAUSE.

A decree will not be reversed on appeal on a theory on which the case was not tried below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.*]

2. PUBLIC LANDS (§ 120*)—SALE—TIMBER AND STONE ACT—ALIENATION—FRAUD.

The Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89, as amended by Act Aug. 4, 1892, c. 375, 27 Stat. 348 [U. S. Comp. St. 1901, p. 1545]) does not limit the dominion which a purchaser has over land after its purchase from the government or restrict his power of alienation, but merely denounces a prior agreement to enter and purchase the land for a third person, so that the fraud for which the purchase may be annulled at the suit of the government, with reference to alienation, must be an agreement to sell, entered into between the entryman and another before the making of the original application to purchase.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. § 120.*]

3. PUBLIC LANDS (§ 38*)—PURCHASE—TIMBER AND STONE ACT—FRAUD—FINAL PROOF.

Where an applicant to purchase public land under the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89, as amended by Act Aug. 4, 1892, c. 375, 27 Stat. 348 [U. S. Comp. St. 1901, p. 1545]) has sworn to the bona fides of his application in his preliminary statement, and he has at the time no contract or agreement to convey the title to a third person, he is not required to again swear to such facts on making final proof.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 82; Dec. Dig. § 38.*]

4. PUBLIC LANDS (§ 120*)—PURCHASE—TIMBER AND STONE ACT—FRAUD—EVIDENCE.

In suits by the United States to set aside certain patents issued under the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89, as amended by Act Aug. 4, 1892, c. 375, 27 Stat. 348 [U. S. Comp. St. 1901, p. 1545]), for alleged fraud of the entrymen in conspiring to purchase the land for sale to others, evidence relating to acts of the entrymen and of those alleged to have contracted to purchase the land after the making of the original applications by the entrymen was admissible only as tending to establish the fraudulent purpose of the entrymen with respect to the land in controversy at the time of the original applications.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. § 120.*]

5. PUBLIC LANDS (§ 120*)—SALE—TIMBER AND STONE ACT—FRAUD—EVIDENCE

In suits to set aside certain patents to land purchased under the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89, as amended by Act Aug. 4, 1892, c. 375, 27 Stat. 348 [U. S. Comp. St. 1901, p. 1545]), evidence held to require a finding, as to part of the land, that it had been purchased pursuant to an agreement to transfer the title to others, and that the transferees were not bona fide purchasers for value.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332-335; Dec. Dig. § 120.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 208 F.—14

Appeals from the District Court of the United States for the Central Division of the District of Idaho; Frank S. Dietrich, Judge.

Suits by the United States against William F. Kettenbach and others to cancel and annul certain patents previously issued by the United States for lands situated in Idaho, under the Timber and Stone Act, and to have the lands returned to the public domain. From decrees in favor of complainant for a part only of the relief demanded, it appeals in each case. Reversed in part, with instructions to enter decrees in favor of the United States in accordance with the prayer of the bills with respect to specified patents, and affirmed as to other specified patents.

See, also, 175 Fed. 463.

The United States of America, the appellant in each of the above-entitled actions, filed three separate bills in equity in the United States District Court for the District of Idaho, for the purpose of having canceled, set aside, and declared null and void certain patents theretofore granted by the appellant for lands lying in that state and district, and to have said lands restored to the public domain.

The bills are in substance and effect identical. In each it is alleged that, prior to the acts therein complained of, the complainant was the owner of the lands therein described, such lands constituting a part of the public domain and situated within the state and district of Idaho; that by an act of Congress of the United States, entitled "An act for the sale of timber lands in the states of California, Oregon, Nevada and in Washington Territory," approved June 3, 1878 (chapter 151, 20 Stat. 89), as amended and extended to all public land states by the Act of Congress of August 4, 1892, c. 375, 27 Stat. 348 (U. S. Comp. St. 1901, p. 1545), it was provided, among other things, in substance that surveyed public lands of the United States within the public land states, valuable chiefly for timber but unfit for cultivation, might be sold to citizens of the United States, or persons who had declared their intention to become such, in quantities not to exceed 160 acres to any one person or association of persons, at the minimum price of \$2.50 per acre; that it was further provided in said act "that any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate * * * setting forth * * * that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or indirectly, made any agreement or contract in any way or manner, with any person or persons whomsoever, by which the title which he might acquire from the government of the United States shall inure, in whole or in part, to the benefit of any person except himself"; that said statement was required by said act to be verified by the oath of the applicant before the register or receiver of the land office within the district where the land was situated; that said act further provided that, "if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury and shall forfeit the money which he may have paid for said lands and all right and title to the same, and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void."

The bills further alleged that on the 1st day of July, 1902, and at divers other times before and after that date, and before the making of the several entries therein mentioned and designated, William F. Kettenbach, George H. Kester, Clarence W. Robnett, and William Dwyer, with divers other persons, did unlawfully and corruptly combine, conspire, confederate, and agree together, and with each other, and with divers other persons, and did form, make, and enter into an unlawful, corrupt, and fraudulent conspiracy, combination, and agreement with each other and with such other persons, for the purpose and to the end of defrauding the complainant of the title and ownership of divers large tracts of public land then owned by the complainant, by means of false, fraudulent, and unlawful entries to be made of the aforesaid tracts of public land, and by means of perjury, the subornation of per-

jury, the procurement of false swearing, and by means of other falsehoods, whereby the officers of the United States should be deceived and imposed upon, and should be induced and procured to divest the United States of its title to the said lands, and to convey said title of the United States to divers persons not lawfully entitled thereto, contrary to the laws of the United States, and for the benefit, advantage, and profit of the said defendants; that after the formation and making of the said unlawful conspiracy and agreement so as aforesaid made and entered into by the said defendants, and at divers times in the state of Idaho, in pursuance and execution of the said conspiracy, and for the purpose of effecting the said unlawful purpose thereof, the said defendants, or some of them, did make and enter into fraudulent, corrupt, and unlawful contracts, agreements, arrangements, and understandings with a large number of persons; that in and by said unlawful contracts, agreements, arrangements, and understandings so as aforesaid made by the said defendants with the said persons, each of the said persons severally agreed and arranged with the said defendants, or with some of them, that he or she would make an entry or purchase a tract of the public land of the United States under and in pretended and apparent accordance with the aforesaid act of Congress approved June 3, 1878, as amended on August 4, 1892, and would, upon obtaining title to the said tract from the United States, convey the said title and tract to the defendants, or to some of them; that the said persons severally did apply to enter, and did make entries of divers tracts of public land of the United States, and each of the said persons did consequently and in the usual course of administration of the public laws obtain from the United States a patent whereby the United States conveyed to each of the said persons, severally, the tracts by him or her entered; that each of said persons so making entry of and obtaining title to the tract by him or her entered did apply to make and did make such entry, and did prosecute and carry on the proceedings, at the solicitation and instigation of the said defendants, being moved and stimulated thereto by the advice, request, and promises of the said defendants, and therein acting upon, in pursuance of, and in accordance with the unlawful, corrupt, and fraudulent agreement, arrangement, and understanding theretofore made and entered into as aforesaid between him or her and the said defendants; that, by reason of the unlawful conspiracy among the said defendants and the said other persons who made the entries enumerated and designated in the said complaints, the perjury procured by the said defendants, and committed by the said other persons in the procurement of the said entries, and the false swearing, misrepresentations, and concealment of material facts committed and practiced by the said persons, the said entries, and each of them, were unlawfully made, and were and are illegal, fraudulent, and invalid, and the United States was and is defrauded thereby; and that the said patents, by reason of the said facts, are invalid, and are voidable at the suit of the United States, as having been procured by fraud, perjury, misrepresentation, and imposition, and in violation of law, and as having been issued and granted under fraudulent imposition and mistake of fact, and in fraud of the United States.

The complainant prayed that the patents issued to the entrymen named in the bills be declared void, be held for naught, and set aside, and that the said lands be restored to the public domain of the complainant.

In the bill of complaint filed in appeal No. 2,209, the complainant, for the causes mentioned, attacked the validity of 17 patents, issued to the following entrymen: Patent No. 4,049, issued February 25, 1904, to Carrie D. Maris; patent No. 4,385, issued August 3, 1904, to John H. Little; patent No. 4,384, issued August 3, 1904, to Ellsworth M. Harrington; patent No. 4,389, issued August 3, 1904, to Wren Pierce; patent No. 4,390, issued August 3, 1904, to Benjamin F. Bashor; patent No. 4,393, issued August 3, 1904, to Joseph B. Clute; patent No. 4,395, issued August 3, 1904, to Francis M. Long; patent No. 4,396, issued August 3, 1904, to John H. Long; patent No. 4,397, issued August 3, 1907, to Benjamin F. Long; patent No. 4,414, issued August 3, 1904, to Bertsel H. Ferris; patent No. 4,415, issued August 3, 1904, to George Ray Robinson; patent No. 4,762, issued December 31, 1904, to Charles W. Taylor; patent No. 4,764, issued December 31, 1904, to Jackson O'Keefe; patent No. 4,765, issued December 31, 1904, to Edgar J. Taylor; patent No. 4,766, issued

December 31, 1904, to Joseph H. Prentice; patent No. 4,772, issued December 31, 1904, to Fred E. Justice; patent No. 4,799, issued December 31, 1904, to Edgar H. Dammarell.

In the bill of complaint filed in appeal No. 2,210, the complainant, for the causes mentioned, attacked the validity of 37 patents, issued to the following entrymen: Patent No. 4,054, issued February 25, 1904, to William B. Benton; patent No. 4,055, issued February 25, 1904, to Joel H. Benton; patent No. 4,213, issued July 2, 1904, to George W. Harrington; patent No. 4,306, issued July 2, 1904, to Pearl Washburn; patent No. 4,352, issued August 3, 1904, to Van V. Robertson; patent No. 4,357, issued August 3, 1904, to John W. Killinger; patent No. 4,359, issued August 3, 1904, to John E. Nelson; patent No. 4,365, issued August 3, 1904, to Robert O. Waldman; patent No. 4,377, issued August 3, 1904, to Soren Hansen; patent No. 4,391, issued August 3, 1904, to James C. Evans; patent No. 4,392, issued August 3, 1904, to Lon E. Bishop; patent No. 4,393, issued August 3, 1904, to Joseph B. Clute; patent No. 4,394, issued August 3, 1904, to Frederick W. Newman; patent No. 4,404, issued August 3, 1904, to Charles Dent; patent No. 4,405, issued August 3, 1904, to Charles Smith; patent No. 4,411, issued August 3, 1904, to George Morrison; patent No. 4,412, issued August 3, 1904, to Edward M. Hyde; patent No. 4,477, issued September 9, 1904, to Drury M. Gammon; patent No. 4,635, issued November 1, 1904, to William Haevernicks; patent No. 4,641, issued November 1, 1904, to Geary Van Artsdalen; patent No. 4,770, issued December 31, 1904, to Guy L. Wilson; patent No. 4,771, issued December 31, 1904, to Frances A. Justice; patent No. 4,773, issued December 31, 1904, to Edna P. Kester; patent No. 4,774, issued December 31, 1904, to Elizabeth Kettenbach; patent No. 4,775, issued December 31, 1904, to William J. White; patent No. 4,776, issued December 31, 1904, to Elizabeth White; patent No. 4,777, issued December 31, 1904, to Mamie P. White; patent No. 4,779, issued December 31, 1904, to Martha E. Hallett; patent No. 4,780, issued December 31, 1904, to Daniel W. Greenburg; patent No. 4,781, issued December 31, 1904, to David S. Bingham; patent No. 4,784, issued December 31, 1904, to William McMillan; patent No. 4,785, issued December 31, 1904, to Hattie Rowland; patent No. 5,015, issued May 29, 1907, to William E. Helkenberg; patent No. —, issued November 1, 1904, to Alma Haevernicks; patent No. —, issued January 28, 1904, to Rowland A. Lambdin; patent No. —, issued January 28, 1904, to Fred W. Shaeffer; patent No. —, issued September 9, 1904, to Ivan R. Cornell.

In the bill of complaint filed in appeal No. 2,211, the complainant, for the causes mentioned, attacked the validity of eight patents, issued to the following entrymen: Patent No. —, issued September 11, 1907, to Charles E. Loney; patent No. —, issued September 19, 1907, to Mary A. Loney; patent No. —, issued December 28, 1907, to Frank J. Bonney; patent No. —, issued September 11, 1907, to James T. Jolly; patent No. —, issued June 3, 1909, to Effie A. Jolly; patent No. —, issued September 11, 1907, to Charles S. Myers; patent No. —, issued September 11, 1907, to Jannie Myers; patent No. —, issued September 11, 1907, to Clinton E. Perkins.

The defendants, in the several answers filed by them in each of said actions, denied all of the material portions of the bills of complaint, and particularly and specifically denied all unlawful combination, confederation, or conspiracy, as charged in said bills.

At the request of all of the parties to the actions, special examiners were appointed to take the testimony, and to report the same to the District Court. Upon the taking of the testimony it was stipulated by and between all of the parties to the actions that the testimony of all of the witnesses of all of the parties to the said causes produced and taken before the special examiners in all of said causes should be considered as having been taken in each and all of said causes, and should go to make up the record in each and all of said causes with the same force and effect as though said causes were consolidated.

In the judgment and decree entered in the court below, the relief prayed for by the appellant was denied as to the patents granted to the entrymen des-

ignated in appeal No. 2,209, and in appeal No. 2,211, and the bill of complaint in each of these actions was dismissed for want of equity. As to the patents granted to the entrymen designated in appeal No. 2,210, the relief prayed for by the appellant was denied with the exception of the patents issued to Guy L. Wilson (No. 4,770), to Francis A. Justice (No. 4,771), and to Robert O. Waldman (No. 4,365). The patents issued to the three last-named entrymen, and numbered respectively 4,770, 4,771, and 4,365, were by said judgment and decree ordered delivered to the clerk of the court to be canceled, and it was further adjudged and decreed that the lands described therein were then and at all times had been the property of the complainant, the United States of America.

Upon motion of the appellant, made in appeal No. 2,209, it was ordered that appeal No. 2,210 and appeal No. 2,211 be consolidated with it, for hearing and argument in this court.

Peyton Gordon, Sp. Asst. to the Atty. Gen., of Washington, D. C., for the United States.

James E. Babb, of Lewiston, Idaho, for appellees Frank W. Kettenbach, Clearwater Timber Co., Idaho Trust Co., Lewiston Nat. Bank, and Potlatch Lumber Co.

George W. Tannahill, of Lewiston, Idaho, for William F. Kettenbach, George H. Kester, William Dwyer, Elizabeth White, Edna P. Kester, Martha E. Hallett, and Kittie E. Dwyer.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

MORROW, Circuit Judge (after stating the facts as above). 1 It is contended by the complainant in this court that the patents described in these three cases should be declared fraudulent and void on the single ground that the evidence establishes the fact that the entrymen applied to purchase the lands described in their entries for the purpose of speculation. Section 2 of the Act of June 3, 1878, does require the entryman to set forth in his sworn statement, among other things:

"That he does not apply to purchase the same (the land) on speculation, but in good faith to appropriate it to his own exclusive use and benefit."

The definition of the word "speculation" is given by Webster as "the act or practice of buying land, goods, shares, etc., in expectation of selling at a higher price." It may be conceded that, when the entrymen made entry of the lands in controversy, it was with the expectation that they would sell them at a higher price; but we are not required to dispose of these appeals upon these words of the statute.

[1] The cases are not so presented in the bills of complaint and were not so tried in the court below. The charge in the bills of complaint is, in substance, that, at the time the entrymen made application to purchase the lands described in their entries, they had made an agreement with certain persons by which the title to the land which they were to acquire from the United States should inure to the benefit of persons other than themselves. Whether this charge was true or not was the question at issue in the court below, and to this issue the voluminous testimony we find in the record was directed, and is now before the court for the purpose of determining these appeals.

It is this question, and this question alone, we must determine with respect to the 61 patents assailed in these cases.

[2, 3] 2. In a number of recent decisions, the Supreme Court of the United States has determined just what acts may be construed as fraudulent in cases of entries upon claims under the Timber and Stone Act of June 3, 1878, as amended and extended by the Act of August 4, 1892. In these decisions, the law has become well settled that the act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation; that all that it denounces is a prior agreement, the acting for another in the purchase; that, if when the title passes from the government no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied; and that an applicant is not required, after he has made his preliminary sworn statement concerning the bona fides of his application and the absence of any contract or agreement in respect to the title, to additionally swear to such facts on final proof. *United States v. Budd*, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384; *Williamson v. United States*, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278.

[4] In the cases which we now have before us for decision, the testimony is very voluminous. A great portion of it relates to acts of the entrymen, and of the defendants, or some of them, at the time of making final proof, or prior to that time and subsequent to the making of the original application to purchase the land. Under the decisions just referred to, this testimony was only admissible and can only be considered by this court in so far as it tends to establish the fraudulent purpose of the entrymen with respect to the land in controversy at the time of the original application.

[5] The most direct and positive testimony in support of the allegations of conspiracy to defraud the government, on the part of the defendants, is the testimony of Clarence W. Robnett. But he is one of the defendants charged as a co-conspirator, and for that reason his testimony is to be treated as that of an accomplice and is to be received cautiously and scrutinized with care. It is also true that his testimony is not altogether free from contradictions and misstatements, and, were it not for the corroborating testimony of the entrymen, we should reject it altogether. But after a careful reading of the testimony of these witnesses, and after considering their statements in connection with admitted facts and all the surrounding circumstances, we are convinced that the testimony of Robnett as to the material facts with respect to a number of the entries is in the main correct. Robnett testified that he overheard and participated in various conversations between George H. Kester and William F. Kettenbach about the timber situation in Idaho; that during these conversations Kester and Kettenbach stated that they believed they could make a "great deal" of money out of the timber; that the plan that Kester and Kettenbach talked over at different times was relative to getting entrymen to file on claims and to pay such entrymen for their right; that the entrymen were to go up into the timber and see the claims, come back and file, prove up, and deed the claims over to whomever Kester and Ket-

tenbach might designate; and that the latter were to furnish all expenses incurred by the entrymen in the performance of these acts. Now, the manner in which many of the claims the validity of which is attacked by these bills were taken up by the various entrymen, and afterwards sold to the defendants, or to some of them, coincides so entirely even in smaller details, with the plan which, according to the testimony of Robnett was outlined by Kester, Kettenbach, and himself as early as 1902, that the force of it cannot be ignored.

We proceed to a consideration of the question whether the allegations of the bills of complaint are sustained by the testimony with respect to the existence of fraud on the part of the entrymen, and on the part of the defendants, at the time of the filing of the original application in each instance, reserving for consideration in another paragraph of this opinion the question as to whether the present holders of the legal title to such claims as have passed from the ownership of the original entrymen obtained the same as innocent purchasers. In the plan outlined, the three appeals (together with the respective patents involved in each) will be considered in their numerical order.

3. With respect to the claims set forth in appeal No. 2,209, it is conceded by the government that there is not sufficient evidence to justify the cancellation of the patent issued to Fred E. Justice. We think that this is equally true in the instances of the patents issued to Wren Pierce, Benjamin F. Bashor, Joseph B. Clute, Francis M. Long, John H. Long, Benjamin F. Long, Charles W. Taylor, Jackson O'Keefe, Edgar J. Taylor, Joseph H. Prentice, and Edgar H. Dammarell. As to the patents issued to these entrymen, the judgment and decree of the court below will not be disturbed. But as to the other claims, the validity of which is attacked in appeal No. 2,209, to wit, the claims of Carrie D. Maris, John H. Little, Ellsworth M. Harrington, Bertsell H. Ferris, George Ray Robinson, there is the direct testimony of Clarence W. Robnett that he had an agreement with each of the entrymen last named, whereby each was to enter upon a claim, and, after proving up on it, was to deed it to whomsoever Robnett should designate. The testimony of Robnett in this particular is corroborated by the testimony of the entrymen, each of whom stated that his claim was taken up at the instigation of Robnett, and, indeed, some of the entrymen testified directly that there was an agreement between them and Robnett, whereby the latter was to pay all of the expenses of securing the claim, and that they were afterwards to sell the claim to a purchaser to be secured by Robnett. In most instances the entryman was to receive a stipulated sum; in some cases \$100, in others \$150, in still others \$200, and in one instance at least the profits to be made upon a sale of the claim were to be divided between Robnett and the entryman. The expenses incident to securing each of the claims entered upon by the persons last above named were paid by Robnett, the money being advanced by him directly for that purpose, or given to them by him as a loan, to secure which they gave their notes. In addition to the facts which we have thus briefly set forth, there are other facts, of less import, which we think fully sustain the allegations of the bill that each of the timber and stone entries last above set forth

was made under and by virtue and in pursuance of a prior agreement existing between each of the entrymen and Clarence W. Robnett, and that such agreement was entered into by Robnett with each of said entrymen pursuant to the unlawful conspiracy to defraud the government theretofore existing between him and the defendants George H. Kester and William F. Kettenbach.

4. In appeal No. 2,210, the court below denied the prayer of the complainant's bill as to all of the patents sought to be canceled in that action, with the exception of the patents issued to Guy L. Wilson, Frances A. Justice, and Robert O. Waldman; the patents issued to the entrymen last named being by the decree of that court ordered set aside and canceled. We are therefore not called upon to consider the bona fides of the three entrymen last named. It is conceded by the complainant in this court that the evidence is not sufficient to justify the cancellation of the patents issued to George W. Harrington, John W. Killinger, Geary Van Artsdalen, and William E. Helkenberg. We think this is also true with respect to the patents issued to Pearl Washburn, Van V. Robertson, James C. Evans, George Morrison, Edward M. Hyde, William Haevernick, Edna P. Kester, Elizabeth Kettenbach, William J. White, Elizabeth White, Mamie P. White, Martha E. Hallett, Daniel W. Greenburg, Hattie Rowland, and Alma Haevernick. In most of the cases last named the claims are still owned by the original entrymen. There is no sufficient evidence to support the allegations of the bill respecting their acquisition by means of fraud, and as to them the judgment of the court below is affirmed. But as to the other entries the validity of which is attacked in this appeal, to wit, the entries of William B. Benton, Joel H. Benton, John E. Nelson, Soren Hansen, Drury M. Gammon, Lon E. Bishop, Frederick W. Newman, Charles Dent, Charles Smith, David S. Bingham, William McMillan, Rowland A. Lambdin, Ivan R. Cornell, and Fred W. Shaeffer, much that has been said with respect to the claims which we think should be forfeited in appeal No. 2,209 applies with equal force to the claims last enumerated. The claims of William B. Benton, Joel H. Benton, John E. Nelson, Soren Hansen, and Drury M. Gammon were taken up at the request or with the assistance of Clarence W. Robnett. The claims of Lon E. Bishop, Frederick W. Newman, Charles Dent, and Charles Smith were taken up at the request or with the assistance of one Fred W. Emory. The claim of David S. Bingham was taken up at the request or with the assistance of one Jackson O'Keefe. The claims of William McMillan, Rowland A. Lambdin, Ivan R. Cornell, and Fred W. Shaeffer were taken up at the request or with the assistance of George H. Kester. In the main, the plan pursued by the entrymen in the acquisition of these claims from the government was similar to the method whereby the entrymen acquired title to the claims which we think should be canceled in appeal No. 2,209. Some of the entrymen testified that they had agreements for the sale of their claims, with the person at whose request or with whose assistance they entered upon the land, prior to the filing of the original application therefor. In all of the entries last enumerated, the testimony can permit of but one conclusion: That the claims were taken up in pursu-

ance of unlawful agreements entered into between the entrymen and the persons at whose request or with whose assistance the claims were taken up, and that said agreements were entered into between said parties pursuant to the unlawful conspiracy to defraud the government theretofore existing between the defendants George H. Kester, William F. Kettenbach, and Clarence W. Robnett.

5. The eight claims set forth in appeal No. 2,211, and which were filed upon by Charles E. Loney, Mary A. Loney, Frank J. Bonney, James T. Jolly, Effie A. Jolly, Charles S. Myers, Jannie Myers, and Clinton E. Perkins, were secured for the entrymen named by one Harvey J. Steffey. Steffey testified that he had an understanding with one William Dwyer, who is made a defendant in this action, relative to locating entrymen on claims under the Timber and Stone Act; that he knew that Dwyer and George H. Kester and William F. Kettenbach were working together; that his understanding with Dwyer was that the entrymen would transfer their claims to Kester and Kettenbach; that he (Steffey) was to pay each entryman \$200, and each entryman, after he had made final proof, was to convey to Kester and Kettenbach; and that the eight entries enumerated in the bill filed in this appeal were made by the entrymen therein named in accordance with the agreement that Steffey had with William Dwyer. In support of the testimony given by Steffey, it appears from the testimony of each of the entrymen that he was given the money for the expenses incident to taking up the claim by Steffey; and it also indisputably appears in the case of each entry involved in this appeal that the entryman was assured by Steffey that he could make from \$150 to \$250 out of the transaction, and that in order to realize such sum the claim was to be sold by the entryman. We think that this testimony alone is fully sufficient to establish the fact that each of the entrymen named in this appeal had an agreement with Harvey J. Steffey, prior to making entry upon the claim, for the sale of his claim, and that Steffey was in the whole transaction acting as an agent for the defendants William Dwyer, George H. Kester, and William F. Kettenbach.

6. The remaining question to be reviewed in these appeals is: Were the present holders of the legal title to such of the claims as have passed from the ownership of the original entrymen (and which we have determined were fraudulently obtained from the government) purchasers in good faith without knowledge of the facts rendering the entries invalid? The claims which, for the reasons hereinabove stated, we have determined were fraudulently obtained from the government, are those entered upon by the following entrymen: Carrie D. Maris, John H. Little, Ellsworth M. Harrington, Bertsell H. Ferris, George Ray Robinson, William B. Benton, Joel H. Benton, John E. Nelson, Soren Hansen, Drury M. Gammon, Lon E. Bishop, Frederick W. Newman, Charles Dent, Charles Smith, David S. Bingham, William McMillan, Rowland A. Lambdin, Ivan R. Cornell, Fred W. Shaeffer, Charles E. Loney, Mary A. Loney, Frank J. Bonney, James T. Jolly, Effie A. Jolly, Charles S. Myers, Jannie Myers, and Clinton E. Perkins. Of the claims taken up by the entrymen last enumerated, the legal title to the claims held by the following entrymen was, at the time of the

commencement of these actions, respectively, vested in the defendants George H. Kester, or William F. Kettenbach, individually, or in George H. Kester and William F. Kettenbach jointly, namely: Carrie D. Maris, John H. Little, Ellsworth M. Harrington, Bertsell H. Ferris, George Ray Robinson, Soren Hansen, Charles Loney, Mary A. Loney, Frank J. Bonney, James T. Jolly, Effie A. Jolly, Charles S. Myers, Jannie Myers, and Clinton E. Perkins. As to the claims entered upon by the entrymen last named, the legal title to which is now vested in George H. Kester, or in William F. Kettenbach, individually, or in George H. Kester and William F. Kettenbach jointly, the question as to whether they or either of them were innocent purchasers cannot arise, in the light of the conclusion at which we have arrived concerning the claims which they now own: That each of such claims was taken up in pursuance of a conspiracy to defraud the government of the United States existing between the defendants George H. Kester and William F. Kettenbach, and certain other of the defendants named in these actions, prior to the initial entry. Of the remaining claims which, as we have determined, were taken up in fraud of the United States, the legal title to the claims entered upon by Lon E. Bishop, Frederick W. Newman, Charles Dent, Charles Smith, David S. Bingham, and William McMillan is now vested in the Idaho Trust Company, a corporation; the legal title to the claims entered upon by Rowland A. Lambdin, Ivan R. Cornell and Fred W. Shaeffer is now vested in the Potlatch Lumber Company, a corporation; the legal title to the claim entered upon by Drury M. Gammon is now vested in the Lewiston National Bank, a corporation; the legal title to the claims entered upon by William B. Benton and Joel H. Benton is now vested in the Clearwater Timber Company, a corporation; and the legal title to the claim entered upon by John E. Nelson is now vested in Elizabeth W. Thatcher. We shall review the testimony concerning the acquisition of these claims by the present owners thereof in the order designated.

With respect to the six claims the legal title to which is now vested in the Idaho Trust Company, to wit, the claims of Lon E. Bishop, Frederick W. Newman, Charles Dent, Charles Smith, David S. Bingham, and William McMillan, the facts surrounding their purchase by the trust company are as follows: On July 6, 1907, George H. Kester and William F. Kettenbach, who on that date were the holders of the legal title to each of the claims last enumerated (with the exception of the claim of William McMillan), sold and transferred all of said claims so held by them to the Idaho Trust Company. On July 23, 1907, the said George H. Kester and William F. Kettenbach executed a trust agreement to and with the Idaho Trust Company, reciting the deed of July 6, 1907, and defining the terms and conditions upon which the trust company should hold the title to the real estate conveyed to it by said deed. Under the terms of the trust agreement, the Idaho Trust Company was to hold said real estate in trust for George H. Kester and William F. Kettenbach, their heirs, executors, administrators, and assigns. In and by the trust agreement, no power was given to the trust company to sell any portion of said real estate, except at

such prices and upon such terms as George H. Kester and William F. Kettenbach, in writing, should direct. After a full consideration of all the facts disclosed by the record incident to the transfer to and purchase by the Idaho Trust Company of the claims last hereinabove enumerated, and included in the deed of July 6, 1907, we agree with the contention of the appellant that the Idaho Trust Company is merely the holder of the record title to said claims, and that the entire control and disposition of said claims still remain in the hands of George H. Kester and William F. Kettenbach, who, as we have heretofore determined, acquired them from the original entrymen with full knowledge of the facts rendering the entries invalid, and in fraud of the government of the United States.

The remaining claim now owned by the Idaho Trust Company, to wit, that of William McMillan, was conveyed by the entryman to Kittie E. Dwyer, by deed dated April 9, 1906. The sale of this claim by the entryman was negotiated by William Dwyer, the husband of the grantee. The entryman testified that he negotiated with William Dwyer for the sale of his claim with the consent of George H. Kester, who had rendered him financial assistance in securing the claim, and it cannot be seriously questioned that in this transaction, as well as in the other transactions to which we have referred, William Dwyer was acting for and on behalf of the defendants George H. Kester and William F. Kettenbach, and with full knowledge of the facts rendering the claim invalid. By deed dated December 31, 1908, Kittie E. Dwyer, together with her husband, William Dwyer, conveyed said claim to the Idaho Trust Company. On the same date, Kittie E. Dwyer and her said husband executed a trust agreement with said trust company, reciting the conveyance to said trust company of even date therewith, and setting forth and defining the conditions upon which the trust company should hold the real estate conveyed to it by said deed. The terms and conditions of this trust agreement were similar to the terms and conditions of the trust agreement executed by and between the Idaho Trust Company and George H. Kester and William F. Kettenbach, to which we have just referred, and with respect to this claim also we are of opinion that the Idaho Trust Company is merely the holder of the record title and that the entire control and disposition of it still remain in the hands of William Dwyer and his wife, Kittie E. Dwyer, who acquired said claim from the entryman with full knowledge of the facts rendering the entry invalid.

With respect to the claims of Rowland A. Lambdin, Ivan R. Cornell, and Fred W. Shaeffer, the legal title to which is now vested in the Potlatch Lumber Company, a corporation, it is conceded by the appellant that said corporation was an innocent purchaser thereof, without knowledge of the facts rendering the entries invalid.

With respect to the claim of Drury M. Gammon, the legal title to which is now vested in the Lewiston National Bank, said claim was sold by the entryman to Clarence W. Robnett by deed dated October 9, 1903, and was transferred by Robnett to the Lewiston National Bank by deed dated November 25, 1904. At the time this claim was purchased by the Lewiston National Bank, George H. Kester was cashier

thereof, William F. Kettenbach was president thereof, and Clarence W. Robnett (at whose request or with whose assistance this claim was acquired by the entryman) was employed as a bookkeeper therein. In the paragraph of this opinion numbered 4, we have stated that we were of the opinion, for the reasons therein set forth, that this claim, together with the other claims therein enumerated, were taken up in pursuance of unlawful agreements entered into between the entrymen and the person at whose request or with whose assistance said claims were acquired, and that such agreements were entered into between said parties pursuant to the unlawful conspiracy to defraud the government theretofore existing between the defendants George H. Kester, William F. Kettenbach, and Clarence W. Robnett. That fact being established, in connection with the fact that the defendants named were officers and employes of the Lewiston National Bank at the time of the purchase of said claim by that bank, and the further fact William F. Kettenbach and George H. Kester had complete charge of the management of the affairs of said bank during all of the time that they held their respective offices therein, we are forced to reject the contention of the appellees that the Lewiston National Bank was an innocent purchaser of the said claim and was unaware of the facts rendering the entry invalid.

With respect to the claims of William B. Benton and Joel H. Benton, the legal title to which is vested in the Clearwater Timber Company, a corporation, and the claim of John E. Nelson, the legal title to which is vested in Elizabeth W. Thatcher, there is very little, if any, testimony in the record tending to show the circumstances surrounding the acquisition of these claims by the present owners thereof; and, although we are convinced that each of said claims was acquired by the original entryman in fraud of the government of the United States, still the testimony appears to be sufficient to establish the fact that each of said claims was acquired by the present owner of the legal title without knowledge of the facts rendering the original entry invalid.

7. We are of opinion that the charge of conspiracy to defraud the United States out of the title and possession of the lands described in the bills of complaint has been established with respect to the entries upon which the following enumerated patents have been issued, and that, by reason of such fraudulent proceeding on the part of the entrymen and the defendants, the patents are null and void and should be surrendered up and canceled, and the lands as described restored to the public domain, namely:

In appeal No. 2,209: Patent No. 4,049, issued February 25, 1904, to Carrie D. Maris; patent No. 4,385, issued August 3, 1904, to John H. Little; patent No. 4,384, issued August 3, 1904, to Ellsworth M. Harrington; patent No. 4,414, issued August 3, 1904, to Bertsell H. Ferris; patent No. 4,415, issued August 3, 1904, to George Ray Robinson.

In appeal No. 2,210: Patent No. 4,377, issued August 3, 1904, to Soren Hansen; patent No. 4,392, issued August 3, 1904, to Lon E. Bishop; patent No. 4,394, issued August 3, 1904, to Frederick W. Newman; patent No. 4,404, issued August 3, 1904, to Charles Dent;

patent No. 4,405, issued August 3, 1904, to Charles Smith; patent No. 4,477, issued September 9, 1904, to Drury M. Gammon; patent No. 4,781, issued December 31, 1904, to David S. Bingham; patent No. 4,484, issued December 31, 1904, to William McMillan.

In appeal No. 2,211: Patent No. ———, issued September 11, 1907, to Charles E. Loney; patent No. ———, issued September 19, 1907, to Mary A. Loney; patent No. ———, issued December 28, 1907, to Frank J. Bonney; patent No. ———, issued September 11, 1907, to James T. Jolly; patent No. ———, issued June 3, 1909, to Effie A. Jolly; patent No. ———, issued September 11, 1907, to Charles S. Myers; patent No. ———, issued September 11, 1907, to Jannie Myers; patent No. ———, issued September 11, 1907, to Clinton E. Perkins.

It is accordingly ordered that the decrees of the court below, with respect to the patents named, be reversed, with instructions to enter decrees in favor of the United States in accordance with the prayer of the bills with respect to such patents; and with respect to all the other patents mentioned in the bills of complaint the decrees be affirmed.

PACIFIC TELEPHONE & TELEGRAPH CO. v. HOFFMAN et al.

(Circuit Court of Appeals, Ninth Circuit. October 20, 1913.)

No. 2,192.

1. TELEGRAPHS AND TELEPHONES (§ 15*)—INJURIES FROM MAINTENANCE—OBSTRUCTIONS IN HIGHWAYS—CONCURRING CAUSE.

Where plaintiffs' automobile, after crossing a railroad track at night, struck a guy wire attached to one of defendant's telephone poles and extending into the highway near to the traveled part of the road, resulting in the injuries complained of, and the testimony was sufficient to show that the wire, if not the sole cause, was at least a concurring or successive cause of the accident, defendant was not entitled to a verdict on the ground that, as between the obstruction caused by the railroad crossing and the guy wire, the evidence was insufficient to show which caused the accident, and that the jury should not be permitted to guess or speculate between such causes.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 9; Dec. Dig. § 15.*]

2. TELEGRAPHS AND TELEPHONES (§ 20*)—OBSTRUCTIONS IN HIGHWAYS—INJURIES TO TRAVELERS—QUESTION FOR JURY.

Where an automobile, driven at a high rate of speed at night, first struck a railroad crossing and then a guy wire attached to one of defendant's telephone poles and extending into the highway, resulting in injuries to the car and the occupants, whether the railroad crossing or the wire was the proximate cause of the accident, and how far the preceding event of the car striking the crossing operated in producing the final catastrophe, *held* for the jury.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 13; Dec. Dig. § 20.*]

3. NEGLIGENCE (§ 61*)—PROXIMATE CAUSE—CONCURRING CAUSE.

Where concurring or successive acts of negligence of numerous persons combined caused plaintiff's injury, he may recover of either or both, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 74, 75; Dec. Dig. § 61.*]

4. TELEGRAPHS AND TELEPHONES (§ 15*)—OBSTRUCTIONS IN HIGHWAY—"NUISANCE"—GUY WIRE.

Rem. & Bal. Code Wash. § 8308, provides that it is a public nuisance to obstruct or encroach on a public highway, and section 8309 declares that nuisance consists in unlawfully obstructing a highway so as to render it dangerous for passage. Section 9314 authorizes telephone companies to maintain their lines and erect their poles along highways in such a manner as not to incommode the public use of the highway. *Held*, that a guy wire attached to a telephone pole and anchored at a point near the traveled part of the highway was a public "nuisance," if its location endangered the safety of travelers or tended to obstruct or render dangerous their passage over the highway.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 9; Dec. Dig. § 15.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4855-4864; vol. 8, p. 7734.]

5. TELEGRAPHS AND TELEPHONES (§ 20*)—OBSTRUCTIONS—NUISANCE—QUESTION FOR JURY.

In an action for injuries to plaintiffs and to an automobile by the machine striking a guy wire attached to one of defendant's telephone poles and anchored near the traveled part of the highway, whether the wire was in such a position as to obstruct or render dangerous the passage over the highway, so as to constitute a nuisance, was for the jury.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 13; Dec. Dig. § 20.*]

6. TRIAL (§ 279*)—INSTRUCTIONS—EXCEPTIONS—SUFFICIENCY.

Exceptions to instructions, failing to specify the grounds so as to notify the trial judge of the specific objection are insufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 690; Dec. Dig. § 279.*]

7. TELEGRAPHS AND TELEPHONES (§ 15*)—OBSTRUCTIONS IN HIGHWAY—GUY WIRE.

Where a telephone company was authorized to construct its line along a highway in such a manner and at such points as not to incommode the public use of the highway, and pursuant to such authority constructed a guy wire attached to a pole and anchored at a point near the traveled part of the way so as to endanger public travel, the wire constituted an obstruction and rendered the telephone company liable for injuries to a traveler resulting therefrom.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 9; Dec. Dig. § 15.*]

8. TELEGRAPHS AND TELEPHONES (§ 20*)—OBSTRUCTIONS IN HIGHWAY—INJURIES TO TRAVELERS—INSTRUCTIONS.

In an action for injuries to travelers on a highway by an automobile coming in contact with a guy wire attached to defendant's telephone pole and anchored near the traveled part of the way, after the automobile had passed at high speed over a railroad crossing, the court charged that, if the machine was driven at an unlawful speed, and it was known to plaintiffs or either of them that it was being driven in excess of 24 miles an hour and "that to drive the same at the rate of speed it was being driven in the nighttime was dangerous," and if either plaintiff having such knowledge failed to warn the driver or request him to stop and permit such plaintiff to get out, if he or they had time and opportunity to do so, then such plaintiff voluntarily committed himself to the action

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the driver and was responsible for his own act in failing to take precautions, and, if in addition thereto such rate of speed was shown to have contributed to the accident, then such plaintiff could not recover. *Held*, that such instruction was not objectionable in that the quoted clause in effect charged the jury that it was not sufficient to charge plaintiffs with contributory negligence unless they knew that such unlawful speed was dangerous in the nighttime.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 13; Dec. Dig. § 20.*]

In Error to the District Court of the United States for the Southern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Consolidated actions by Otto Hoffman, by E. J. Morrison, by Clarence E. Maxfield, and by George F. Mottet and others, against the Pacific Telephone & Telegraph Company. From a judgment in favor of the plaintiff in each case, defendant brings error. Affirmed.

The writ of error in this cause brings up for review four separate actions: One by Otto Hoffman against the Pacific Telephone & Telegraph Company; a second by E. J. Morrison against the Pacific Telephone & Telegraph Company; a third by Clarence E. Maxfield against the Pacific Telephone & Telegraph Company, and a fourth by George F. Mottet, S. V. Davin, and Xavier F. Michellod against the Pacific Telephone & Telegraph Company.

The suits of Otto Hoffman, E. J. Morrison, and Clarence E. Maxfield, as individuals, against the Pacific Telephone & Telegraph Company, were actions for personal injuries sustained by each of the plaintiffs, by reason of an automobile in which they were riding in an easterly direction along the public highway near the town of Walla Walla, in the state of Washington, coming in contact with a guy wire which was attached to and used as a brace or support for one of the poles of the telephone company, erected on the northerly boundary of the highway. The fourth suit was an action brought by George Mottet, S. V. Davin, and Xavier F. Michellod, as owners of the automobile, against the telephone company, to recover damages for injury to their automobile by reason of the accident.

The roadway over which the automobile was passing at the time of the accident was a public highway known as the Walla Walla and Wallula Road, connecting the city of Walla Walla and the town of Wallula almost due westward, and about 30 miles distant. Between these two points run also the tracks of the Oregon, Washington Railroad & Navigation Company's branch line. The public highway is 60 feet wide, with a strip of macadam 18 feet wide running approximately through the center of the roadway. From the city of Walla Walla the highway runs on the south side of and parallel with the railroad track to a point about $1\frac{1}{4}$ miles west of that city, where the highway turns and crosses the railroad track from the southerly to the northerly side at almost a right angle, and then turning to the left proceeds in the same general direction to the west. The crossing of the highway over the railroad track was, at the time of the accident, planked between the rails to a width of about 24 feet. Along the highway are the poles and wires of the defendant's telegraph and telephone line. To the east of the railroad crossing the defendant's poles and wires are on the north side of the highway, but at the crossing the poles and wires are transferred to, and continue west on the south side of the highway. At a point east of the crossing and on the north side of the highway, and about 25 feet east of the south rail of the railroad track, stood a telephone pole to which was attached a guy wire. This guy wire was less than one-half inch in diameter, and was used to support and brace the pole in an erect position. The wire extended from a point near the top of the pole southerly in the direction of the center of the highway, to the ground, where it was firmly and securely anchored and embedded at a point about 9 feet from the base of the pole to which it was attached. From

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the foot of the guy wire to the beaten roadway was 31 inches, and from the edge of the beaten roadway to the macadam was a distance of about 2½ feet. The appearance of the highway was that at one time it had been graded for its entire width of 60 feet; but, as is usual with country highways, the entire width was not in actual use by vehicles passing over the highway. The middle strip of macadam, 18 feet in width, in addition to a few feet on either side, was sufficient to accommodate the general traffic.

The accident which gave rise to these actions occurred at about 9 o'clock on the evening of April 2, 1910. The plaintiffs in the first three actions, Otto Hoffman, E. J. Morrison, and Clarence E. Maxfield, were riding in an automobile driven by one Mullinix, who is not a party to either of these actions. The automobile was owned by George F. Mottet, S. V. Davin, and Xavier F. Michellod, the plaintiffs in the last-named action. The automobile in charge of the driver, Mullinix, with Hoffman in the front seat with the driver, and Morrison and Maxwell in the rear seat, had passed down the Walla Walla Road in a westerly direction from the city of Walla Walla, to a point beyond the railroad crossing, and was returning eastward along the highway. When approaching the railroad crossing, Morrison said to the driver, "Look out for the crossing." For the purpose of taking the curve turning to the right at the crossing, the automobile was steered by the driver to the left or north side of the highway, and by reason of the slippery condition of the road, caused by recent rains, the automobile skidded still further to the left, causing the front and rear wheels on the left side of the machine to pass from the beaten road into the grass bordering the road; the right wheels remaining on the macadamized portion of the road. In crossing the railroad tracks the left wheel missed the planking between the rails, causing a jar to those in the automobile.

The testimony introduced on behalf of the plaintiffs tended to show that the occupants of the car experienced only a slight jar when they crossed the tracks of the railroad, and that they were not thrown out; that the driver was trying hard to turn the machine as they approached the crossing; that it had been raining and the road was wet and slippery; that they had been going at about 30 miles an hour, but before they reached the crossing they met a buggy, when they slowed up, and kept slacking up until they reached the crossing. The plaintiff Hoffman testified that "Mr. Morrison made some remarks, told the driver to be careful about the railroad crossing, and the first thing we knew we were going over the railroad crossing, over the railroad tracks up the right of way, and we hit this guy wire, and of course the car upset." On cross-examination this witness testified: "I remember the car going over the railroad tracks. I could feel a slight jar. It did not throw us out of the car, jarred us a little bit. I noticed we were crossing the rails." After crossing the railroad the automobile continued in the same direction until it struck the guy wire attached to the telephone pole, a distance of about 25 feet from the south rail of the railroad track, when the rear end of the car skidded around. The collision resulted in overturning the car, and at a point about 20 or 22 feet east of the guy wire the car stopped and was found standing at right angles with the road; the front of the car facing to the north. The plaintiffs Hoffman, Morrison, and Maxfield were thrown to the ground at some point east of the railroad crossing, whereby they received the injuries complained of, and the automobile was damaged. The appearance of the car was that the guy wire had struck the car between the hood and the front fender, breaking the top and the glass shield and the fender, and damaging the wheels and other parts of the car.

An examination of the ground was made on the morning after the accident by W. H. Buck, a witness for the plaintiffs, who was asked: "Q. When you went there, how did you find the situation with reference to the automobile and the guy wire? A. When I went down there in the morning, I went down more to see the accident than anything else. I found the automobile had left the crossing—there was a plank crossing in it at the time—going over the south rail of the railroad track there four or five ties from the end of the plank crossing at that end. The left wheel of the automobile had skidded; well, in fact, both of them, but the left-hand wheel showed very plainly beside the macadam road in the crossing. Q. As it approached the— A. As it

was approaching the wire. Now, this is on the south side of the railroad track. Q. That was between the railroad track and the guy wire? A. And the guy wire."

The testimony on behalf of the defendant tended to show that where the automobile crossed the railroad tracks all of the wheels were off of the plank crossing; that the marks on the ties showed that they had been badly splintered by the passage of the car; that the rails presented an obstacle of 10 or 12 inches in height. A witness named Baker, introduced on behalf of the defendant, was asked on direct examination: "Q. Well, immediately or anywhere near the south side of the railroad track did you find any car marks, automobile tracks? A. No, I could not see any indication of a car having been across or in between the tracks, between the point where it struck and where I said within 30 feet of the pole, I could not say that the car had struck the ground at all; there was nothing to indicate that. Q. Did you look at it with that in your mind? A. Yes, I was looking at it to see how far the car jumped. Q. And how far, from your examination, would you say that it did? A. Well, I could see that it lit, but I don't think it lit closer than 25 or 30 feet anyhow, because there was not any tracks up there to obliterate that ground, and there weren't any signs of any car striking there; that is, between the pole and where the car went off on the track, is approximately 60 feet." On cross-examination he was asked: "Q. Now, Mr. Baker, when you were discussing the question of the car lighting and testified, you were indulging then largely in speculation, were you? A. I saw no tracks between where those steps were around here obliterating the track that might have been there; between there and where the car first struck the tracks, the railroad tracks, or the ties, I saw no track whatever indicating that the car had passed over that ground."

There was evidence that the car weighed 3,880 pounds and carried a tire 48, 2 by 4½.

The complaint in each action was originally filed in the superior court of the state of Washington in and for the county of Walla Walla, but the cases were subsequently transferred for trial to the United States District Court for the Eastern District of Washington, Southern Division.

By stipulation of counsel, the actions of Otto Hoffman, E. J. Morrison, and Clarence E. Maxfield, as individuals, against the telephone company, for damages for personal injuries, and the action of George F. Mottet, S. V. Davin, and Xavier F. Michellod, against the telephone company, as owners of the automobile, for damages for injuries to it, were consolidated and tried as one action before a jury.

At the close of the testimony introduced by the plaintiffs, the defendant challenged the sufficiency of the evidence to sustain a verdict in favor of the plaintiffs, or any of them, and against the defendant, and moved the court to take the case from the further consideration of the jury and to enter a judgment for the defendant. The grounds upon which the motion was based were that the evidence adduced by the plaintiffs failed to show that the defendant was or had been guilty of any negligence in connection with the matters and things charged in the complaint, and that the evidence further showed that the plaintiffs, and each of them, had been guilty of contributory negligence, and that their contributory negligence brought about the injuries and damages alleged to have been sustained by them respectively. The motion was denied.

At the close of the case the defendant renewed its motion made at the close of the plaintiffs' testimony, and again challenged the sufficiency of the evidence on the whole case to warrant a verdict in favor of the plaintiffs, and moved the court to take the case from the further consideration of the jury and to enter a judgment in favor of the defendant. This motion was also denied.

The jury returned four separate verdicts: One in favor of the plaintiff Otto Hoffman, and against the telephone company, in the sum of \$6,000; a second in favor of the plaintiff E. J. Morrison, and against the telephone company, in the sum of \$5,000; a third in favor of the plaintiff Clarence E. Maxfield, and against the telephone company, in the sum of \$800; and a fourth in favor of the plaintiffs George F. Mottet, S. V. Davin, and Xavier F. Michellod, and

against the telephone company, in the sum of \$500. Judgments were entered against the defendant, and in favor of the plaintiffs, respectively, for the amounts stated above; from which judgments the defendants prosecuted this writ of error.

Post, Avery & Higgins, F. T. Post, and A. G. Avery, all of Spokane, Wash., for plaintiff in error.

C. C. Gose and W. B. Mitton, both of Walla Walla, Wash., for defendants in error.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

MORROW, Circuit Judge (after stating the facts as above). [1] 1. It is contended by the defendant that as between the obstruction to the passage of the automobile caused by the guy wire, and the obstruction caused by the railroad crossing, the evidence is not sufficient to show that the guy wire was the cause of the accident, invoking the rule that where one of two or more things may have caused the accident, for one of which the defendant is responsible, and for the other he is not, it is not for the jury to guess or speculate between these causes, and find that the negligence of the defendant was the real cause of the accident, where there was no satisfactory foundation in the testimony for that conclusion. *Patton v. Texas & P. Ry. Co.*, 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361. The rule is not applicable in this case. There is no question but the car came into collision with the guy wire, and we think there is in the testimony a sufficient foundation for the conclusion that the guy wire, if not the sole cause, was either a concurrent or a successive cause of the accident.

[2] But in appealing to this rule, the defendant seeks to eliminate the guy wire altogether as an independent intervening cause of the accident, basing this theory, it seems, upon the testimony of the witness who, on the morning after the accident, inspected the ground and saw no tracks of the car between the railroad crossing and the guy wire, a distance of about 25 feet. From this testimony the defendant draws the inference that when this car, weighing nearly two tons, met the obstruction of the railroad crossing, it made a clean jump from the railroad crossing to the guy wire, a distance of about 25 feet. The common knowledge of any one of experience would be that such a projection of the car would be impossible; but the obvious answer to such a theory, whatever its merit or demerit, is that it was a question of fact for the jury and not a question of law for the court.

But assuming for the defense the more reasonable theory that the car may have been diverted from its course, or the driver lost steering control of it, by the obstruction of the railroad crossing, and the car thereby brought into collision with the guy wire, still it would be a question for the jury to determine how far the preceding event operated in producing the final catastrophe. As said by the Supreme Court of the United States in *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469, 476 (24 L. Ed. 256):

"In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the obvious

province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new or independent agencies, and this must be determined in view of the circumstances existing at the time."

[3] There is also another well-established rule not to be overlooked in this connection, and that is that, if concurring or successive acts of negligence of numerous persons combined together caused the plaintiff's injury, he may recover damages of either or both, and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury. Supplement to Thompson's Law of Negligence, by White, par. 75. We think that, with respect to this feature of the case, the evidence that the guy wire was one of the proximate causes of the accident was sufficient to go to the jury.

[4] 2. The next question relates to the character of the obstruction considered with respect to its location in the public highway. As has been stated, the public highway was 60 feet wide, and the whole of this width had been dedicated to public use. By section 8308 of Remington and Ballinger's Codes and Statutes of the state of Washington, it is provided that it is a public nuisance to obstruct or encroach upon the public highway, and in section 8309 it is provided that:

"Nuisance consists in unlawfully doing an act * * * which injures or endangers the * * * safety of others, * * * or * * * obstructs or tends to obstruct, or render dangerous for passage * * * any * * * street or highway."

By section 9314 it is provided:

"Any telegraph or telephone corporation, or the lessees thereof, doing business in this state, shall have the right to construct and maintain all necessary lines of telegraph or telephone for public traffic along and upon any public road, street or highway * * * and may erect poles, piers or abutments for supporting the insulators, wires and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the * * * highway."

The pole to which the guy wire in question was attached was located on the northern boundary of the highway at a point where the highway turned from the railroad crossing. The guy wire was anchored and embedded in the ground about 31 inches from the edge of the beaten and traveled portion of the highway, and at a point where an automobile making the turn in the road from the crossing, and the driver not observing the obstruction of the wire, might cut across the protruding curve and strike the wire. The question is: Did this guy wire so located incommode the public use of the highway, or was it a nuisance by reason of the fact that it endangered the safety of others or tended to obstruct or render dangerous passage over the highway?

[5] This was a question of fact to be submitted to the jury with proper instructions. This the court did, instructing the jury that the statute granted to the defendant the right to erect and maintain its telephone poles and lines along the public highway, subject to the condition that they should not be erected so as to incommode the public use of the highway; that, if the jury found from the testimony that the poles were so erected as not to incommode the public use of the high-

way, then the verdict should be for the defendant. To this instruction the defendant, of course, took no exception. The court then referred to sections 8308 and 8309 of Remington and Ballinger's Codes and Statutes of Washington, and, proceeding with its instructions, stated that the grant of a right of way to the telephone company was, of course, subject to the limitation and condition in the statute that any person who placed a permanent obstruction in the public highway, of such character as to endanger the use of the highway for ordinary public travel, committed a nuisance and was liable in damage to any person who was injured by reason of the maintenance of that nuisance without fault on his part. To the latter instruction the defendant excepted, but without specifying the grounds of such exceptions.

[6] These exceptions were not sufficient under the well-established rule in the federal courts requiring that, where a party excepts to an instruction of the court, the ground of the exception must be specified, so that the court may have an opportunity to supply any deficiency or correct any error that may have been made in the instruction before the jury retires from the courtroom. *McDermott v. Severe*, 202 U. S. 600, 610, 26 Sup. Ct. 709, 50 L. Ed. 1162; *Dotson v. Milliken*, 209 U. S. 237, 242, 28 Sup. Ct. 489, 52 L. Ed. 768.

But this objection to the exception is not material in this case, since the general exception relied on is that the court did not, as requested by the defendant, instruct the jury to return a verdict for the defendant. With respect to this feature of the case, the defendant contends that the pole and guy wire were lawfully placed, if they did not "incommode the public use of the highway," and that the public use here referred to was the reasonable and ordinary use of the highway, and not every possible use or a use having reference to unusual conditions; that the automobile had no greater right to incommode the ordinary and reasonable use of the highway by the telephone company than the latter had to incommode the automobile in its ordinary and reasonable use of the highway. In other words, these rights were reciprocal, and had reference to the usual and ordinary uses and conditions of the highway.

[7] But the primary and general use of a highway is for travel, and any obstruction that renders it dangerous or unsafe for that purpose is unlawful; and, although a telephone company may have the right to occupy a highway with its poles, yet if it secures them in the highway by guy wires so as to endanger the public travel, or the safety of individuals in the reasonable and ordinary use of the highway, such method of securing and maintaining its poles is an obstruction, and the law declares that such an obstruction is a nuisance, and the act of maintaining such a nuisance negligence. *Shearman & Redfield on the Law of Negligence*, § 365; *Addison on Torts* (8th Ed.) p. 890; *Thompson's Commentaries on the Law of Negligence*, vol. 1, § 1239.

In the case of *Sheldon v. Western Union Telegraph Co.*, 51 Hun, 591, 4 N. Y. Supp. 526, the defendant had constructed a telegraph line along the road in question, and in connection with it maintained a pole at a point where there was an angle in the road, so that the tendency was that the pole would fall away from the road. The pole

was quite close to the fence constituting the boundary of the road. To prevent the pole from falling away from an upright position, the defendant sank a stone close to the traveled part of the highway, fastened a wire to it, carried the wire to the telegraph pole above the ground, and attached it to the pole. By means of this anchor and wire the pole was held firm. There were two apple trees on the same side of the road as the anchor stone, which, when in leaf, prevented the wire being seen by persons using the highway. There was a bank on the opposite side of the road which forced the traveler close to the sunken stone. The plaintiff was driving a team of horses along the road, and, while endeavoring to pass another team, collided with the wire and was thrown from the wagon. The court said:

"The question is a peculiar one in this, that both parties had a right to use the road; the plaintiff because it was a public highway, and the defendant because of legislative permission to use the highway. The first question is: Which right is paramount? Highways are well established and defined in law. The right to use them as they have been accustomed to be used from time immemorial cannot be questioned. The right of the defendant is subject to the public user. The defendant may not use the road so as to obstruct or render dangerous the public travel. If this correctly states the rights of the parties, a case of injury by negligence of the defendant is clearly made out. The wire between the stone and the pole was not easily seen, under favorable circumstances. The wire was so close to the road that it was a dangerous snare to travelers, and, besides this, the road was so narrow by reason of the bank, and the traveler's view was so obstructed by the trees, that the jury was justified in finding the defendant guilty of negligence."

In *Wilson v. Great Southern Telephone & Telegraph Co.*, 41 La. Ann. 1041, 6 South. 782, a guy wire had been erected in order to sustain and strengthen the posts of the defendant company placed on neutral ground on St. Charles avenue, in the city of New Orleans. The posts were situated about three feet six inches from the street, and the guy wire was some six or seven feet above the ground, but not high enough to be clear of vehicles passing on the neutral ground. Outside of the asphalt pavement, and inside of the neutral ground, about $3\frac{1}{2}$ feet from the edge of the pavement, there was located a fire plug. The plaintiff was the driver for an engine company, and in attempting to turn his engine for the purpose of connecting the same with the fire plug it partly went on the neutral ground. The driver was struck by the guy wire and severely injured. The court said:

"The telephone and telegraph company had the undoubted right to erect its poles, and to secure them, but this permission does not authorize them to put them up, and to secure them, by wires strung so as to endanger human life. The city ordinances forbid the use of the neutral ground on St. Charles avenue to carriages and other vehicles; but this prohibition did not authorize the defendant company to erect its wires so as to injure any one who might be trespassing upon the neutral ground. No one, even to protect himself against trespassers, has a right to erect death traps on his premises. The posts were placed in dangerous proximity to the street, and ordinary prudence, and a due regard for the safety of the public, would have dictated that the guy wire should be placed beyond the possibility of injuring any one. Persons using the street without any intention of violating the city law might by accident be driven with a vehicle on the neutral ground. In a case of this kind, it would hardly be considered that he contributed to his own accident if he should be injured by the wire."

It is clear that in the present case there was evidence tending very strongly to show negligence on the part of the defendant in erecting and maintaining the guy wire at the point where it was located on the highway, and that question of negligence was for the jury to determine under appropriate instructions.

[8] 3. It is assigned as error that the court refused to give a requested instruction concerning evidence relating to the unlawful rate of speed of the automobile prior to the accident, and the negligence of the plaintiffs who were riding in the machine at that time, in not protesting to the driver against such unlawful rate of speed. The court gave an instruction to the jury upon that subject as follows:

"If you find from the evidence that the automobile mentioned in this action was driven along the public highway in Walla Walla county at an unlawful speed, and that it was known to the plaintiffs or either of them that it was being driven at a rate exceeding 24 miles an hour, and that to drive the same at the rate of speed it was being driven in the nighttime was dangerous, and if either plaintiff having this knowledge failed to warn the driver or asked him to stop and permit such plaintiff to get out, if he or they had time and opportunity to do so, then such plaintiffs voluntarily committed themselves to the action of the driver of the automobile, and he is responsible, not for the act of the driver, but for his own act in failing to take the precautions which under such circumstances he should have taken, and if, in addition thereto, such rate of speed is shown to have contributed to the accident, then such plaintiff cannot recover in this action."

The objection to this instruction is that it contains this clause:

"And that to drive the same at the rate of speed it was being driven in the nighttime was dangerous."

It is contended that the effect of this instruction was to instruct the jury that it was not sufficient to charge the plaintiffs with contributory negligence, unless they knew that such unlawful rate of speed was dangerous in the nighttime. The objection is without merit. The question was: Did the plaintiffs know that the automobile was being driven at a dangerous rate of speed? If they did, and the rate of speed contributed to the accident, and they did not protest against it, then the jury were justified in inferring that the plaintiffs were guilty of contributory negligence. The automobile was being driven in the nighttime, and the court called the attention of the jury to that fact, which would appear to be a feature of the instruction favorable to the defendant, since a high rate of speed must be more dangerous in the nighttime than in the daytime. We are of opinion that the instruction given by the court was correct and that the case was submitted to the jury with appropriate instructions.

The judgment of the court below is therefore affirmed.

COBBAN et al. v. CONKLIN.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1913.)

No. 2,236.

1. EQUITY (§ 53*)—EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW—WAIVER OF OBJECTION.

While under Rev. St. § 723 (U. S. Comp. St. 1901, p. 583), a suit in equity cannot be maintained in a federal court in any case where a plain, complete, and adequate remedy may be had at law, the provision is mainly to secure to the defendant the privilege of a trial by jury, and this he may waive. If in a suit in equity he answers and submits to the jurisdiction of the court, he cannot thereafter object that the plaintiff has a plain and adequate remedy at law, provided the subject-matter of the suit is of a class over which a court of chancery has jurisdiction, and it is competent for the court to grant the relief sought.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 173-176; Dec. Dig. § 53.*]

2. CANCELLATION OF INSTRUMENTS (§ 43*)—DECREE—CONFORMITY TO BILL AND PROOF.

A bill to set aside conveyances on the ground of fraud *held* to sustain a decree granting the relief prayed for, although the fraud and conspiracy charged against the defendants was not proved where they obtained their title through the fraud of another, which was also charged.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 96-99; Dec. Dig. § 43.*]

3. DEEDS (§ 54*)—DELIVERY—OBTAINING POSSESSION WITHOUT CONSENT OF GRANTOR.

An instrument of conveyance never delivered but of which possession was obtained without the knowledge or consent of the grantor does not divest the grantor's title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 112-125; Dec. Dig. § 54.*]

4. PRINCIPAL AND AGENT (§ 10*)—CREATION OF AGENCY—INSTRUMENT VOID FOR NONDELIVERY.

A power of attorney to convey land which was never delivered by the grantor but was obtained from her possession without her knowledge or consent was void, and a deed from the donee conveyed no title, although the purchaser bought in good faith.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 19-23; Dec. Dig. § 10.*]

5. ESCROWS (§ 14*)—UNAUTHORIZED DELIVERY BY DEPOSITARY.

The unauthorized delivery of an instrument of conveyance held in escrow conveys no title even in favor of an innocent purchaser without notice.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. §§ 17-20; Dec. Dig. § 14.*]

Appeal from the District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit in equity by Mollie Conklin against R. M. Cobban, E. B. Weirick, individually and also as trustee, and the Payette Lumber & Manufacturing Company. Decree for complainant, and defendants appeal. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

For opinion below, see 198 Fed. 881.

On September 7, 1905, the appellee brought a suit for the cancellation of certain deeds and powers of attorney which she alleged to be fraudulent and forged and which constituted a cloud upon her title to 3,723 acres of timber lands in Boise county, Idaho. The appellant the Payette Lumber & Manufacturing Company held the record title to the lands by a warranty deed executed on May 19, 1903, from the appellant E. B. Weirick, trustee, and Weirick deraigned title through warranty deeds made in September, 1901, purporting to be executed by the appellee by the appellant Cobban as her attorney in fact. The court below found upon the evidence that the allegations of fraud and conspiracy charged against the appellants were not sustained but held that the conveyances by Cobban as attorney in fact of the appellee were unauthorized and void, and a decree was entered canceling the powers of attorney under which Cobban made the conveyances and canceling the deeds made thereunder and adjudging that the Payette Lumber & Manufacturing Company, which had purchased without actual notice of any infirmity or defect in the conveyances, was entitled to a conveyance from the appellee, upon payment to her of \$10,130.38, with interest, but that upon failure to make such payment the title be quieted in the appellee.

The facts disclosed in the record are in brief that in 1900 the appellee owned an undivided one-half interest in 9,600 acres of lands in Inyo and Tulare counties, in the state of California, known in the record as the Monache lands; the other half interest being owned by the estate of Patrick Reddy, deceased. Joseph C. Campbell, of the firm of Campbell, Metson & Campbell, was the attorney for the Reddy estate, and he had previously been the attorney for the Conklin estate, through which the appellee derived her interest in the Monache lands. Mr. Campbell was also attorney for John A. Benson, who in that year entered into negotiations for the purchase of the Monache lands. The lands had been included within the Sierra Forest Reserve. The owners of such lands were authorized by law to exchange them for other public lands which were subject to settlement. To make the exchange, the owners were required to execute deeds conveying to the United States their lands in the reservation, to have the deeds recorded in the proper county recorder's office, and thereafter to file in the Land Office the deeds, together with abstracts showing a clear and unincumbered title in the United States, and applications to select other public lands specifically described, and of equal acreage, in lieu of the deeded lands. The appellee, her son, W. E. Conklin, Benson, and Mr. Campbell had a conference with reference to the sale of those lands, at which a verbal agreement was made, all the terms of which are not definitely or positively shown by the evidence but for one thing: It was agreed that the lands should be sold to Benson at the price of \$3.80 net per acre. The appellee testified that deeds for the lands were to be executed and placed in escrow and were not to be taken out until the money was paid by Benson, which was to be within 90 days. In this she was corroborated by the testimony of her son. Mr. Campbell testified that the land was to be conveyed to the United States, and that the payment of \$3.80 net per acre was to be made through the Anglo-California Bank, upon approval of the lieu selections by the Land Department, and that the titles to the lieu lands were to be approved in the name of the appellee and the Reddy estate; that when so approved Benson would have the right to purchase the same at \$3.80 per acre, but that the title was not to pass out of either the Reddy estate or the appellee until the lands were paid for; and that nothing was said about any powers of attorney to sell the lieu lands. Benson testified that it was agreed that powers of attorney should be executed to sell the lieu lands, but his testimony was contradicted by the testimony of all the other persons who were present at the making of the contract, and it was not credited by the court below. It is admitted that Benson was to prepare the necessary deeds which were to be submitted for signature to the appence through Mr. Campbell. Benson thereafter prepared the papers and sent them from time to time to Mr. Campbell's office to be executed by the representatives of the Reddy estate and the appellee. A messenger

from Mr. Campbell's office took them to the residence of the parties who were to sign them. It appears that the appellee examined a few of the papers and, finding them correct, executed all thereof, relying upon the fact that they had come through Mr. Campbell's office. Among the papers so executed were not only conveyances of the Monache lands to the United States but powers of attorney in blank to convey in the name of the grantors the lieu lands that were or might be selected in exchange therefor. The papers when executed were returned to Mr. Campbell's office, and from there Benson in some way obtained possession of them.

Prior to February 19, 1901, a syndicate had been formed of certain persons in Montana to purchase public lands by the use of lieu land scrip. The appellant Cobban was a member of the syndicate, and he acted for the others in purchasing such scrip. The agreement was that after the approval of the selections the lands acquired were to be conveyed to Weirick, as trustee, for the use and benefit of the members of the syndicate. Cobban purchased from Benson the scrip which represented the right of the owners of the Monache lands to make lieu selections. Benson would forward the scrip to a bank with a sight draft attached, and upon the payment thereof there were delivered to Cobban the deeds surrendering the base lands to the United States, the abstracts of title therefor, applications to select lieu lands, powers of attorney to select lieu lands, and irrevocable powers of attorney to convey the same. But all these papers except the original deeds were blank as to the description of the lands to be selected and to be conveyed, and the powers of attorney were blank as to the name of the attorney to whom power was given to select lieu lands and to convey the same. Cobban admitted that he had no dealing with the appellee, that he was never authorized by her to insert his name in any of said powers of attorney, and that Benson never exhibited any authority to him to insert his (Cobban's) name in any of said powers; but he testified that, having received the papers in blank, he assumed the right to insert such things as were necessary to enable him to select and convey lieu lands. The selections of land involved in the present suit were approved by the United States, and the lands were patented in the name of the appellee and in those of the administratrix and the administrator of the Reddy estate, and the same lands were afterwards conveyed by Cobban, as attorney in fact for the patentees, to Weirick, as trustee. Thereafter Weirick and Cobban, acting for the syndicate, gave an option on the lands, which was assigned to the appellant the Payette Lumber & Manufacturing Company, and on May 19, 1903, the lands were conveyed to that company. The appellee was paid by Benson through the office of her attorneys at law \$2,750 on account of the conveyance of the Monache land, leaving a large sum due and unpaid, which Benson received from the appellants and appropriated to his own use. In December, 1901, the appellee, having become suspicious of Benson, caused some investigation of the records to be made and found that the Monache lands had been conveyed to the United States by deeds which were of record, and she learned in July, 1902, that powers of attorney were in existence, and her first knowledge that powers of attorney purporting to have been executed by her had been used in Idaho was acquired in October, 1903. She thereupon filed in the office of the county recorder of Boise county, Idaho, a general revocation of all powers of attorney. That revocation was recorded more than five months prior to the execution of the deed to the Payette Lumber & Manufacturing Company.

Richards & Haga and McKeen F. Morrow, all of Boise, Idaho, for appellants.

N. E. Conklin, of Berkeley, Cal., and Wm. B. Davidson, of Boise, Idaho, for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1]
The contention is made that the court below was without jurisdiction

of the cause of suit for the reason that the suit is brought to remove a cloud from title, and that such a suit may be maintained in a federal court only when the plaintiff is in possession, or the land is vacant and unoccupied, for the reason that otherwise the plaintiff has an adequate remedy at law, citing *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873, and *Lawson v. United States*, 207 U. S. 1, 28 Sup. Ct. 15, 52 L. Ed. 65. The rule so invoked was well established before it was expressed in section 723 of the Revised Statutes (U. S. Comp. St. 1901, p. 583), which provides that suits in equity shall not be maintained in either of the courts of the United States in any case where a plain, complete, and adequate remedy at law may be had. Referring to the provisions of that section, Mr. Justice Brown said:

"These provisions are obligatory at all times and under all circumstances and are applicable to every form of action, the laws of the several states to the contrary notwithstanding." *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167.

But the rule was devised and the statute was enacted mainly to secure to the defendant the privilege of a trial by jury, and this he may waive. If in a suit in equity he answers and submits to the jurisdiction of the court, he cannot thereafter object that the plaintiff has a plain, complete, and adequate remedy at law, provided that the subject-matter of the suit is of a class over which a court of chancery has jurisdiction, and it is competent for the court to grant the relief sought. *Reynes v. Dumont*, 130 U. S. 354-395, 9 Sup. Ct. 486, 32 L. Ed. 934; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005; *Wylie v. Coxe*, 15 How. 415, 14 L. Ed. 753; *Tyler v. Savage*, 143 U. S. 79, 97, 12 Sup. Ct. 340, 36 L. Ed. 82; *Southern Pacific Co. v. United States*, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. Ed. 507; *Hapgood v. Berry*, 157 Fed. 807, 85 C. C. A. 171.

In *Reynes v. Dumont* the court quoted the rule as stated in *Daniell's Chancery Practice* that:

"If a defendant in a suit in equity answers and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. This objection should be taken at the earliest opportunity. The above rule must be taken with the qualification that it is competent for the court to grant the relief sought, and that it has jurisdiction of the subject-matter."

In *Wylie v. Coxe* the court said:

"The want of jurisdiction, if relied on by the defendant, should have been alleged by plea or answer. It is too late to raise such an objection on the hearing in the appellate court, unless the want of jurisdiction is apparent on the face of the bill."

The equitable jurisdiction to remove clouds from title to real estate is old and well settled. The bill in the case at bar contained all the essential averments to show jurisdiction of such a cause of suit. It alleged that the title was in the appellee, and that the lands were not in the possession of either of the parties to the suit, but were vacant, unoccupied timber lands in the possession of no one. The answer admitted that the lands were wild and uncultivated timber lands but alleged that they were in the possession of the Payette Lumber &

Manufacturing Company. No evidence whatever was taken on the subject of the possession. The appellants point to the language of the opinion of the court below in which it was said that it was "not improbable that expenses aggregating considerable amounts had been incurred * * * in caring for the timber growing thereon and in paying taxes and other charges"; and they argue that this indicates that they were in possession. But nothing can be asserted upon a mere conjecture of the court, unsupported by evidence. For aught that the record shows to the contrary, it was true, as alleged in the bill, that neither party to the controversy was in possession of the lands. However that may be, the controlling facts are that the appellants answered the bill on the merits and made no objection thereto on the ground that the appellee had an adequate remedy at law, and now present that objection for the first time in this court on the appeal. It is clear that it comes too late.

[2] The appellants contend that the court below erred in that it awarded relief which was not authorized by the allegations of the bill, that the gravamen of the bill was fraud and conspiracy between the appellants, but that the relief afforded was based upon the finding that the insertion of the names of attorneys in the powers of attorney by Cobban was unauthorized and void; and they invoke the rule that the decree cannot go beyond the scope of the bill, that it is not enough that the proof show that the complainant is entitled to some relief, but that it must show that he is entitled to relief which is predicable upon the allegations of his bill, and that this is especially true in cases where the charge is fraud. We may concede the doctrine, which is contended for, that the relief must be founded upon and consistent with the facts set up in the bill or with some theory of the case on which the bill is based, and that a bill to set aside a conveyance on the ground of fraud will not sustain a decree granting such relief on an entirely distinct ground of equitable jurisdiction, such, for instance, as mistake. *Hendryx v. Perkins*, 52 C. C. A. 435, 116 Fed. 1020; *McKinney v. Big Horn Basin Dev. Co.*, 93 C. C. A. 258, 167 Fed. 770; *Eyre et al. v. Potter et al.*, 15 How. 41, 14 L. Ed. 592; *Burk v. Johnson*, 76 C. C. A. 567, 146 Fed. 209. In *Price v. Berrington*, 7 Eng. Law & Eq. 260, Lord Truro said:

"When the bill sets up a case of actual fraud and makes that the ground of the prayer for relief, the plaintiff is not entitled to a decree by establishing some one or more of the facts, quite independent of fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated."

But we think that the appellants' contention involves a misconception of the case which is made by the bill. While the bill charges fraud, it cannot be said that the decree is not based upon fraud. It is true that not all the allegations of fraud are sustained by the proof, and that the court found that the charge of conspiracy and fraud which was made against Cobban, Weirick, and the Payette Lumber Company was not justified by the evidence. But the fraud of Benson was proven, and it was the proof of his fraud which justified the decree. Benson fraudulently procured the execution of powers of attorney in

blank and fraudulently procured the possession thereof after their execution. There is no evidence that the appellee knowingly and intentionally executed those papers or placed them in Benson's hands under such circumstances as to charge her with knowledge of his purpose to use them as he did. If such had been the case, she would have no standing in a court of equity to complain of Cobban's act of inserting names and descriptions in the blanks. But the findings of the lower court, while they fall short of sustaining all the charges of fraud, found fraud sufficient whereon to rest the decree. It was not necessary that the defendants should have participated in Benson's fraud. It was enough that they derived their title through it. The decree, therefore, is not inconsistent with the frame and theory of the bill, and it does not rest on a ground entirely distinct from that which the bill presents.

[3] It is urged that the appellee, having intrusted Benson with the papers, gave him the power to make a perfect record title in any purchaser, and that the appellant Payette Lumber & Manufacturing Company purchased the lands in good faith for value, and without notice, and took the legal title wholly discharged from the claims and equities of the appellee. The evidence is that the appellee, while she signed the papers which were placed before her, never acknowledged the execution of any of them, and that the certificates of acknowledgment were attached thereafter, when they came into the possession of Benson, and that she signed them relying on the fact that they came from the office of Campbell, Metson & Campbell, and without examining them or understanding their contents, but supposing them all to be the deeds which the contract contemplated. If, however, she is to be charged with knowledge of the contents of papers to which she appended her signature, the fact remains that she never in any way delivered or authorized or consented to the delivery of the powers of attorney to Benson. J. C. Campbell testified that he did not deliver them to Benson and did not authorize their delivery, and that he did not know of their existence, and that there was no agreement at any time that the title was to pass until the lands were paid for through the Anglo-California Bank. It is the general rule that the delivery of a deed with the consent of the grantor is essential to pass title, and that an instrument of conveyance never delivered but obtained without the knowledge or consent of the grantor does not divest the grantor's title. *Henry et al. v. Carson*, 96 Ind. 412; *Allen v. Ayer*, 26 Or. 589, 39 Pac. 1; *Steffian v. Bank*, 69 Tex. 513, 6 S. W. 823; *Tisher v. Beckwith*, 30 Wis. 55, 11 Am. Rep. 546; *Bowers v. Cottrell*, 15 Idaho, 221, 96 Pac. 936.

[4] There having been no delivery, therefore, to Benson, the rules respecting a purchaser in good faith do not protect the Payette Lumber & Manufacturing Company, for the good faith of the purchaser cannot create a title where his grantor has none, and nothing can be founded upon a deed which is absolutely void. *Sampeyreac v. United States*, 7 Pet. 222, 241, 8 L. Ed. 665; *Lindblom v. Rocks*, 77 C. C. A. 36, 146 Fed. 660; *Texas Lumber Mfg. Co. v. Branch*, 8 C. C. A. 562, 60 Fed. 201. The case stands upon ground entirely distinct from those

cases in which execution and delivery have been procured by fraud so that the conveyance is voidable only, and the fraud cannot be alleged to defeat the right of a purchaser in good faith who pays value without notice and who thus brings himself within the protection of the general equity principle that, wherever one of two innocent persons suffers loss on account of the wrongful act of a third, he who has enabled the third person to occasion the loss must be the person to suffer.

[5] Again, the court below reached the conclusion from the evidence, correctly, we think, that by the terms of the contract the papers after their execution were to be deposited by J. C. Campbell in escrow with the Anglo-California Bank, with instructions to deliver them to Benson only upon the receipt of the stipulated purchase money, and that Campbell, having failed to deposit them in escrow, must be deemed to have retained them in the capacity of an escrow depository. If so, the subsequent delivery of them was ineffectual to convey title, for it is the general rule that the unauthorized delivery of an instrument of conveyance held in escrow conveys no title, even in favor of an innocent purchaser without notice. 16 Cyc. 581; Provident Trust Co. v. Mercer County, 170 U. S. 593, 18 Sup. Ct. 788, 42 L. Ed. 1156; *Balfour v. Hopkins*, 93 Fed. 564, 35 C. C. A. 445; *Fearing v. Clark*, 16 Gray (Mass.) 74, 77 Am. Dec. 394; *Tyler v. Cate*, 29 Or. 515, 45 Pac. 800; *Bradford v. Durham*, 54 Or. 1, 101 Pac. 897, 135 Am. St. Rep. 807.

The decree is affirmed.

DAVEY v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 15, 1913.)

No. 1,876.

1. INDICTMENT AND INFORMATION (§ 119*)—REQUISITES OF OFFENSE—FELONIOUSLY—SURPLUSAGE.

In framing an indictment under a statute, the allegation of the crime should bring the accused clearly and precisely within it, but, that having been done, an unnecessary description of the manner in which the crime was committed will not vitiate the indictment, and hence an allegation that defendant "feloniously" endeavored to influence, intimidate, or impede a witness was surplusage.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 311-314; Dec. Dig. § 119.*]

2. INDICTMENT AND INFORMATION (§ 83*)—PRINCIPAL AND ACCESSORY.

Cr. Code, § 135 (Act March 4, 1909, c. 321, 35 Stat. 1113 [U. S. Comp. St. Supp. 1911, p. 1628]), provides that whoever corruptly or by threats or force shall endeavor to influence, intimidate, or impede any witness in any court of the United States shall be fined, etc., and section 322 declares that whoever directly commits any act constituting an offense defined in any law of the United States or aids, abets, or procures its commission is a principal. *Held* that, where counts of an indictment against accused charged him with aiding, abetting, counseling, and procuring the bribing of a witness, they were not fatally defective for failure to charge him directly as a principal.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 226; Dec. Dig. § 83.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. OBSTRUCTING JUSTICE (§ 11*)—INTIMIDATION OF WITNESS—INDICTMENT—
MATERIAL WITNESS.

Where an indictment for aiding and abetting the bribing of a witness alleged that the person intended to be bribed was a witness in a case then and there pending in the District Court of the United States for the District of Indiana entitled, etc., and that he was then and there a material and important witness for the United States in such case, it sufficiently alleged that the court had jurisdiction over the cause and that the person was a witness.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. §§ 19-28; Dec. Dig. § 11.*]

4. OBSTRUCTING JUSTICE (§ 4*)—INTIMIDATION OF WITNESS—BRIBERY—GRAND JURY.

The grand jury being an integral part of the court, an attempt to bribe or corrupt a witness before the grand jury is an offense against the United States within Cr. Code, § 135 (Act March 4, 1909, c. 321, 35 Stat. 1113 [U. S. Comp. St. Supp. 1911, p. 1628]), providing that whoever corruptly or by threats, force, etc., shall endeavor to influence, intimidate, or impede any witness in any court of the United States shall be punished, etc.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 13; Dec. Dig. § 4.*]

5. OBSTRUCTING JUSTICE (§ 19*)—TRIAL—VERDICT—CONSISTENCY.

Cr. Code, § 135 (Act March 4, 1909, c. 321, 35 Stat. 1113 [U. S. Comp. St. Supp. 1911, p. 1628]), provides that whoever corruptly or by threats or force, etc., shall influence, intimidate, or impede any witness in any court of the United States, etc., shall be fined or imprisoned, and section 322 declares that whoever directly commits any act constituting an offense defined in any law of the United States or aids, abets, counsels or commands, induces, or procures its commission is a principal. *Held* that, where an indictment charged accused with corruptly endeavoring to influence a witness by paying him \$100 to disregard a subpoena and absent himself from a grand jury investigation and by paying the same witness \$20 to absent himself from a trial in the United States District Court and in other counts alleging that accused unlawfully, etc., aided and abetted another in bribing the same witness for the same purposes, a verdict acquitting accused of the first charge and finding him guilty of the second was not inconsistent with itself in that it acquitted him of being a principal in the misdemeanor and found him guilty as an accessory, when by section 322 an accessory is made a principal.

[Ed. Note.—For other cases, see Obstructing Justice, Cent. Dig. § 33; Dec. Dig. § 19.*]

In Error to the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Charles A. Davey was convicted of endeavoring to influence, intimidate, and impede a witness, and he brings error. Affirmed.

The writ of error in this case seeks to reverse a judgment of the District Court of the United States, by which plaintiff in error was sentenced to imprisonment in the penitentiary and to pay a fine. The judgment was rendered upon a verdict of the trial court on the fifth, sixth, seventh, and eighth counts of a consolidated indictment charging the plaintiff in error with endeavoring to influence, intimidate, and impede a witness. The sections of the Criminal Code involved are:

Section 135: "Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States Commissioner or officer acting as such commissioner, or any grand or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States Commissioner, or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

Section 322: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

Two indictments were returned by the grand jury. The first contained four counts charging Davey with corruptly endeavoring to influence a witness named McMillen by paying him \$100 to disregard a subpoena and absent himself from a grand jury investigation and by paying the same witness \$20 to absent himself from a trial in the United States District Court.

The second indictment also contained four counts and charged that Davey "unlawfully, knowingly, feloniously, corruptly, and with corrupt intent aided and abetted" one Walker in bribing the same witness for the same purposes mentioned in the first indictment.

The order of consolidation provided that the counts in the indictment should be numbered 1 to 4, inclusive, and the four counts in the second indictment should be numbered 5 to 8, inclusive, in the consolidated indictment.

The fifth count charged "that Richard E. Walker * * * unlawfully, knowingly, feloniously, corruptly, and with corrupt intent did then and there endeavor to influence Melvin McMillen, a witness in a case then and there pending in the District Court of the United States, * * * to refuse, fail, and neglect to appear and testify as a witness in * * * said case; * * * and that Charles A. Davey unlawfully, knowingly, feloniously, corruptly, and with corrupt intent did then and there aid, abet, counsel, command, induce, and procure the said Richard E. Walker * * * to endeavor to influence the said * * * witness," etc.

The sixth count charged "that Richard E. Walker [with like intent] did then and there advise, induce, persuade, and influence Melvin McMillen, in a case then pending in the District Court of the United States, * * * to refuse, fail, and neglect to appear and testify as a witness in said * * * case; * * * and he (the said Melvin McMillen) * * * did not testify as a witness in said case; and he (the said Richard E. Walker) unlawfully, knowingly, feloniously," etc., "did then and there and thereby obstruct and impede the due administration of justice in said case then and there pending in said District Court; and * * * that Charles A. Davey did then and there [with like intent] * * * aid, abet, counsel, command, induce, and procure the said Richard E. Walker" to so obstruct and impede the due administration of justice in the case then pending in the District Court of the United States.

The seventh count charged that "Richard E. Walker [with like intent] did then and there endeavor to influence Melvin McMillen, a witness in a matter under investigation by the United States grand jury, * * * to refuse, fail, and neglect to appear and testify as a witness * * * before the grand jury; * * * that he (the said McMillen) had been duly and legally served with a subpoena duly and legally issued under the laws of the United States * * * to appear in said District Court of the United States before said grand jury; * * * and that Charles A. Davey [with like intent] did then and there * * * aid, abet, counsel, command, induce, and procure the said Richard E. Walker to * * * endeavor to influence said witness," etc.

The eighth count charged "that Richard E. Walker [with like intent] did then and there endeavor to influence Melvin McMillen, a witness in a case pending in the District Court of the United States, * * * which said charge was to be investigated by the United States grand jury, * * * to refuse, fail, and neglect to appear and testify as a witness in said District Court aforesaid, before said grand jury; * * * and that Charles A.

Davey * * * [with like intent] did aid, abet, counsel, command, induce, and procure the said Richard E. Walker as aforesaid to [with like intent] obstruct and impede the due administration of justice," etc.

The verdict of the jury found the plaintiff in error not guilty as charged in counts 1, 2, 3, and 4 of the consolidated indictment and guilty as charged in counts 5, 6, 7, and 8 thereof.

The evidence is not preserved in the record, and the only error relied upon for a reversal of the judgment is the overruling by the trial judge of the motion in arrest of judgment.

Frank S. Roby and Ward H. Watson, both of Indianapolis, Ind. (Chas. P. Drummond, of South Bend, Ind., Sol. H. Esarey and Elias D. Salsbury, both of Indianapolis, Ind., and Wm. Leavitt, of counsel), for plaintiff in error.

Charles W. Miller, U. S. Atty., and Clarence W. Nichols, Asst. U. S. Atty., both of Indianapolis, Ind. (Rowland Evans, of Indianapolis, Ind., of counsel), for the United States.

Before BAKER and KOHLSAAT, Circuit Judges, and CARPENTER, District Judge.

CARPENTER, District Judge (after stating the facts as above). It is urged that the offense defined by section 135 is a misdemeanor, and that the statement in the indictment that the plaintiff in error acted "feloniously" took the charge out of the terms of the law.

[1] In framing an indictment under a statute, the definition of the crime should bring the accused clearly and precisely within it, but, that having been done, an unnecessary description of the manner in which the crime was committed will not vitiate the indictment. The use of the word "feloniously" at the most was surplusage. *Dolan v. United States*, 133 Fed. 440, 69 C. C. A. 274; *State v. Sparks*, 78 Ind. 166.

[2] It is also argued that an indictment is void which charges one as an accessory to a misdemeanor. An accessory is one who aids, abets, counsels, or helps. Section 322, *supra*, makes one a principal who aids and abets, counsels, or procures the commission of an offense against the United States. The fifth, sixth, seventh, and eighth counts charged Davey with aiding, abetting, counseling, and procuring the bribery of the witness McMillen. That it fails to brand him as a principal is immaterial. It is sufficient when it advises him of the offense with which he is charged. At most, the fault is one of form only, which does not tend to prejudice.

[3] The point is made that the indictments are insufficient in not showing that the court had jurisdiction over the cause in which McMillen was to be a witness, and that McMillen was not legally designated as a witness. In counts 5 and 6 it is stated that McMillen was a witness "in a case then and there pending in the District Court of the United States for the District of Indiana, which said cause was then and there entitled 'The United States v. Richard E. Walker, No. 7,085, at the May term of said court,'" and that he "was then and there a material and important witness for the United States in the case aforesaid." This we deem sufficient. *United States v. Bittinger*, Fed. Cas. No. 14,598, cited by counsel for plaintiff in error, does not hold to the contrary. If the law referred only to those witnesses who had

been legally designated as such by the issuance of process or by order of court, in many instances it would amount to a dead letter. It would be necessary only that the corrupting influence be started with sufficient diligence to accomplish the desired purpose before a subpoena had been served or the order entered, and the persons exercising such influence would not be amenable to the law. This cannot be.

[4] It is also claimed that a grand jury is not a court, and that the provisions of section 135 do not apply to witnesses subpoenaed to appear before a grand jury. The grand jury is an integral part of the court. Its impaneling is directed by the court. It is charged by the court and advised of its duties in the matters coming before it for investigation.

"It has been justly observed that no act of Congress directs grand juries or defines their powers. By what authority then are they summoned, and whence do they derive their powers? The answer is that the laws of the United States have created courts, which are invested with criminal jurisdiction. This jurisdiction they are bound to exercise, and it can only be exercised through the instrumentality of grand juries. They are therefore given by a necessary and indispensable implication. But how far is this implication necessary and indispensable? The answer is obvious. Its necessity is coextensive with that jurisdiction to which it is essential." Marshall, Chief Justice, in *United States v. Hill*, 1 Brock. 156, Fed. Cas. No. 15,364.

"The grand jury, * * * like the petit jury, is an appendage of the court, acting under the authority of the court, and the witnesses summoned before them are amenable to the court precisely as the witnesses testifying before the petit jury are amenable to the court." *Heard v. Pierce*, 8 Cush. (Mass.) 338, 54 Am. Dec. 757.

We are of the opinion that a witness called before the grand jury is a witness in a "court of the United States," as contemplated by section 135. See, also, the case of *Savin*, Petitioner, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150, which we deem controlling.

[5] The principal contention of the plaintiff in error is that the verdict is inconsistent with itself; that Davey was acquitted as principal in a misdemeanor and therefore cannot be found guilty as an accessory because by section 322 the accessory was made a principal.

At common law there was no such offense as aiding and abetting a misdemeanor. Congress, in section 322, created a new crime and provided in effect that an accessory to an offense against the government should be punished as a principal. The fact that the statute provided that whoever directly commits an offense, and also whoever aids and abets the commission of the offense, are both principals and punishable as such does not relieve the government from charging the facts which make up the crime. Two distinct crimes are covered by sections 135 and 322. In one the crime is doing something directly; in the other doing the same thing indirectly. It is clear that, in order to convict a man of doing something indirectly, he must be so charged, although, if found guilty, his punishment may be that of a principal.

In *Kibs v. People*, 81 Ill. 599, the plaintiff in error was indicted for larceny. Section 74 of the Illinois Criminal Code provides:

"Whoever embezzles or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently convert to his own use, moneys, goods,

or property, delivered to him, which may be the subject of larceny, or any part thereof, shall be deemed guilty of larceny."

On the trial proof was made of facts which amounted, in law, to embezzlement. The court said:

"The indictment is for larceny simply, as at common law. The uniform construction of similar statutes, both in this country and in England, is that the indictment must set out the acts of embezzlement and then aver that so the defendant committed larceny [citing authorities]. The defendant's fiduciary character is the distinguishing feature between embezzlement and larceny and must be specially averred. * * * But the section of the Criminal Code quoted relates to a class of cases which were not larceny at common law. It is said by eminent writers on criminal law that the statutes in relation to embezzlement were passed solely and exclusively to provide for cases which larceny at common law did not include; hence nothing that was larceny at common law is larceny under the embezzlement statutes; and nothing that is larceny under the embezzlement statutes is larceny at common law."

The conviction was accordingly reversed, because the statute making one guilty of embezzlement guilty of larceny created a new crime, and it was incumbent upon the grand jury to advise the accused of the specific crime of which he was charged.

In *United States v. Mills*, 7 Pet. 138, 8 L. Ed. 636, the defendant Mills was indicted for aiding and abetting Straughan to rob the mail. The offense was defined by two sections of the act of Congress approved March 3, 1825 (4 Stat. at Large, 102, c. 64), just as the offense in the indictment in the case now under consideration was defined as to Davey by two sections of the Criminal Code. The sections were:

"Sec. 21. If any person employed in any of the departments of the post office establishment, shall unlawfully * * * secrete, embezzle, or destroy, any letter, packet, bag, or mail of letters, with which he or she shall be intrusted, or which shall have come to his or her possession, * * * every such offender being thereof duly convicted, shall, for every such offense, be fined, * * * or imprisoned, * * * or both."

"Sec. 24. Every person who, from and after the passage of this act, shall procure, and advise, or assist, in the doing or perpetration of any of the acts or crimes by this act forbidden, shall be subject to the same penalties and punishments as the persons are subject to, who shall actually do or perpetrate any of the said acts or crimes, according to the provisions of this act."

Section 24 did not provide in so many words that the aider and abettor was a principal, but it did provide that he should be subject to the same penalties and punishments as the person who should actually do any of the acts or crimes legislated against, which, legally speaking, is only another way of enacting the same thing.

Section 322 of the Criminal Code, in declaring that whoever aids, abets, counsels, commands, induces, or procures the commission of any act constituting an offense defined in any law of the United States is a principal merely defines the crime of aiding and abetting and provides in effect that one found guilty shall be punished as a principal would be punished.

The defendant in the *Mills Case* moved in arrest of judgment. The court, in the course of its opinion, said:

"The offense charged in this indictment is a misdemeanor, where all are principals; and the doctrine applicable to principal and accessory in cases of

felony does not apply. The offense, however, charged against the defendant is secondary in its character; and there can be no doubt that it must sufficiently appear upon the indictment that the offense alleged against the chief actor had in fact been committed."

In *United States v. Gooding*, 12 Wheat. 460, 6 L. Ed. 693, the court said:

"The fifth instruction turns upon a doctrine applicable to principal and accessory in cases of felony, either at the common law or by statute. The present is a case of a misdemeanor, and the doctrine, therefore, cannot be applied to it, for in cases of misdemeanor all those who are concerned in aiding and abetting, as well as in perpetrating the act, are principals. Under such circumstances, there is no room for the question of actual or constructive presence or absence, for, whether present or absent, all are principals. They may be indicted and punished accordingly. Nor is the trial or conviction of an actor indispensable to furnish a right to try the person who aids or abets the act; each, in the eye of the law, is deemed guilty as a principal. In the present indictment the offense is in the third and fourth counts laid, by aiding and abetting, in the very terms of the act of Congress. If the crime, therefore, could be supposed to be of an accessorial nature, it is truly alleged, according to the fact, and not merely according to the intendment of law. We do not consider that the terms 'aid' and 'abet,' used in this statute, are used as technical phrases belonging to the common law, because the offense is not made a felony, and therefore the words require no such interpretation. The statute punishes them as substantive offenses and not as accessorial, and the words are therefore to be understood as in the common parlance and import assistance, co-operation, and encouragement."

The indictment in the instant case was laid in the terms of the act of Congress defining the offense, with such additional averments as were necessary to appraise the plaintiff in error of the precise nature of the crime of which he was accused. The averments as to the acts done by Walker are direct and specific and sufficient to charge him with a crime. They are followed by language aptly charging that Davey unlawfully and knowingly, and with corrupt intent, aided and abetted, induced, and procured Walker unlawfully, knowingly, and corruptly to obstruct and impede the due administration of justice in a case pending in the District Court of the United States.

The crime of which plaintiff in error was found guilty was defined by section 322; the crime of which he was found not guilty was defined by section 135. The mere fact that the punishment for one who aids and abets is the same as that of a principal or that one who aids and abets may be charged as a principal does not render the verdict inconsistent, because, in order to hold the accused under section 322, it was necessary for the grand jury to define what law was violated and the manner of that violation.

Counsel for plaintiff in error say that the accused has been found guilty and not guilty of the same offense. The error in their reasoning lies in the assumption that the crime of doing a thing directly and the crime of aiding and abetting in a violation of the law is the same offense.

An argument based upon inconsistency and repugnancy in verdicts is not favored by the law. In theory each count charges a distinct substantive offense, and the finding of the jury as to a particular count is independent of and unaffected by the finding upon any other count.

All that the law requires is that the gravamen of the charge in each count upon which there has been a verdict of guilty shall be the same. *Walsh v. United States*, 174 Fed. 615, 98 C. C. A. 461.

Many other points are made by counsel for the plaintiff in error which go rather to matters of form than to matters of substance. An indictment is well enough which states facts that constitute a crime in language which leaves no doubt in the mind of the defendant of what he is accused. It is true that a defendant should be informed clearly by the indictment of the exact and full charge made against him; yet the manner in which the information is given is unimportant. The function of an indictment is performed when it announces a substantial accusation of crime, states facts sufficient in law to support a conviction, and furnishes the accused with such a description of the charge as will enable him to make his defense and avail himself of a conviction or acquittal for protection against further prosecution for the same offense. *Hume v. United States*, 118 Fed. 689, 55 C. C. A. 407.

Moreover, section 1025 of the Revised Statutes (U. S. Comp. St. 1901, p. 720) provides:

"No indictment found and presented by a grand jury in any District or Circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

In this case there is no question but that the trial jury were of the opinion that, on the charge of directly interfering with the witness, plaintiff in error was not guilty; but that on the charge of indirectly interfering with the witness, or assisting in such interference, he was guilty. So long as Davey was advised clearly of the crime with which he was accused, and so long as there can be no doubt as to what was in the minds of the jury when they rendered their verdict, no fundamental principle being involved, the judgment of the trial court should be affirmed, and it is so ordered.

ACME HARVESTING CO. v. ATKINSON.

(Circuit Court of Appeals, Seventh Circuit. April 15, 1913.)

No. 1,947.

1. MASTER AND SERVANT (§ 221*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES.

Where a master has promised a servant to repair a defect in a machine the servant is employed to operate, the servant may rely on such promise for a reasonable time, and continue to operate the machine without assuming risk of injury because of the defect.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 638-640, 642-645; Dec. Dig. § 221.*]

Assumption of risk incident to improvement, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MASTER AND SERVANT (§ 288*)—INJURIES TO SERVANT—DEFECTIVE MACHINE—PROMISE TO REPAIR—REASONABLE TIME—QUESTIONS FOR JURY.

Where plaintiff employed to operate a trip hammer called the attention of his foreman to a defect therein, which might cause the hammer to drop automatically, and on a Saturday the foreman promised to have the machine fixed the succeeding day, but did not do so, and plaintiff continued to operate the hammer until the following Friday, when he was injured by the automatic falling of the hammer, whether a reasonable time to repair had elapsed so as to charge plaintiff with the assumption of the risk notwithstanding defendant's promise to repair was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

3. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—DEFECTIVE MACHINERY—DUTY TO WATCH DEFECTS.

A trip hammer at which plaintiff was employed was defective in that certain nuts were in the habit of working loose, so as to cause the hammer to fall automatically. Defendant's foreman promised to have the same repaired, and instructed plaintiff in the meantime to watch the defective parts. The room in which plaintiff was employed was noisy, and the nuts in question were seven feet from the floor, so that it was not easy to see when they began to work loose, and plaintiff's work in handling the metal and adjusting it in the hammer and dropping the same was such as to require close attention. *Held*, that plaintiff's promise to watch the defects did not charge him with an assumption of the risk so as to preclude a recovery for injuries sustained by the falling of the hammer because of them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

In Error to the District Court of the United States for the Southern District of Illinois; J. Otis Humphrey, Judge.

Action by N. D. Atkinson against the Acme Harvesting Company. Judgment for defendant, and defendant brings error. Affirmed.

Defendant in error (herein termed plaintiff) recovered a judgment in an action on the case against plaintiff in error (designated as defendant herein) for injuries received through the fall of a trip hammer, whereby plaintiff's hand was crushed. On the trial, the issues were narrowed down to the charge that plaintiff was put to work with a certain die-casting machine which defendant wrongfully allowed to become worn and in a dangerous and unsafe condition of repair; that upon discovery of such condition, plaintiff reported the same to defendant through its foreman, whereupon defendant, through its foreman, promised to repair said machine, and that plaintiff, relying upon said promise, contrived to operate said device for a reasonable time thereafter, and was injured through the negligence of defendant in failing to repair. Defendant pleaded the general issue and pleas setting up contributory negligence. Practically the only question to be considered is the liability of defendant growing out of its promise and failure to repair.

From the record it appears that defendant was engaged in the manufacture of harvesting and farm machinery at Bartonville, Peoria county, Ill.; that in the conduct of its business, it employed a die-casting machine, otherwise known as a drop or trip hammer, which is used in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

stamping and forming malleable iron into desired articles required in manufacturing the implements aforesaid. The drop hammer is composed of an anvil-like base made of metal, and about $2\frac{1}{2}$ feet in height, 2 feet wide and about 4 feet long, into which a die is fitted and fastened. The drop or hammer head is about 18 inches square—a solid piece of metal—fitted with a counter die. This latter part is so adjusted as to be lifted up to a distance of about four feet above the base between two perpendicular guide bars, within which it is raised and allowed to drop, being suspended by means of cables fastened to pulleys on a perpendicularly revolving arm, which has four holes in it, any one of which may receive the horizontal bolt which holds the pulley and cable attached to the hammer. By means of the holes, it is possible to so locate the bolt as to obtain varying lengths of drop as may be desired. The bolt is fastened in its hole by what is termed double nuts screwed onto the bolt, and fastened on the inside, the outer nut being a lock nut. Normally this arrangement should constitute a secure resistance to the tendency of the inner nut to work off the bolt end. In case the nuts work off, the bolt will draw out, and the hammer head will be released and fall. When not in motion, the latter remains at the top, on the dead center of the arm. When tripped, it will fall, and effect the stamping result. When the trip lets go, the hammer rises to its highest position again to await further actuation. So long as the trip is operated, the hammer head continues to rise and fall. The whole machine, including the bolt and nuts, was subjected to violent agitation and jars, which had a tendency to unseat the nuts.

There were two trip hammers in the room, which was about 40x30 feet in area. Besides the hammers, there was other machinery in the room. The forms created by the stamping hammers were subject to grinding and polishing upon emery wheels. Trucks were pushed back and forth (the machinery was operated by electricity), and altogether the place was very noisy.

Plaintiff had been employed by defendant for about five months prior to the accident; first, on the so-called platform, unloading steel malleables, and afterwards in grinding and polishing them. This work was deemed common labor.

About a month before the accident, plaintiff was placed in charge of one of the trip hammers. He told defendant's foreman that he knew nothing about operating the device, and was advised by the latter that that would not make any difference. There is no question raised as to the power of the foreman in the premises.

It was the duty of plaintiff to throw the machine in and out of gear. To manage the work, he was obliged to stand under the lever, take out the so-called malleables and dies from the stamp with his hands, and put in new material, using a hammer and pry when necessary. To fasten the dies in place, he also worked with his hands. Whenever a variance in the force of the hammer stroke was desired, he had to shift the bolt from one hole to another. After he had been working on the drop hammer about three weeks, he discovered that the nuts had worked off the pin. The lock nut dropped to the floor. Then

when he dropped the hammer, bolt and all fell down. Plaintiff then notified the foreman of the trouble. The latter took a look at the machine, and directed plaintiff to replace the bolt and nuts, which he did, telling the foreman the nuts should be fixed. The foreman ordered plaintiff to resume work and promised to send the head machinist down to fix the nuts, and afterwards told plaintiff that he had done so, and that the machinist would repair the machine.

Two or three days thereafter the nuts became loose again, and plaintiff again notified the foreman, who asked if the machinist had been down. When told that he had not, the foreman said he would see him (the machinist) again. Afterwards the foreman told plaintiff again that he had seen the machinist, and that he would be down and attend to it.

Plaintiff says he believed that it would be attended to, but that he never saw the machinist. Afterwards, and on Saturday, March 19, 1910, the nuts again came loose, but did not release the hammer. The foreman was again advised, and again promised to have the machinist come down and fix it. Afterwards he told plaintiff to start up again, saying that the machinist would fix the machine up the next day, Sunday, March 20th. Plaintiff came back to work Monday, and worked back and forth between the two drop hammers. On the following Friday, March 25th, plaintiff says he called the foreman to inspect his machine. The foreman, however, says he was only asked to look at some of the malleables shaped by the drop hammer, or to note that the castings were too large for the dies. Neither of them noticed anything wrong with the bolt and nuts. Aside from that fact, plaintiff says on cross-examination that the foreman examined the machine thoroughly. This is corroborated by one Taylor, a witness for plaintiff. The foreman then directed plaintiff to go ahead with his work. Plaintiff thereupon took out the defective malleable, placed another one in the die, dropped the hammer, which at once ascended to its dead center resting place. Plaintiff thereupon proceeded to remove the form from the die. In doing so, he had to reach in under the hammer. While he was doing so the hammer became loose and dropped onto his right hand, whereby it became necessary to remove his thumb, index, and middle fingers, and about a third of his hand. While plaintiff was ignorant of the fact, as he claims, it does appear that the machinist examined the bolt and nuts on two occasions, and advised the foreman (who says plaintiff was present and heard) that the bolt and nuts could not be made more safe. Plaintiff was instructed to watch the nuts to see that they did not work off, and undertook to do so with what diligence was reasonably to be expected of him under the circumstances. He, however, relied on the promise made by the foreman that the repairs would be made. It does not appear whether he knew repairs had not been made on Sunday, the 20th. His work for the rest of the week up to the time of the accident, so far as the use of the defective machine was concerned, was intermittent. On Friday, the 24th, the foreman made some examination of the working part of the machine. The record fails to show that there was any further effort or complaint made with regard to the bolt and nuts be-

tween Monday and Friday when the accident occurred, although plaintiff changed the bolt from one hole to another two or three days prior to the accident.

It appears that there were, in the immediate vicinity of the trip hammer, certain blocks, which defendant claimed were for use in protecting the operative person from accidental falls of the hammer.

The court instructed the jury that the evidence was contradictory as to the use, and instructions to plaintiff to use these blocks; that if they believe from the evidence that plaintiff was so instructed, and was injured by reason of his failure so to do, he could not recover, and that if they found further from the evidence that there was a long-continued custom about the use of the blocks, then they should take all the evidence into consideration in making up their minds as to such use and instruction to plaintiff to use said blocks, and refused to give the instruction as asked by the defendant, viz.:

"That if the plaintiff had been instructed to watch the nuts and keep them tight, and was injured by reason of his failure to watch the nuts, in that state of the proof he could not recover."

Motions to take from the jury at the close of plaintiff's evidence, and again at the close of all the evidence, were made by complainant and denied. The jury found for the plaintiff, and assessed his damages at the sum of \$5,000. Motions for a new trial and for a judgment non obstante veredicto were made and overruled, and judgment was entered as aforesaid. The errors assigned set up: (1) That the court admitted improper evidence and rejected proper evidence; (2) that the court refused to take the case from the jury as aforesaid; (3) that the court instructed the jury with regard to custom in the use of blocks as above set out, when there was no competent evidence as to custom in that respect; (4) that there was no evidence to support the verdict; (5) that the court overruled said motions for a new trial and judgment non obstante veredicto.

John G. Campbell, of Chicago, Ill., and Frank T. Miller and John M. Elliott, both of Peoria, Ill., for plaintiff in error.

Jesse Black, Jr., of Pekin, Ill., and Joseph A. Weil, of Peoria, Ill., for defendant in error.

Before BAKER and KOHLSAAT, Circuit Judges, and GEIGER, District Judge.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] The rule of law applicable here was stated by the Supreme Court of the United States in *Hough v. Railway Co.*, 100 U. S. 214, 25 L. Ed. 612. In that case a railroad engineer was injured through defects in his engine, of which he was advised, and concerning which he had made complaint to the railroad company, and received assurance that the defects would be removed.

"But, there can be no doubt," says the court speaking through Justice Harlan, "that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance, and,

as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept"

—citing Cooley on Torts, 289, wherein it is said that:

"If the servant, having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engaged to assume the risk."

On page 225 of 100 U. S. (25 L. Ed. 612) the court says:

"If, under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery, upon the ground of contributory negligence."

[2] The court further holds in said case that the fact that the engineer knew of the alleged defect was not, under the circumstances, and as a matter of law, absolutely conclusive of want of due care, and that in such a case the question of negligence was for the jury to decide. The same court reaffirmed the rule above laid down in *Northern Pacific R. R. Co. v. Babcock*, 154 U. S. 201, 14 Sup. Ct. 982, 38 L. Ed. 958, wherein the court says:

"As the employé had given notice of the defect to the proper officer whose duty it was to make the repairs, and the impression had been conveyed to him that these would be made, he had a right to assume that they had been made, and to act upon that assumption. The mere fact of his taking the engine out at midnight under the circumstances did not, of itself, unsupported by other proof, imply an assumption by him of the risk resulting from the dangerous and defective condition of the attachment to the engine,"

—citing *Hough v. Railway*, supra. In the case just quoted from in 154 U. S., the accident occurred 10 or 12 days after the promise; he having been laid up in the meantime.

The same rule was laid down in *Missouri Furnace Co. v. Abend*, 107 Ill. 44-52 (47 Am. Rep. 425):

"The reason, upon which the rule is said to rest," says the court, "is that the promise of the master to repair defects relieves the servant from the charge of negligence by continuing in the service after the discovery of the extra perils to which he would be exposed."

In this case the defect consisted of both original misarrangement of the oiling appliance of the engine, whereby the oiler was unnecessarily exposed when oiling, and failure to repair.

"It is, however," says the court at page 53 of 107 Ill. (47 Am. Rep. 425), "a question of fact, to be found as any other fact in the case, whether the servant is guilty of negligence by continuing to use defective machinery for a reasonable time for the fulfillment of the promise after the master has promised to make the needed repairs."

In *Weber Wagon Co. v. Kehl*, 139 Ill. 644, 29 N. E. 714, plaintiff, on about the last of February, 1888, complained to his foreman that the floor surrounding a shaper with which he was working had become, by constant use, slippery. The foreman promised "to fix it."

After two weeks had elapsed, and nothing having been done, plaintiff complained to the superintendent, who said he would see to it. About two weeks later, he again complained to his foreman, who again promised to remedy the defect. Nothing was done. On April 12th, or about 12 days after the last promise to repair, he slipped, whereby his hand was caught in the knives and cut off. A verdict for plaintiff was sustained.

The authorities almost uniformly sustain the proposition that a person may rely upon a promise to repair without being guilty of contributory negligence, and that the question of reasonable time is one of fact for the jury. Here the jury have found for the plaintiff on that point, and we find nothing in the evidence to show that such finding was not based on and justified by the facts appearing of record.

[3] The defendant, however, insists that plaintiff undertook to watch the defective parts and thus avoid an accidental fall of the hammer. The danger arising from the defects set out were not incidental to the operation of the trip hammer, and cannot be considered as one of plaintiff's assumed risks, nor could the master in this manner shift his responsibility. No servant can be deemed to have assumed the risk growing out of a negligent master. Did it then become the duty of plaintiff to insure his own safety by assuming the extra task of performing the master's task of providing safe machinery? From the evidence it appears, as above noted, that the room in which plaintiff was working was noisy; that the bolt and nuts in question were seven feet from the floor; that it was not easy to see when the nuts began to work away from the bolt; and that plaintiff's work in handling the metal and adjusting it to the dies and dropping the hammer was such as to require his close attention. Under the circumstances he could not have been expected to give that constant attention to the condition of the bolt and nuts which their uncertain operation required without neglecting his real task. Moreover, there was evidence which the jury was at liberty to believe, to the effect that the foreman himself had, just before the accident, inspected the machine. The jury found that plaintiff had not been guilty of negligence in respect to keeping watch of the bolt and nuts. Even had plaintiff failed to pay attention to the master's orders to watch the bolt and nuts, it would be well within the province of the jury to have determined that such requirement of the master, in the absence of willful negligence on plaintiff's part in the premises and under the circumstances of this case, was unreasonable, and not such as to relieve the master from knowingly failing to provide a reasonably safe place in which the servant might perform the work for which he was hired. The requirement of the law in such cases is not a mere formality. It is inconceivable that defendant could not have remedied the defects herein complained of with little effort. The failure to repair has closed the door of opportunity for a lifetime to plaintiff. We conclude that the verdict of the jury and the judgment of the district court were warranted by the evidence. We do not deem the other errors assigned well taken. The judgment of the district court is affirmed.

SYNNOTT v. TOMBSTONE CONSOL. MINES CO., Limited, et al.

(Circuit Court of Appeals, Ninth Circuit. October 29, 1913.)

No. 2,263.

1. BANKRUPTCY (§ 314*)—CLAIMS PROVABLE—NATURE OF LIABILITY.

Bonds issued by a corporation by which it agreed to pay their face value, with interest, out of certain funds created from the net surplus earnings of the company, on the back of which were provisions as to the creation of such funds from the earnings of the company, and the payment of the bonds therefrom, and that the obligation thereby created was solely against the company as such, and only against the funds mentioned, except that in the event of liquidation or dissolution the obligation should attach to all the funds and assets of the company, and a covenant by the company that such bonds as a unit should be deemed, in accordance with such provisions, to control the title of all the property of the company, which thereby acknowledged that it held all its rights, interest, or title to such property subject to such provisions, were not provable against the company in bankruptcy, where there had never been any surplus earnings, and as a consequence the funds in question had never been created, since there was no fixed liability of the company to the holders of the bonds, and any lien arising out of the provisions on the back of the bonds was limited to the earnings, as there could be no lien to secure something for which no liability existed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469-473, 478, 483-487, 489, 490; Dec. Dig. § 314.*]

2. BANKRUPTCY (§ 314*)—CLAIMS PROVABLE—NATURE OF LIABILITY.

A debt to be provable in bankruptcy must be a fixed liability absolutely owing at the time the petition in bankruptcy is filed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469-473, 478, 483-487, 489, 490; Dec. Dig. § 314.*]

On petition for rehearing. Denied.

For former opinion, see 207 Fed. 544.

Adams & Blinn and Amos L. Taylor, all of Boston, Mass., and Doan & Doan, of Douglas, Ariz. (Thomas E. Hayden, of San Francisco, Cal., of counsel), for appellant.

Everett E. Ellinwood and John M. Ross, both of Bisbee, Ariz., for appellee.

Before GILBERT and ROSS, Circuit Judges.

ROSS, Circuit Judge. The petition for a rehearing in this case calls attention to the fact that, although the terms of the bonds in question were not printed in the transcript, the bonds were, under stipulation of the respective parties, forwarded to the clerk of this court, and are on file in his office.

[1] An inspection of them shows that they were issued under and by virtue of a resolution of the board of directors of the Tombstone Consolidated Mines Company, Limited, authorizing "the issuance and sale of a series of special contract bonds which shall not exceed, at par, the aggregate sum of three million dollars (\$3,000,000)," each one of which recites upon its face that for value received the company—"agrees to pay to the registered holder of this special contract bond, which is of the above series and issue, and is of the par value of one hundred (\$100)

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dollars, the face value hereof in gold coin of the United States of America, of the present weight and fineness, or its equivalent, and is payable in twenty equal installments, represented by the attached coupons, from and out of a retirement fund, created from the net surplus earnings of the company as hereinafter stipulated, at the times and upon the terms and conditions hereinafter stated, but not otherwise; also that the company agrees to pay to the registered holder hereof, in like gold coin from an interest fund created from the net surplus earnings of the company, as hereinafter stipulated and not otherwise, interest on the face value of this bond, or so much thereof as may from time to time remain unpaid, at the rate of six per centum per annum payable semiannually in equal installments on the first days of January and July in each year before any dividends are paid on the stock of the company."

Indorsed upon the back of each bond, and expressly made a part thereof, are the following provisions:

"This special contract bond (hereinafter referred to as bond), as well as all others of the same series, is authorized, sold, and issued by the Tombstone Consolidated Mines Company, Limited (hereinafter referred to as the company), and has been purchased and accepted by the holder hereof, for himself and assigns, subject to the following terms and conditions; that is to say:

"Clause I. The net proceeds derived from the sale of this and other bonds of the same issue shall be held in the treasury of the company, or be strictly applied by the company to the purchase of any or all of the properties and mining claims at Tombstone, Arizona, now under contract by it, and independently or with some separate company organized for such purpose, to the cost of construction, maintenance, or control of a railroad to be used in connection with said properties, or to the purchase of stocks or bonds in such a railroad company, all as the board of directors of the company may or may not deem advisable, and to the acquisition of such other mining claims and properties as the company may decide to secure, and to the purchase, installation, and maintenance of suitable mining and milling machinery, for the development and operation of all such properties as are now under contract, or hereafter may be acquired or controlled in connection with the business of the company, and to all legitimate and reasonable expenditures in connection therewith, or for any other purpose or object for which the company was incorporated, whenever such expenditures shall have been first approved by the company, and for such other purpose or object only.

"Clause II. Out of the earnings of the company the board of directors or executive committee shall create and maintain certain special funds for the particular uses and held under the particular names as hereafter in this clause set forth, to wit:

"(a) An operating fund, for carrying on the current business of the company, which, in the opinion of the board or committee, shall be sufficient for such purpose, but shall not exceed at any one time the sum of three hundred thousand (\$300,000) dollars.

"(b) An interest fund, which, in the opinion of the board or committee, shall be sufficient to promptly meet and pay the semiannual interest payments on all bonds outstanding and unpaid, but which fund shall not exceed at any one time the sum of ninety thousand (\$90,000) dollars; it being hereby expressly agreed and understood that no payment of interest is promised or shall be made hereunder, except from and out of the interest fund, in this clause named, and that said fund shall be created and maintained solely from the surplus earnings of the company as herein set forth and not otherwise.

"(c) A retirement fund, from which shall be paid from time to time the installment coupons attached to all bonds issued and sold, and to which shall be transferred all net surplus earnings of the company not required for the creation and maintenance of the special funds hereinbefore named, or for the payment of dividends upon the stock of the company, which stock dividends shall not be cumulative, and shall not exceed four per centum per annum, un-

til such time as all bonds issued by the company shall have been paid and redeemed.

"Clause III. The earnings of the company, under the supervision and within the judgment and discretion of the board of directors or executive committee, shall be used, paid, and applied for the following purposes, but only in the order herein in this clause stated; that is to say:

"(a) All current expenses of the company shall be paid or provided for, and the operating fund at all times be kept as nearly unimpaired as the earnings of the company will permit.

"(b) All earnings yet remaining shall be used and applied to the payment of all interest installments, due on all bonds outstanding and unpaid, and to keep the interest fund for such purpose at all times as nearly unimpaired as the earnings of the company available for such purpose will permit. The interest on this, and all other bonds of like issue, shall be cumulative and shall be payable semiannually, on the first days of January and July of each year, at the rate of six per centum per annum on their par value, or any unpaid portion thereof. Should the surplus or net profits arising from the business of the company and available for the interest fund herein named according to the terms of this agreement, prior to any interest day, be insufficient to pay the interest then due on this and other bonds of the same series, such interest shall be payable from future profits available for and in such fund, and no dividend shall at any time be paid upon the stock of the company, until the full amount of interest at the rate of six per cent. per annum, up to that time, upon the par value of all bonds, outstanding and unpaid, shall have been paid, or set apart for payment.

"(c) All earnings of the company yet remaining may, within the discretion of the board or committee, be used in the payment of dividends on the stock of the company, but at a rate of not to exceed four per centum per annum, which stock dividends shall not be cumulative, and shall not exceed the limit herein named until all bonds issued and outstanding, with accrued interest, shall have been fully paid, as herein provided.

"(d) All earnings of the company still remaining shall be transferred to the retirement fund, and whenever the cash on hand in said fund shall equal one-twentieth of the face value of all bonds then outstanding and unpaid, the company shall promptly pay and retire one of the installment coupons of this bond and one of the installment coupons of all other bonds of this series then outstanding and unpaid. Whenever a sufficient sum shall have accumulated in said retirement fund for such purpose, written notice thereof shall be promptly mailed to all registered holders of outstanding bonds, according to the last address given and shown by the books of the company, the sum necessary to retire one installment coupon on each of the said outstanding bonds shall be deposited with the Manhattan Trust Company of New York City, or with its successor or successors in the trust (hereinafter called the trust company), in trust for and subject to the order of each of such registered holders, and each of such installment coupons shall be paid, upon presentation and surrender, at the offices of the trust company, and interest upon so much of each of said bonds as the amount deposited will redeem and pay shall cease from and after ten days subsequent to the mailing of said notice. Upon surrender of said coupons, they shall be canceled by the trust company, and the payment thereof shall to such extent constitute a payment of this and other outstanding bonds of the same series and issue. All moneys so deposited for the payment of such coupons shall be held by the trust company at the risk of the holder of this and other like bonds, from and after the expiration of ten days subsequent to the mailing of such notice. The company, in lieu of depositing such funds with the trust company as herein provided, shall have the right, upon the giving of proper written notice, to make direct payment of such coupons out of the retirement fund of the company, at its offices in New York City, or Prescott, Arizona, and with like effect, as if paid through the trust company. The determination of the board of directors or executive committee with reference to the application, use, distribution, and payment of the earnings of the company, as in this

clause indicated, when made in good faith, shall be conclusive and binding upon the holders of all bonds, issued, outstanding, and unpaid.

"Clause IV. The company reserves the right to retire all bonds, issued and outstanding, at any interest paying date after June 1, 1902, by the payment of the full face value of such bonds, together with all accrued and unpaid interest at the rate of six per centum per annum up to such time. Provided, the company shall not exercise this right of redemption as to any number of bonds less than the whole number then issued, outstanding, and unpaid. Provided, further, that notice of the company's desire to retire such bonds shall be mailed to the registered holder of the same at least thirty days before the interest date fixed for such retirement; also, that the company has deposited at the same time with the trust company, at its offices in New York City, or holds for such specific purpose in the retirement fund of the company, a sufficient sum to meet and pay all of the said bonds, or any amount remaining due thereon. After such date, if such notice shall have been given, and if a sufficient deposit of money has been made, or is so held, as herein required, such notice and deposit or holding shall constitute a full payment of this bond, and of all other bonds of like issue, and all interest thereon from such time shall cease, and the money so placed with the trust company, or held in the retirement fund of the company, shall thereafter be held at the risk of the holder of this, and of all other bonds of like issue.

"Clause V. In the event of liquidation or dissolution of the company, all bonds outstanding and unpaid shall be paid in full, both as to principal and accrued interest thereon, at the rate of six per centum per annum, before any distribution is made of any of the assets of the company to the holders of the stock of the company.

"Clause VI. It is further agreed that the company will not execute, sign, or deliver any mortgage, deed of trust, conveyance, lease, release, or waiver, or other instrument which shall, subject to the terms and conditions of this agreement, be prior to or in any way give a preference as against or over the rights of the holder of this bond or of any other bond of like issue.

"Clause VII. It is expressly agreed and understood by the holder of this bond that the obligation hereby created is solely against the company as such, and is only against the retirement fund created from the surplus earnings of the company, as hereinbefore stipulated. Provided that, in the event of liquidation or dissolution of the company, the obligations of this bond shall immediately extend and attach to all the funds and other assets of the company whatsoever, as in clause V of this instrument, above stipulated and set forth. The company further covenants and agrees that the total bonds of this issue outstanding at any time, and as a unit, shall be deemed and taken, subject to and in accordance with the conditions hereinbefore set forth, to control the title to all the property of the company, real and personal, and of every kind and nature, and for the enforcement thereof the company hereby declares and acknowledges that it holds all its rights, interests, or title in and to any and all real and personal property, of every kind and nature whatsoever, now held or which may be hereafter acquired by it, subject to and in accordance with the aforesaid conditions, and that the company has caused a copy of this special contract bond to be duly filed and recorded in the county of Cochise, territory of Arizona, in which the properties of the company are situate.

"Clause VIII. This bond is authorized, sold, issued, purchased, and accepted upon the terms and conditions hereinbefore stated, and none other, and no officer, agent, or other representative of the company shall have the power to waive or modify any provision or condition of this agreement, or to add any other provision or condition thereto."

[2] We are of the opinion that the court below was clearly right in its ruling that the instruments in question were not provable against the estate of the bankrupt corporation, for the reason that they created no fixed liability against it. The law is that a debt to be provable in bankruptcy must be a fixed liability absolutely owing at the time the

petition in bankruptcy is filed. Bankruptcy Act, § 63; *In re Neff*, 157 Fed. 57, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349; *County Com'rs v. Hurley*, 169 Fed. 92, 94 C. C. A. 362; *In re Adams* (D. C.) 130 Fed. 381; *Collier on Bankruptcy* (8th Ed.) pp. 701, 706; *Id.* (9th Ed.) pp. 854, 867.

The instruments in question expressly declare on their face that both the principal and interest are payable only out of certain named funds to be created out of the surplus earnings of the company, and any lien that ever could arise out of the provisions indorsed on their back was necessarily limited to such surplus earnings, for manifestly there could be no lien to secure something for which no liability existed. The case showing that there never were any surplus earnings of the company, and that, as a consequence, the funds out of which the instruments expressly declared both principal and interest thereof was only payable were never created, we regard it as too clear for argument that there has never been any fixed liability of the company in question absolutely owing to the holders of any of the so-called bonds. The marvel to us is that such instruments with such terms and conditions could have found a purchaser other than such persons as were willing to take chances on a mining venture, such as this project evidently was in its every feature.

The petition for a rehearing is denied.

BARNETT et al. v. BEGGS.

(Circuit Court of Appeals, Eighth Circuit. October 1, 1913.)

No. 3,714.

1. CONTRACTS (§ 322*)—ARCHITECTS' SERVICES—FINDINGS.

In an action for architects' services, evidence held to sustain the jury's finding that plaintiffs only submitted sketches which were subject to change, and that no completed plans and specifications were ever delivered.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 322.*]

2. WORK AND LABOR (§ 9*)—EXPRESS CONTRACT.

Where there is an express written contract for services between the parties, plaintiff, to recover for work and labor done, must declare on the written contract so long as it remains in force and unrescinded, and cannot recover on a quantum meruit, under the rule that implied promises exist only when there is no express promise between the parties.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 23, 24; Dec. Dig. § 9.*]

3. CONTRACTS (§ 282*) — ARCHITECTS' SERVICES — PLANS SATISFACTORY TO OWNER.

Where a contract for architects' services required plans and specifications satisfactory to defendant, plaintiffs were bound to furnish plans which were satisfactory to defendant, and not merely such as ought to have been satisfactory to him.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1284-1289; Dec. Dig. § 282.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by George D. Barnett and others against John I. Beggs. Judgment for defendant, and plaintiffs bring error. Affirmed.

P. H. Cullen, of St. Louis, Mo. (W. S. Campbell, William R. Orthwein, Thomas T. Fauntleroy, and Shepard Barclay, all of St. Louis, Mo., on the brief), for plaintiffs in error.

Morton Jourdan, of St. Louis, Mo., for defendant in error.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. The plaintiffs are a firm of architects, and bring this action to recover for services which they claim to have performed for the defendant in the preparation of plans and specifications for a residence to be erected by him for his daughter in St. Louis. The complaint contains two counts. The first proceeds upon an express contract by virtue of which plaintiffs were entitled to 2½ per cent. of the cost of the building. This count alleges that plaintiffs completed plans and specifications in the month of March, 1907, in accordance with the terms of their contract, and asks to recover the stipulated compensation of 2½ per cent. The second count proceeds upon quantum meruit, and alleges that, after the plans and specifications were prepared in accordance with the contract, the defendant directed plaintiffs to make changes therein, requiring additional service for revising and redrawing the same. For these services they seek to recover \$3,146.68. Defendant finally abandoned the project of building the residence, and admits that he is liable as for a complete set of plans and specifications, but denies any other liability. The trial court directed a verdict upon the first count of the complaint, pursuant to the admission above referred to, and submitted the issues on the second count to the jury, who returned a verdict for nominal damages of \$1. Plaintiffs sue out this writ of error.

The contract is contained in a letter written by plaintiffs to defendant on August 15, 1906, which reads as follows:

"Complying with your request of August 14th, in regard to making plans for your residence, will say that our charges are as follows:

"One per cent. for preliminary studies; and for preliminary studies, plans, and specifications, two and one-half per cent., and preliminary studies, plans, and specifications and superintendence, or what is known as full professional services, five per cent., upon the cost of the building.

"Our method of proceeding with sketches for residence is as follows:

"First, we make an original draft of floor plans, and submit same to the owner for his approval. When the owner has noted alterations desired upon this plan and signified changes, a second tracing is made from the first, preserving the first, with all notes, for reference.

"This proceeding is continued through as many sets of sketches as are necessary to bring the residence to what you deem, in your mind, to be most satisfactory, and at the same time complying with the proposed cost.

"When this has been done, we take an approximate estimate on the cost of building. If this is satisfactory, the general plans are made, and the building is put upon the market for bids from responsible contracting firms.

"If the bids are satisfactory, the contract is awarded, and the building is supervised until the completion of the work.

"We wish to state that, if the work is placed in our hands, it shall have our personal attention in all its branches, and we will consider all details in connection with same, in a most careful manner.

"We are very desirous of doing this work for you, and will guarantee absolute satisfaction in all particulars.

"If this proposition is satisfactory to you, we would thank you to let us know in regard to same.

"We have been doing some slight studying since I spoke to you the other afternoon along the lines that you outlined, and are quite enthusiastic in regard to the beauty of a house constructed in this manner.

"The natural style for a rough granite house is the Romanesque. We have a great many most valuable architectural works on this beautiful style."

Defendant accepted this offer, and plaintiffs began the work of preparing sketches. This proceeded for some months. There was voluminous correspondence between the parties, which is set forth fully in the record. In these letters neither the plaintiffs nor the defendant kept clear the distinction between "sketches" and "plans." What must have been mere sketches are referred to in the correspondence by both parties as plans. For example, on December 19, 1906, plaintiffs wrote the defendant as follows:

"We are sending you to-day complete set of plans revised in pencil."

It is quite clear, however, from defendant's answer, that he did not regard the documents as plans, for he makes numerous suggestions for changes, and closes his letter with the following language:

"With the changes noted in drawings and the above suggestions given consideration, and the alterations made by me worked in to scale, I think we shall be about ready to ask for preliminary estimates."

It will be seen, from the original offer of the plaintiffs, that preliminary estimates were to be based, not upon completed plans, but upon sketches which had reached the stage when they were satisfactory to defendant. It is quite clear that the "complete set of plans" referred to in plaintiffs' letter of December 19th were regarded by the defendant as sketches, for he proceeds to suggest in his reply numerous changes and alterations. Plaintiffs accepted this view, and replied, stating that they would make the suggested changes. Mr. Haynes, one of the plaintiffs, testifying as a witness, stated that they started on the plans near the close of the year 1906, and changed them repeatedly until about July, 1907. Mr. Barnett says:

"We had made all these various preliminary sketches and submitted them to Mr. Beggs, and then we had gone ahead with the finished plans and submitted several sets of finished plans, that were changed again and again, as is shown in the letters repeatedly. The plans were rubbed until there were holes in the tracings in all of them from being erased—constant and continuous changes."

[1] There is much other evidence of similar purport, from employees in plaintiffs' office. The evidence, in our judgment, fails to show that any final plans were completed in March, and accepted by the defendant. The correspondence in May and June proceeds the same as in the earlier months, the defendant making numerous suggestions as to changes, and the plaintiffs accepting those suggestions and modifying the plans accordingly. In July one of the plaintiffs

was invited to visit Milwaukee to examine a residence there which had impressed the defendant's taste. Numerous notes were taken, and the plans were to be modified accordingly. Defendants on one occasion complained of being compelled to make these frequent changes, and stated that their expenses were largely increased as the result; but they at no time intimate that they have ever performed their contract as to plans and specifications, and that additional work will have to be paid for on the basis of its reasonable value. The issue was submitted to the jury to determine whether the plaintiffs completed plans and specifications in March that were satisfactory to and accepted by the defendant, and they were instructed that if such was the case defendant would be liable for services subsequently rendered. The jury have found that issue in favor of defendant, and the evidence, in our judgment, abundantly supports the finding. Plaintiffs requested the defendant to make payment on account from time to time, but at no time did they intimate that the definite $2\frac{1}{2}$ per cent. was due them by reason of the fulfillment of their contract for "preliminary studies, plans, and specifications." It seems to us quite clear that plaintiffs were willing to treat their work on these subjects as incomplete, acting all the time upon the hope that plans would finally be arrived at that would be acceptable to the defendant, and that he would then build the residence, and they would get the full commission of 5 per cent., with the professional advantage which would accrue to them as architects for such a building. It was not until it became clear that defendant would not build the house that the claim was put forward that they had completed studies, plans, and specifications in March, and were entitled to the $2\frac{1}{2}$ per cent., and as to services rendered by them after that date they were entitled to additional compensation.

[2] It is difficult to pass from a liability under an express contract to one upon quantum meruit. If that can be done, there would certainly have to be a very clear and definite understanding on the part of both parties that the services under the express contract had been completed.

"The rule is that, if there be an express written contract between the parties, the plaintiff, in an action to recover for work and labor done, * * * must declare upon the written agreement so long as the special agreement remains in force and unrescinded, as he cannot recover under such circumstances upon a quantum meruit. * * * Implied promises or promises in law exist only when there is no express promise between the parties—'expressum facit cessare tacitum.' Hence, says Chitty, a party cannot be bound by an implied promise, when he has made an express contract as to the same subject-matter; which is certainly sound law, unless the express contract has been rescinded or abandoned." *Hawkins v. United States*, 96 U. S. 689, 697 (24 L. Ed. 607).

The law, as well as business candor, required the plaintiffs, if they expected to make a claim for work upon plans and specifications outside of their written contract, to bring that subject clearly and unequivocally to defendant's attention. This they wholly failed to do.

Plaintiffs build up a somewhat impressive argument in this way: They say that under the contract they were not entitled to $2\frac{1}{2}$ per

cent. until they had furnished plans and specifications which were satisfactory to defendant. Then as the second step they say that defendant admitted, both personally and by his counsel, that he was liable for $2\frac{1}{2}$ per cent. They say finally that from this premise the conclusion necessarily follows that plans and specifications were furnished which were satisfactory to the defendant. Conceding the force of this reasoning, we do not think it made a case which would justify the court in declaring as a matter of law that plans and specifications were supplied by the plaintiffs which fulfilled their obligations under the contract. At most the showing simply made a case for the jury. The admission of liability by the defendant it seems to us may be more fairly explained upon the ground that defendant, having abandoned the project of building the house, and having put the plaintiffs to a large amount of labor which they performed for him, properly conceded that he was liable to the same extent that he would have been if plans and specifications had been completed and accepted by him. We do not think it was meant to admit all the averments of the first count of the complaint, but simply to admit a liability of $2\frac{1}{2}$ per cent. of the estimated cost of the building, for all that plaintiffs had done.

[3] The error mainly relied on is the following language in the charge of the trial court to the jury:

"It was the duty of the plaintiffs under the contract to make plans and specifications for a residence which would be satisfactory to and approved by the defendant; and it was alone for the defendant to determine whether the plans and specifications of the proposed house were satisfactory to him."

The thought here expressed is repeated in other parts of the charge. Plaintiffs complain that this language left defendant's liability to his mere whim or caprice. There are two answers to this complaint. First, there is no evidence in the record that the defendant's conduct was arbitrary or capricious; second, the language was in strict accord with the law. The contract required the plaintiffs to furnish plans that were satisfactory to the defendant. This did not mean plans which a jury of 12 men might say ought to have been satisfactory to him. The law is well settled that in matters of taste a defendant may condition his liability upon his being satisfied. Speaking of such cases the Court of Appeals of New York says, in *Crawford v. Publishing Co.*, 163 N. Y. 404, 407, 57 N. E. 616, 617:

"The plaintiff did not agree to satisfy a court or jury, but undertook to satisfy the publishers. It was their taste, their fancy, their interest, and their judgment that was to be satisfied."

The authorities are collected in *Wald's Pollock on Contracts* (3d Ed.) 51, and 9 *Encyclopedia of Law and Procedure*, 618, where the rule is stated as follows:

"The personal thread which runs through agreements relating to matters of fancy, taste, or judgment has caused a unanimity of judicial opinion that here at least a promisee is practically debarred from questioning the grounds of decision on the part of the promisor, or investigating its propriety. The courts refuse to say that, where a man agrees to pay if he is satisfied with a thing, he can be compelled to pay on proof that some one else is satisfied with it. They recognize that in matters of fancy, taste, or judgment there

is no absolute standard as to what is good or bad, and leave each man free to act on his ideas or prejudice as the case may be."

We do not deem the other errors of sufficient importance to require separate consideration.

The judgment is clearly right, and is affirmed.

C. W. HULL CO. v. MARQUETTE CEMENT MFG. CO.
(Circuit Court of Appeals, Eighth Circuit. October 1, 1913.)

No. 3,891.

1. CONTRACTS (§ 26*)—MEETING OF MINDS.

Since parties to a contract may settle one term at a time, where plaintiff and defendant negotiated a contract for a cement sales agency in that manner, first agreeing on territory, then on quantity, then on general features, such as terms of payment, return of sacks, etc., then on the amount of monthly deliveries, and finally, after plaintiff wrote fixing the final price per barrel, defendant wired that such price was acceptable, such telegram consummated a binding contract between the parties as a matter of law.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 119, 120; Dec. Dig. § 26.*]

2. FRAUDS, STATUTE OF (§ 118*)—MEMORANDUM—SEPARATE WRITINGS.

A complete contract, binding under the statute, may be gathered from letters, writings, and telegrams between the parties relating to the subject-matter of the contract, provided they are so connected that they may be fairly said to constitute one paper relating to the contract.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 199, 262-265; Dec. Dig. § 118.*]

3. FRAUDS, STATUTE OF (§ 159*)—PART PERFORMANCE—QUESTION FOR JURY.

In an action for breach of a cement sales agency contract, evidence held sufficient to justify submission to the jury of the question whether a delivery of 995 barrels of cement during the season of 1907 was a delivery under the contract so as to establish sufficient part performance to satisfy the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 378; Dec. Dig. § 159.*]

4. APPEAL AND ERROR (§ 1001*)—VERDICT—REVIEW.

A verdict on an issue of fact, based on sufficient evidence, is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

5. APPEAL AND ERROR (§§ 216, 263*)—OBJECTIONS TO CHARGE—EXCEPTIONS—REQUESTS—NECESSITY.

An objection to the manner in which the trial judge presented a question to the jury is not reviewable where no proper request on the subject was presented and the language used by the court was not directly challenged by an exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1523, 1525-1532; Dec. Dig. §§ 216, 263;* Trial, Cent. Dig. § 627.]

6. SALES (§ 384*)—CONTRACT—BREACH—MONTHLY DELIVERIES—DAMAGES—EVIDENCE.

Where a cement sales agency contract required the buyer to give shipping directions for a certain quantity of cement each month, it had the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

entire month in which to give such directions as to the entire installment to be delivered during that month, so that, in ascertaining the market value of cement to assess damages for the buyer's breach of such contract, evidence as to the value of cement at the place of delivery on the last day of each month was properly received, though the price steadily declined during the month.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.*]

7. WITNESSES (§ 256*)—REFRESHING RECOLLECTION—MEMORANDA.

In an action for a buyer's breach of a cement sales agency contract, plaintiff's manager, before testifying as to the value of cement on the last days of each month covered by the contract, had made written computations after consulting certain books and records and examined his computations before coming to court to refresh his memory. *Held*, that opposing counsel was not entitled to an inspection of such memoranda as part of the witness' cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 891; Dec. Dig. § 256.*]

In Error to the District Court of the United States for the District of Nebraska; Page Morris, Judge.

Action by the Marquette Cement Manufacturing Company against the C. W. Hull Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John Lee Webster, of Omaha, Neb., for plaintiff in error.

Edward M. Martin, of Omaha, Neb., and Benjamin T. Roodhouse, of Chicago, Ill., for defendant in error.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. The Marquette Cement Manufacturing Company was plaintiff below and brought this action to recover damages from C. W. Hull Company for the alleged breach of a contract to purchase 50,000 barrels of cement from plaintiff during the season of 1907. The Hull Company, with headquarters at Omaha, Neb., had held the exclusive agency for the sale of plaintiff's cement in certain territory for three years prior to 1907. Early in that year negotiations were entered upon between the companies as to the business for the ensuing season. It was carried on mainly by correspondence and involved questions as to the quantity, price, and territory. On February 13th the territory had been defined and the quantity fixed at 50,000 barrels. On that date plaintiff submitted to defendant, on one of its regular quotation forms, a proposition for the year's business. The document covered such subjects as the terms of payment, the return of sacks, and excuses for failure to perform on the part of the plaintiff, due to causes beyond its control. In this proposal plaintiff offered the defendant cement f. o. b. its mill at Chicago as follows:

10,000 barrels	at	1.40.
20,000	"	" 1.50.
25,000	"	" 1.60.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On February 15th the defendant replied to this proposal as follows:

"We have your esteemed favor of the 13st inst., and the general scheme which you suggest is not unsatisfactory, but the prices are too high. We believe we ought to have for this contract a level 10 cts. per barrel better than you offer on your distribution, or else 25,000 barrels at 1.40 and 25,000 barrels at 1.50 to be taken in even weekly amounts during the season."

On February 18th plaintiff replied as follows:

"In reference to yours of the 15th, we will make a price of 1.40 in bulk at our mill on 10,000 barrels, and 1.50 in bulk at our mill on 40,000 barrels, the 50,000 barrels to be taken by you in equal monthly shipments beginning March 1, 1907, all to be shipped before December 1, 1907."

On February 25th defendant submitted a counter proposal inclosing a written contract covering matters as to which the parties were already agreed and proposing prices and monthly shipments as follows:

April.....	5,000 barrels at 1.40.
May.....	5,000 " " 1.40.
June.....	5,000 " " 1.40.
July.....	5,000 " " 1.40.
August.....	10,000 " " 1.50.
September.....	10,000 " " 1.50.
October.....	10,000 " " 1.50.

It will be noticed that it changed the time of the first month's delivery from March to April, and also provided for 20,000 barrels at 1.40 instead of 10,000 barrels, as plaintiff proposed in its letter of the 18th.

February 26th plaintiff replied to defendant's letter of the 25th as follows:

"Referring to yours of the 25th inst. just received, with memorandum of agreement inclosed, would say that we are willing to have the shipments begin April 1, 1907, as suggested by you, but cannot accept your order except on the basis of our former proposition, the quantities and prices being as stated in your memorandum of agreement except that the 5,000 barrels for June and July the prices will be \$1.50 per barrel, f. o. b. bulk mill. We have several matters of importance pending, and make this proposition good for your acceptance until the close of business February 27th, and must ask you to wire us whether or not you desire to avail yourselves of this our very favorable proposition to you. If we do not hear from you as above, all propositions will be considered as withdrawn."

It will be noted that plaintiff here acceded to defendant's request that deliveries begin April 1st instead of March 1st but refused to accede to its request that the 5,000 barrels to be shipped respectively June and July should be at \$1.40 per barrel; plaintiff expressly providing in this final offer that the shipments for these months should be at \$1.50 per barrel.

February 27th the Hull Company, complying with the requirements of this letter, wired the Marquette Company as follows:

"One fifty bulk mill for June and July is acceptable to us."

In our judgment this telegram covered the only matter in difference between the parties and brought their minds together into a binding contract.

On February 28th plaintiff wrote the defendant a letter in which it states its understanding to be the same as that expressed in defendant's proposed contract of the 25th, saving only the matter of price for the June and July shipments, and embodied the order as agreed upon by the negotiations culminating in the telegram on one of its regular quotation forms. Neither in this letter nor in the quotation form are any matters introduced as to which the parties had not already reached an agreement, and their only office seems to have been to express in a single statement the terms which had been agreed to from time to time in the correspondence. Neither document contemplates a reply or acceptance by defendant, and they cannot properly be construed as a new offer by plaintiff. The letter begins with the following language:

"Referring to our regular formal proposition of the 13th inst., and our letter of the 26th inst., we have booked your order for 50,000 barrels in accordance with the terms therein."

To this letter, with its formal statement of the result of the negotiations between the parties, and the definite declaration of the understanding of the plaintiff, there was no response by the defendant. From that time on plaintiff went forward filling orders from time to time given by the defendant for cement during the season of 1907.

In a letter of February 28th accepting such an order, plaintiff stated to the defendant as follows:

"This will apply on your contract dated to-day, and is subject to the terms and conditions stated therein."

Similar language is used in accepting other orders. For example, on April 2d plaintiff wrote defendant as follows:

"Above order applies on your 50,000 barrel contract dated February 28, 1907, and is subject to the terms and conditions stated therein, and takes up your April quantity."

The price of cement declined during the summer, and defendant failed to give shipping orders for the quantities which it had agreed to receive from month to month. The record contains numerous letters in which the defendant calls upon the plaintiff to furnish such shipping directions and insists that the defendant take the quantities of cement agreed upon. References are made in these letters to the contract between the parties. Defendant in no way repudiates its obligation or intimates that it had not agreed to accept cement from month to month but simply omitted to give the shipping directions. The record also contains persuasive evidence of communications by telephone between the officers of the plaintiff company and the defendant company on the same subject, and there is also the testimony of Mr. Dickinson, the sales manager of the plaintiff company, that during all this time he had frequent personal interviews with the president of the defendant company, urging him to give shipping directions in accordance with the contract; and that at no time was there any suggestion that the contract was not in full force. The case was submitted to a jury and resulted in a judgment in favor of plaintiff, to review which this writ of error was sued out by the Hull Company.

[1] We are of the opinion that the court would have been justified

in charging the jury that the telegram of February 27th consummated a binding contract between the parties. The court, however, did not do this but submitted to the jury the question as to whether there had been an actual meeting of the minds and directed them to consider the negotiations had between the parties, both before and after February 27th, as bearing upon this question. Defendant insisted that there had been no contract and objected to the court's submitting the question to the jury. As already stated, we think the court would have been justified in directing the jury that the telegram completed a contract between the parties. Defendant cannot complain that the court, instead of doing this, sent the case to the jury on that subject.

Counsel for appellant builds up an imposing argument in this way: He starts with the basic principle that in order to create a contract there must be a definite proposal on one side and an unconditional acceptance on the other. He then takes up the letters and shows that each offer was met by some new term and, applying his rule, lays aside each letter as a nullity because it failed to produce a complete agreement. Parties, however, have the right to reach their agreements in their own way. They may settle upon one term at a time, and, if it is reasonably clear that this has been their method, then, when the last term is agreed upon, their contract is just as complete and binding as if all its terms had been settled by a single act. Here the parties first agree upon territory, then upon quantity, then upon general features, such as terms of payment, return of sacks, etc., then upon the amount of the monthly deliveries, and finally upon the price. At every stage, as the negotiations advance, it seems clear to us that the parties carry forward the terms as to which they have already agreed. On February 26th the only matter in difference was whether the 10,000 barrels to be delivered in June and July should be at the price of \$1.40 or \$1.50 a barrel. Defendant's telegram of the 27th settled that and thus consummated the agreement. That is the reasonable interpretation of the written communications between these parties. We are also satisfied that this was the intent and understanding of both parties on the 27th of February. The doubt and final denial on the part of defendant were caused by the steady decline in the price of cement during the season of 1907.

[2] Again the documents introduced in evidence are amply sufficient to constitute such a memorandum as satisfies the statute of frauds. It "is well established that a complete contract binding under the statute of frauds may be gathered from letters, writings, and telegrams between the parties relating to the subject-matter of the contract and so connected with each other that they may be fairly said to constitute one paper relating to the contract." *Ryan v. United States*, 136 U. S. 68, 83, 10 Sup. Ct. 913, 918 (34 L. Ed. 447). See, also, *Freeland v. Ritz*, 154 Mass. 259, 28 N. E. 226, 12 L. R. A. 561, 26 Am. St. Rep. 244; *Crystal Palace Flouring Co. v. Butterfield*, 15 Colo. App. 246, 61 Pac. 479; *Collyer v. Davis*, 72 Neb. 887, 101 N. W. 1001.

[3-5] The trial court submitted to the jury the question as to whether there was an agreement between the parties, and, if so, whether there

was such a part performance under it as to satisfy the statute of frauds. The evidence is very clear that 995 barrels of cement were delivered by plaintiff to defendant during the season of 1907, and that these deliveries were made by the plaintiff with the understanding on its part that they were under the contract and written notice thereof so stating mailed to the defendant. The evidence is also clear that this cement was received and actually used by defendant. Its counsel, however, urges that the evidence fails to show that these various deliveries were accepted and received *under the contract*. We think there was ample evidence to justify submitting that question to the jury, and the jury by their verdict have found that these deliveries were so accepted and received by defendant. The finding of the jury is conclusive upon that question. Some complaint is made of the manner in which the trial judge presented this question to the jury in the charge. No proper request, however, on the subject was prepared by the defendant, nor was the language used by the court directly challenged by an exception. It follows that no complaint can be made on the subject in this court.

[6] The defendant had the entire month in which to give shipping directions as to the installment of cement to be delivered during that month. In ascertaining the market value of cement for the purpose of assessing damages, the court, therefore, properly received evidence as to the value of cement at the place of delivery on the last day of each month, although the price had steadily declined during the month.

[7] Plaintiff's sales manager testified as to the value of cement on the last days of each month, covered by the terms of the contract. On cross-examination it was developed that, in arriving at his values the witness had made some written computations after consulting books and records, and that he had kept a memorandum of such computations and examined the same before coming to court for the purpose of refreshing his memory. Counsel for defendant insisted that these memoranda be produced, and because they were not produced, as they were in Chicago, he moved that all the testimony of the witness on the question of market value be stricken out and assigns error because his motion was denied. It is quite clear that these written computations were not the record of any transaction between parties but were simply a record of the witness' mental operations. If he could have made his computations mentally, there would have been no memoranda. The fact that he used pencil and paper does not change the law. The rule of evidence which counsel invokes has no proper application to the facts. Witnesses testifying as to value may base their opinions upon what they read and what they hear, as well as upon their own experience, and what they read does not become a written memoranda of which cross-examining counsel is entitled to an inspection.

We have examined the other errors referred to in the brief and do not find them of sufficient importance to call for special comment.

The judgment of the District Court is affirmed.

WESTERN UNION TELEGRAPH CO. OF ILLINOIS v. SOUTHEAST &
ST. L. RY. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. May 8, 1913. Rehearing Denied July 3, 1913.)

No. 1,904.

1. REMOVAL OF CAUSES (§ 11*)—TEST OF REMOVABILITY.

The fundamental test of removability of a cause from a state to a federal court is that the suit be one of which the courts of the United States are given original jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 29-31; Dec. Dig. § 11.*]

2. REMOVAL OF CAUSES (§ 25*)—GROUNDS—FEDERAL JURISDICTION—FEDERAL QUESTION.

A suit cannot be removed as one arising under the Constitution, laws, or treaties of the United States, unless such fact appears by plaintiff's statement of his own claim. If it does not so appear, the omission cannot be supplied by averment in the petition for removal or in the subsequent pleadings.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. § 25.*]

3. REMOVAL OF CAUSES (§ 25*)—FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION.

A petition by a telegraph company under a state statute to condemn a right of way for its telegraph line along the right of way of a railroad company did not present a federal question so as to confer federal jurisdiction, because such condemnation might interfere with interstate commerce or involved an interference with navigable waters of the United States subject to the federal control.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. § 25.*]

Jurisdiction of federal courts in cases involving federal questions, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Mining Co.*, 35 C. C. A. 7; *Earnhart v. Switzler*, 105 C. C. A. 262.]

4. COURTS (§ 489*)—JURISDICTION—CONSTITUTIONAL QUESTIONS—DETERMINATION.

Whenever an issue arises in any forum, state or federal, whether an alleged cause of action infringes or involves rights under the supreme law of the land, such question must be determined in either forum, and hence a state court, in proceedings to condemn a right of way for a telegraph line along a railroad right of way, had jurisdiction to take cognizance of any infractions of the supreme law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

In Error to the District Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge.

Action by the Western Union Telegraph Company of Illinois against the Southeast & St. Louis Railway Company and others. From a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

judgment dismissing its petition, plaintiff brings error. Reversed for want of jurisdiction.

The Western Union Telegraph Company of Illinois, plaintiff in error, moves to reverse the decree of the District Court for want of jurisdiction, with direction to remand the cause to the state court.

The cause in question is the proceeding for condemnation instituted by the plaintiff in error, in the county court of St. Clair county, referred to in the opinion of this court in *Western Union Telegraph Co. of Illinois v. Louisville & N. R. Co.*, 201 Fed. 919, 120 C. C. A. 257. It was removed to the District Court on petition of the defendants in error, averring in substance that the suit is wholly of a civil nature and "arises under the Constitution and laws of the United States," whereof the District Courts of the United States are given original jurisdiction under the acts of Congress, concurrent with the jurisdiction of state courts. In the District Court the plaintiff in error made application to have the cause remanded to the state court, which application was denied, and jurisdiction under the removal was upheld. Thereupon, on motion of the defendants in error and upon the hearing of testimony, the trial court dismissed the proceedings for condemnation. From the judgment accordingly this writ of error is prosecuted, but the challenge of jurisdiction has been presented and heard in advance of hearing upon the merits.

Roy O. West, Percy B. Eckhart, William Rothmann, Thomas G. Deering, and William M. Klein, all of Chicago, Ill., for plaintiff in error.

H. L. Stone of Louisville, Ky., and James M. Hamill and Charles P. Hamill, both of Belleville, Ill., for defendants in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The petition for condemnation, filed by the plaintiff in error in the state court, plainly asserts and rests its alleged right thereto on the provisions of the state statute, and neither the Constitution of the United States, nor any act of Congress, is invoked or mentioned in the petition. It avers in substance: That the petitioner is incorporated as a telegraph company under the laws of Illinois, authorized to construct, own, and operate lines of telegraph in such state; that it is further empowered by such laws to exercise the right of eminent domain for the purposes thereof, as set forth; that the Southeast & St. Louis Railway Company (one of the defendants in error) is an Illinois corporation, owning a railroad having a right of way (as described) across the state, from East St. Louis "to the center thread of the permanent stream of the Wabash river" in White county, together with two branches within the state; that such owner had leased its properties to the Louisville & Nashville Railroad Company, a Kentucky corporation (defendant in error), for use and operation for 49 years, and the lessee was in operation thereof; that the petitioner "desires to construct a line of telegraph over, along, and upon said railroad," a portion of which is situated in St. Clair county. The petition further describes its proposed line upon such right of way as located from a point named in East St. Louis "to the center thread of the permanent stream of the Wabash river" and upon the branches mentioned, states that no rights are sought therein "except to erect, maintain, and operate the proposed line for telegraph purposes," and specifies the char-

acter and location of poles, wires, and attachments to be used. It also avers refusal of both railway companies to grant permission for such use, or agree upon just compensation therefor, and prays for statutory relief in the premises.

Having no ground for invoking federal jurisdiction of the cause for diversity of citizenship, removal to the District Court and procedure therein to final judgment is unauthorized, if the alleged cause of action does not arise under the Constitution and laws of the United States. The limitation of federal jurisdiction, in so far as it is made concurrent with that of state courts, strictly within the congressional provisions therefor, is well established; and the provisions of the Judicial Code, adopted March 3, 1911 (chapter 231, 36 Stat. L. 1087 [U. S. Comp. St. Supp. 1911, p. 128]), for removal of suits "arising under the Constitution or laws of the United States" whereof "the District Courts of the United States are given original jurisdiction" (section 28), constitute the sole reliance for exercise of jurisdiction in this case. Section 28 thereof, together with section 24 conferring original jurisdiction, codify and adopt the terms of the pre-existing statute applicable to the present inquiry, namely, the Act of March 3, 1887 (chapter 373, 24 Stat. L. 552 [U. S. Comp. St. 1901, p. 514]) as "corrected" by the Act of August 13, 1888 (chapter 866, 25 Stat. L. 433 [U. S. Comp. St. 1901, p. 508]), so that it is both unquestionable and undisputed that decisions of the Supreme Court construing the instant provisions thus adopted from the earlier act are applicable here. The terms referred to of section 1 of the prior statute are preserved in code section 24, and the terms of section 2 (for removal) are in code section 28.

[1, 2] These rulings have been uniform in numerous cases involving the effect of the amendatory acts of 1887 and 1888, both as to the original jurisdiction conferred by section 1, when the suit arises under the Constitution or laws of the United States, and as to the right to remove such suits from a state court provided by section 2 of the acts. The primary and leading authority thereupon is *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 458, 14 Sup. Ct. 654, 38 L. Ed. 511, and from the line of subsequent decisions which exemplify and approve the interpretation and test thus adopted as the statutory limitation for removal, it is deemed sufficient to cite: *Chappell v. Waterworth*, 155 U. S. 102, 107, 15 Sup. Ct. 34, 39 L. Ed. 85; *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 187, 188, 22 Sup. Ct. 47, 46 L. Ed. 144, and cases cited; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 56, 64, 24 Sup. Ct. 598, 602 (48 L. Ed. 870), and cases cited; *Louisville & Nashville R. R. v. Mottley*, 211 U. S. 149, 151, 29 Sup. Ct. 42, 53 L. Ed. 126. The fundamental requirement for removal is thus established, that the suit must be one of which the "courts of the United States are given original jurisdiction" by statute; and thereupon these authorities concur in the rule that a suit cannot be removed from a state court "as one arising under the Constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim; and that, if it does not so appear, the want cannot be supplied by any statement in the petition

for removal, or in the subsequent pleadings." *Minnesota v. Northern Securities Co.*, *supra*. Otherwise stated (194 U. S. 66, 24 Sup. Ct. 598, 48 L. Ed. 870), the test is, Could the suit, as disclosed by the complaint, have been brought by the plaintiff in the federal court?

[3] This complaint or petition of the plaintiff in error, setting up the state statute as sole authority for the condemnation sought, furnishes no ground for invoking federal jurisdiction, either original or through removal, unless it plainly appears, from the averments of fact, that the alleged cause of action arises under the Constitution or laws of the United States (*vide Missouri, K. & I. Ry. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355), although not so mentioned in the pleading. The contentions, therefore, to support removal of the cause, rest on the propositions that the complaint avers facts sufficient to that end in two of its material disclosures, namely: (1) Condemnation is sought and specified for right of way and use of property owned and used by one or the other of the defendant corporations for railroad purposes, wherein one or both such corporations are presumptively interstate carriers, using the property in interstate commerce, so that the proposed condemnation involves interference with such commerce. (2) It further specifies for condemnation the railroad right of way extending "to the center thread of the permanent stream of the Wabash river," on the eastern boundary line of the state, and thus involves condemnation for use over "navigable waters of the United States, subject to its jurisdiction and control."

It may well be conceded that one or both of these propositions, when properly raised as an objection to condemnation, may present a federal question, either under the Constitution or under the laws of the United States, and that its determination may either defeat or modify the relief sought. The fact, however, that such questions may arise—whether appearing from averments of the complaint "as likely to arise in the course of the litigation" or otherwise—cannot serve to confer federal jurisdiction under the settled interpretation of the statute above mentioned, "that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution." *Louisville & Nashville R. R. v. Mottley*, 211 U. S. 149, 152, 29 Sup. Ct. 42, 43 (53 L. Ed. 126).

In the last-mentioned case suit was instituted in the federal court to enforce specific performance in equity of a contract on the part of the railroad company to issue free passes to the complainants annually during their lives respectively, under a bill averring that "refusal to comply with the contract was based solely upon" an act of Congress referred to "which forbids the giving of free passes or free transportation, and further averring that such act was inapplicable and inoperative for release from the contract in suit upon grounds stated. On appeal to the Supreme Court from a decree in favor of the complainants, consideration of the merits was denied because "the court below was without jurisdiction of the cause," although that question was not raised by either party, and the decree was reversed with directions "to dismiss the suit for want of jurisdiction." We believe the

opinion and rulings in that case, supplementing *Boston, etc., Mining Co. v. Montana Ore Co.*, 188 U. S. 632, 638, 23 Sup. Ct. 434, 47 L. Ed. 626, and the above-cited line of authorities, to be decisive against every contention advanced for upholding jurisdiction in the case at bar, and that removal from the state court was unauthorized in any view of the averments referred to.

[4] Whenever an issue arises in any forum, state or federal, whether an alleged cause of action infringes or involves rights under the supreme law of the land, such right must be observed and enforced alike in either forum, and it is plainly within the province of the state court to take cognizance of any infractions thereof in the proposed condemnation of railroad right of way for independent telegraph purposes.

The judgment of the District Court, therefore, must be reversed for want of jurisdiction, and it is so ordered, with direction to remand the cause to the state court.

ROBERTS, JOHNSON & RAND SHOE CO. v. DOWER.

(Circuit Court of Appeals, Seventh Circuit. April 15, 1913. Rehearing Denied July 3, 1913.)

No. 1,943.

COURTS (§ 366*)—FEDERAL COURTS—STATE STATUTES—CONSTRUCTION—APPLICATION—STATE DECISIONS—"WILLFUL."

A decision of the Supreme Court of Illinois that the "willful" violation of the Factory Act, causing injury to a servant, deprives the master of the defense of assumed risk and contributory negligence, and that "willful" violation is established by proof of any conscious knowing or intentional failure to comply with the statute, without a showing of actual wrongful intent will be followed by the federal courts sitting in Illinois, though the decision is not strictly a construction of the act, but rather a declaration of its legal effect.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*

For other definitions, see Words and Phrases, vol. 8, pp. 7468-7481, 7835, 7836.

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468; *Converse v. Stewart*, 118 C. C. A. 215.]

In Error to the District Court of the United States for the Southern Division of the Southern District of Illinois; J. Otis Humphrey, Judge.

Action by Elmer Dower, an infant, by Mary Smith as mother and next friend, against the Roberts, Johnson & Rand Shoe Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Review is sought of a judgment in favor of plaintiff in the District Court, rendered June 13, 1912, for \$5,500, for a personal injury sustained by him September 12, 1911, at the factory of defendant at Jerseyville, Ill. At the time of his injury plaintiff was 18 years of age. He was operating a machine for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

brushing shoe bottoms, driven by a belt from a shaft situated above his machine. At the time of the accident this belt came off, and plaintiff attempted to replace it. For this purpose he got up with one foot upon a window sill and the other on a small machine. About two inches from the shaft belt pulley was a shaft coupling about ten inches long horizontally, and five inches diameter. It was in two pieces fitting around the shaft, bolted with three bolts on each side. The coupling as a whole presented a rounded appearance, with its surface hollowed out so that the heads of the bolts, and the bolts themselves, were slightly below the rounded surface of the coupling. This coupling had originally been protected by a coupling shield, of one-eighth inch sheet steel, fitting around it, attached with counter sunk screws, but when the machinery was moved into a new factory a few months before the accident this shield was not replaced, though the attention of the factory superintendent had been called to the matter.

While the plaintiff was in the position described, in the act of putting on the belt, with his head about on a level with the shafting, intent on replacing the belt, and without looking at the coupling, the glove on his right hand caught on the nuts and bolt ends of the coupling, and his arm was wound up in the coupling and shaft and very badly injured.

The four counts of the amended declaration were drawn to present two grounds of liability; the first or statutory count proceeding under the Illinois Factory Act for guarding machinery, and the other three, or common-law counts, on the general theory of negligence in failing to provide a safe place to work, failure to warn of danger, failure to guard machinery, and nonassumption of risk.

The statutory count raises the question whether assumption of risk and contributory negligence are defenses excluded by the Illinois Factory Act of 1909. This statute provides that all power driven shafting, projecting set screws on moving parts, etc., shall be so located, wherever possible, as not to be dangerous to employes, or shall be properly inclosed, fenced, or otherwise protected. It is further provided that a violation shall be a misdemeanor, subjecting the person liable to a fine. The act neither expressly gives a right of action nor expressly abolishes the defense of assumption of risk or contributory negligence; but has been construed to do away with such defenses by the Supreme Court of Illinois in *Streeter v. Western Scraper Co.*, 254 Ill. 244, 98 N. E. 541, 41 L. R. A. (N. S.) 628, Ann. Cas. 1913C, 204.

The jury found for plaintiff on all the counts. To do so they must have found defendant's negligence, plaintiff's nonassumption of risk, and due care on his part. These questions were fairly submitted, and there is evidence to sustain the verdict on all the material questions. Therefore if there was no prejudicial error as to the statutory count, the judgment should stand.

Defendant raised the questions presented by the first or statutory count in several ways, by two pleas, a demurrer to which was sustained, by requested instructions which were refused, by motion to direct a verdict for defendant, which was denied, by exceptions to the charge, and by motion in arrest of judgment; but did not ask a separate verdict.

Seddon & Holland, of St. Louis, Mo., and Sidney S. Breese, of Springfield, Ill., for plaintiff in error.

Ferns & Sumner, of Jerseyville, Ill., for defendant in error.

Before BAKER, Circuit Judge, and ANDERSON and SANBORN, District Judges.

SANBORN, District Judge (after stating the facts as above). In respect to the statutory count the trial court decided that it was its duty to follow the Factory Act of Illinois, as construed by its Supreme Court in the *Streeter* Case.

In the state of Illinois there are four acts passed for the protection of employes and commonly referred to as "Mines and Mining Act" (Hurd's Rev. St. 1911, c. 93), "Child Labor Law" (chapter 48, § 20),

"Railroad Safety Appliance Act" (chapter 114, §§ 223-232), and the "Factory Act" (chapter 48, §§ 89-120). The Supreme Court of Illinois in its construction of each of said acts has held that a willful violation thereof deprives the master of the defense of assumed risk, also that a "willful" violation is any conscious knowing or intentional failure to comply with a statutory provision, and that no wrongful intent need be shown to make a failure willful.

After the Illinois Supreme Court had construed and declared the effect of the "Illinois Mine and Mining Act" in *Odin Coal Co. v. Denman*, 185 Ill. 413, 57 N. E. 192, 76 Am. St. Rep. 45, and *Carterville Coal Co. v. Abbott*, 181 Ill. 496, 55 N. E. 131, the case of *Fulton v. Wilmington Star Mining Co.*, 133 Fed. 193, 66 C. C. A. 247, 68 L. R. A. 168, involving the same act was heard in this court, which followed the Illinois cases in the construction of said act, also in its construction of the term "willful," and denied the master both the defense of assumption of risk and of contributory negligence.

In the case of *Streeter v. Western Scraper Co.*, 254 Ill. 244, 98 N. E. 541, 41 L. R. A. (N. S.) 628, Ann. Cas. 1913C, 204, and which involved the construction and effect of the Factory Act, involved in this cause, the Illinois Supreme Court hold that, where there is a willful violation of the act, the master is deprived of both the defenses of assumption of risk and contributory negligence, giving to the term "willful" the same construction as theretofore given it by said court in the other acts. The following quotation from the opinion in the Streeter Case shows the consistent and reasonable position of the court:

"For many years we have held, in the construction of the Mining Act, that neither assumed risk nor contributory negligence is available as a defense to a suit for damages caused by a willful violation of the provisions of that act (citing Illinois authorities). It is true that these decisions were based partly on the language of the section which gives an action for any injury occasioned by a 'willful' violation of the act, and partly on the requirement contained in section 29 of article 4 of the Constitution, that the General Assembly shall pass laws for the protection of operative miners. The reasoning on which they are based is, however, applicable to the present case, as is the language in *Carterville Coal Co. v. Abbott*, supra: 'To hold that the same principle as to contributory negligence should be applied, in case of one who is injured in a mine because the owner, operator, or manager totally disregarded the statute, as in other cases of negligence, is to totally disregard the provisions of the Constitution, which are mandatory in requiring the enactment of this character of legislation, and would destroy the effect of the statute, and in no manner regard the duty of protecting the life and safety of miners.' A constitutional law is of as much force as the Constitution itself. This law was passed to protect employes, and in view of the construction given to the Mining Act * * * in regard to the assumption of risk, the General Assembly must have supposed that the same construction would be given to this act in that regard."

It is argued that the Streeter Case should not be followed here because not strictly a construction of the Factory Act, but merely declaring its legal effect, and, since the statute is silent as to assumption of risk and contributory negligence, the decision that they are excluded by it is not a part of the statutory law which must be followed by this court. But such a distinction is entirely negated by numerous decisions of the Supreme Court. Thus in *Williams v. Gaylord*, 186

U. S. 157, 22 Sup. Ct. 798, 46 L. Ed. 1102, it was contended that the federal courts are not bound by a state decision defining the application of a local statute, but only by its construction. The court said:

"We are unable to accept the distinction. To accept it would deprive the state courts of the power to declare the implications of state statutes, and confine interpretation to the mere letter. The Supreme Court of California declared the effect of the act of 1880 as deduced from the language and purpose of the act, and this was necessarily an exercise of construction. The very essence of construction is the extension of the meaning of a statute beyond its letter, and it can seldom be done without applying some principle of law general in some branch of jurisprudence, and if whenever such application occurs the authority of the state courts to interpret the statute ceases, the federal tribunals, instead of following, could lead those courts in declaring the meaning of the legislation of the states."

So in *Middleton National Bank v. Toledo, etc., R. Co.*, 197 U. S. 394, 25 Sup. Ct. 462, 49 L. Ed. 803, a local decision that a state constitutional provision was self-executing was held binding on the federal courts. Similar rulings were made as to constitutionality in *Knights Templars Co. v. Jarman*, 187 U. S. 197, 23 Sup. Ct. 108, 47 L. Ed. 139; that a state statute was a public one, in *Hammond v. Hastings*, 134 U. S. 401, 10 Sup. Ct. 727, 33 L. Ed. 960; that an act was mandatory in *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. Ed. 946; whether an act was a revenue measure in *Flanigan v. Sierra Co.*, 196 U. S. 553, 25 Sup. Ct. 314, 49 L. Ed. 597; and whether a statute was penal or remedial in *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038. Many other cases in the Supreme Court might be cited where local decisions declaring the legal effect of a statute have been followed, as part of the law itself. A like conclusion was reached by this court in the *Fulton Case*, where the Mining Act there considered did not expressly take away the defense of contributory negligence. The Illinois court having decided that this defense was excluded, that ruling was adopted by this court.

Defendant in the case now under consideration did not request a separate verdict on the statutory count, and the jury found defendant negligent and that plaintiff used ordinary care and assumed no risk. We have, however, assumed that proper steps were taken by defendant to raise all questions under the statutory count.

Finding no error, the judgment of the District Court is affirmed.

NOONEY v. PACIFIC EXPRESS CO.†

(Circuit Court of Appeals, Eighth Circuit. October 1, 1913.)

No. 3,880.

1. MASTER AND SERVANT (§ 125*)—INJURIES—FRACTIOUS ANIMAL—KNOWLEDGE OF MASTER.

The rule that a master is not liable for injury caused by the vicious conduct of a domestic animal in the absence of previous knowledge should not be applied to injuries sustained by the fright of a young country horse when subjected to the terrors of a modern city street.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 243-251; Dec. Dig. § 125.*]

2. MASTER AND SERVANT (§ 109*)—INJURIES TO SERVANT—UNBROKEN HORSE—"INSTRUMENTALITY."

Where an express company furnished a driver a young country horse, not city broken, to be driven at a single wagon, the horse was an "instrumentality" within the rule that the master is bound to exercise reasonable care to furnish the servant with reasonably safe instrumentalities with which to perform the service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 204; Dec. Dig. § 109.*]

3. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—UNBROKEN HORSE.

Defendant express company purchased a country horse six years of age, and brought him to the city for use in its delivery service. He was seriously frightened at street cars and automobiles. For two days he was driven double with a city broken horse, when plaintiff was directed to hitch him to a single wagon and use him in the package delivery service. On the first day the horse behaved badly, and plaintiff reported the fact to the superintendent, who directed him to try the horse another day. On approaching a street car on that day the horse was greatly frightened, reared on its hind legs so that it nearly fell over backward, and when it came down kicked with its hind feet, striking plaintiff's ankle and causing the injury complained of. *Held*, to justify a finding that the horse had not been properly broken to city life, and that defendant was negligent in assigning the horse to plaintiff to drive single.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

4. MASTER AND SERVANT (§ 220*)—INJURIES TO SERVANT—ASSUMED RISK.

Where plaintiff, after being given a horse to drive in defendant's service that was not city broken, explained to defendant superintendent the misbehavior of the horse, and was directed to try him for one more day, such direction exonerated plaintiff from assuming the risk of injury while using the horse during that day.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 625-637, 641, 644-647; Dec. Dig. § 220.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by John Nooney against the Pacific Express Company. Judgment for defendant, and plaintiff brings error. Reversed, with directions.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
† Rehearing denied December 18, 1913.

Ford W. Thompson, of St. Louis, Mo. (W. B. Thompson, of St. Louis, Mo., on the brief), for plaintiff in error.

Moses N. Sale, of St. Louis, Mo. (J. L. Minnis, of St. Louis, Mo., on the brief), for defendant in error.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. The plaintiff was the driver of one of defendant's express wagons in the city of St. Louis. The defendant purchased a horse in the country, six years of age, 16 hands high, weighing about 1,250 pounds. The horse had never been city broke. It was brought to St. Louis in a car, and taken to defendant's barn. On the way to the barn it showed great fear of street cars and automobiles. In accordance with defendant's practice, this horse was first hitched up with an experienced horse, to a double express wagon weighing about 3,300 pounds. It was driven in this way for two days. Then plaintiff was directed by the foreman of the stable to hitch the horse to a single wagon, and use it in the distribution of express matter. As a safeguard the superintendent directed an experienced driver to accompany the plaintiff. On the first day the horse behaved badly, plunging and rearing, sometimes leaping upon the curbing, and at one time nearly leaping into another carriage. Owing to the terror of the horse, whenever possible the plaintiff drove along alleys where street cars and automobiles would not be encountered. Upon returning to the stable about noon of the first day, plaintiff was asked by the superintendent how the horse behaved, and explained to him its behavior. The superintendent then directed the plaintiff to try the horse for another day in company with the same driver. On this day the horse continued to behave badly. When all the parcels had been delivered but the last, the journey led along Laclede avenue, upon which a double street car track is laid. A car was approaching from the opposite direction in which the plaintiff was driving. At the point where he was about to meet the car, there was another horse and wagon standing next to the curbing, so the plaintiff was obliged to swerve out towards the track upon which the car was approaching. The horse was greatly frightened by the car, reared on its hind legs, so that it nearly fell over backward, and when it came down it kicked with its hind feet, striking plaintiff's foot and ankle, producing the injury for which the action was brought. This was the first time that the horse had kicked. The horse was used by the defendant for one more day in a double rig, and then returned to the country. At the conclusion of plaintiff's case showing these facts, the court directed a verdict in favor of defendant, and plaintiff brings error.

[1-3] Defendant contends that this case falls within the ancient rule of the common law that in order to make a master liable for injury, caused by the vicious conduct of a domestic animal, the master must have known of the vicious character of the animal—that every horse is entitled to one kick, the same as every dog is entitled to one bite. The rule had its origin in an agricultural community long before do-

mestic animals were subjected to the contrasts between the quietness of the country and the terrors of a modern city street. It has not for years been looked upon with favor, and we do not think that it should be applied in any field outside of that which is covered by authority. If it were necessary to apply the rule in this case we think there was sufficient evidence to show scienter. The cause of injury was not that the horse was "possessed of an evil propensity and accustomed to attack and injure mankind," according to the formula of the old common law. On the contrary, the conduct of the horse was due to the fact that it had been taken from the quietness of the country and plunged into the terrifying environment of a great city, without proper training, and of the effect of this change upon the horse defendant had abundant knowledge. The case, however, properly falls within a more recent, as well as a more just, rule. The master is required to furnish his servant with reasonably safe instrumentalities with which to perform his service. Here the horse was such an instrumentality in precisely the same sense as the wagon. The duty of the master was to exercise reasonable care to furnish the plaintiff with a reasonably safe horse for the performance of his service; and the whole question is, Was there evidence which made a case that ought to have been sent to the jury to decide whether or not what the defendant did with respect to this horse constituted the exercise of reasonable care? The evidence showed that the horse was a green, country animal, wholly inexperienced in regard to the city. The defendant was bound to know the effect of exposing such a horse to the cars and automobiles of city streets. If such a horse had been given to the plaintiff without any previous testing of its behavior in the city, all would agree that such conduct would have been negligent. The defendant did not do this, but it did place him in charge of a horse which had not been properly broken for single driving; at least, the evidence was sufficient to carry that question to the jury. It was not necessary that defendant should have known that the horse would be guilty of the particular misconduct which resulted in plaintiff's injury. Defendant was bound to know that a green horse, under such circumstances, was likely to do some act which would cause injury to the driver, and among the acts which it had reasonable cause to anticipate was that such a horse, if sufficiently maddened with fright, would kick. We think the jury would have been justified in finding, under the evidence, that the horse had not been properly tried out and broken to city life in the two days' experience with the double wagon, and that the master was not in the exercise of reasonable care when it turned the horse over to the plaintiff for use upon a single wagon. The court, therefore, erred when it disposed of the issue as a question of law.

[4] We do not think the plaintiff assumed the risk of injury from using the horse on the second day, because of his knowledge of its behavior on the first day. He made a full statement of the conduct of the horse to the superintendent, and was directed to try him for one more day. This was tantamount to a complaint with a promise, to repair in the case of an ordinary instrumentality. Plaintiff was

not employed as a horse trainer, but as an ordinary driver, and we think the direction of the superintendent, under the circumstances disclosed by the evidence, exonerated plaintiff from assuming the risk of injury from the continued use of the horse.

The judgment is reversed, with directions to grant a new trial.

GILMORE & P. R. CO. v. UNITED STATES FIDELITY & GUARANTY CO.

(Circuit Court of Appeals, Third Circuit. October 29, 1913.)

No. 1,745.

1. PRINCIPAL AND SURETY (§ 59*)—SURETY CONTRACT—CONSTRUCTION.

While a modern surety company is not entitled to receive the same degree of protection that courts of equity extend to individual sureties, a surety company is nevertheless entitled to have its contract interpreted according to the ordinary rules of law.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.*]

2. PRINCIPAL AND SURETY (§ 78*)—FUNDS SECURED—"DEPOSIT"—PURCHASE OF EXCHANGE—SURETY BOND.

Where a railroad company's agent took cash, individual checks, etc., to a bank in which his company maintained an inactive deposit account and obtained therefor a cashier's check to the order of the railroad company which he sent to its head office to be deposited and thereafter collected through another bank, such transaction constituted a purchase of exchange and not a deposit of the railroad company's funds within a bond securing deposits.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 124; Dec. Dig. § 78.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1995-1999; vol. 8, p. 7634.]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by the Gilmore & Pittsburgh Railroad Company against the United States Fidelity & Guaranty Company. Judgment for plaintiff for less than the relief demanded, and it brings error. Affirmed.

A. O. Fording, of Pittsburgh, Pa., for plaintiff in error.

Charles F. Patterson, Frank W. Stonecipher, and John M. Ralston, all of Pittsburgh, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. This case was submitted to Judge Orr without a jury upon an agreed statement of facts, which may be summarized as follows:

The railroad company owns and operates a line in the states of Montana and Idaho. The eastern terminus is at Armstead, a small village in Montana, where connection is made with the Oregon Short Line, and one of its western termini is at Salmon, a town in Idaho. During the period in question a single train ran each day (Sundays

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

excepted) between these points, moving east on one day and west on the next. The railroad maintained its operating department at Armstead, but (as Armstead had no bank) most of the department's banking business, including its active account, was kept at the First National Bank of Dillon, a town on the Oregon Short Line about 30 miles distant. There were two mails a day between Armstead and Dillon, and one mail on alternate days between Armstead and Salmon.

The railroad company had carried an ordinary deposit account with the Salmon Bank since April 2, 1910. It was not a very active account, for it only comprised a deposit of \$10,000 on April 2d and seven checks drawn against this credit in August and September by which the credit was reduced to \$125.99. In March, 1911, the bank asked the railroad company to deposit a part of its current funds, and on March 29th the bank was designated as a depository of such funds. Accordingly on April 19, 1911, a further sum of \$10,000 was placed to the railroad's credit. On May 3d the bank, as principal, and the United States Fidelity & Guaranty Company, as surety, executed a bond to the railroad company, as obligee, in the penal sum of \$10,000, reciting that the railroad company had designated the bank "as depository of the funds of the Gilmore & Pittsburgh Railroad Company Limited," and providing that the bank should "faithfully account for and in due and ordinary course of business pay over on legal demand all moneys deposited with said (bank) by or on behalf of the said (railroad company)." No other checks were drawn against this ledger account, so that the sum of \$10,125.99 was due thereon to the railroad company on June 8, 1911, the day when the bank closed its doors. As security for this deposit the railroad had another bond of \$10,000 in another company; this additional bond diminishing the Fidelity and Guaranty Company's obligation by one-half. The Fidelity Company admitted liability for one-half the sum just named, and the District Court entered judgment for this amount; but the railroad company alleged that a further sum of \$3,280.34 was covered by the terms of the bond, and for this amount the Fidelity Company denied liability and in this contention was sustained by the court. The remaining facts that relate to the dispute are as follows:

Beginning with April 24, 1911, the railroad company's station agent at Salmon had regularly used the following method of transmitting his collections: At frequent intervals he would take to the Salmon Bank such cash and individual checks (duly indorsed) as were in his hands and would obtain therefor a cashier's check to the order of the railroad company. This check would be sent at once to the company at Armstead; the company would mail it to Dillon and deposit it there; and the Dillon Bank would thereupon mail it to the Salmon Bank for presentation and collection. The agent at Salmon did not deposit the cash and the checks to the credit of the railroad company's ledger account there; and the cashier's checks were not so deposited. No checks were drawn against that account either by him or by any one else. The method just referred to of obtaining and collecting cashier's checks was followed on 19 occasions during April and May,

1911, and all these checks were duly presented to the Salmon Bank and were paid. But on May 31st and on June 2d two additional cashier's checks for \$2,428.14 and \$752.20, respectively, were obtained by the agent in the usual manner, and payment of both these checks was refused upon presentation. Thereupon the checks were charged back to the railroad's account in the Dillon Bank.

[1, 2] It is the nature of these checks that is now in dispute, and the question is: Does the bond cover such a transaction as has just been described? Or, to state it in other words, were the cashier's checks "moneys deposited with said (bank) by or on behalf of the said (railroad company)?" In an opinion not yet reported, the learned judge answered this question in the negative, and we think he was right. We agree that the modern surety company should not receive the same degree of protection that courts of equity have always extended to an individual surety. *Atlantic, etc., Co. v. Laurinburg* (C. C. A.) 163 Fed. 690, 90 C. C. A. 274; *U. S. Fidelity Co. v. U. S. (C. C. A.)* 178 Fed. 692, 102 C. C. A. 192. But a surety company is nevertheless entitled to have its contract interpreted by the ordinary rules of law, and we think these rules require us to hold that the bond in suit does not cover such a transaction as the purchase of the cashier's checks now in controversy. Under the facts agreed upon, the deposits covered by the bond were "deposits" in the ordinary meaning of that word—moneys credited to a ledger account and subject to the depositor's check. In effect these cashier's checks were bills of exchange drawn by the bank's officer on the bank itself and accepted by the very act of drawing. *Drinkall v. Movius Bank*, 11 N. D. 10, 88 N. W. 724, 57 L. R. A. 341, 95 Am. St. Rep. 693; *Valdetero v. Bank*, 51 La. Ann. 1651, 26 South. 425. The agent was not attempting to make a "deposit" in the usual meaning of the word to the credit of the railroad company; the contract into which he was entering was a contract between a buyer and a seller of exchange rather than a contract between a bank and a depositor having an account on the ledger. If the agent had been making a deposit in the ordinary course, the funds in his hands would have gone into the ledger account and could only have been drawn out by a check thereon, which the agent did not draw and (so far as appears) had no authority to draw. In spite of the very capable argument for the railroad company, it seems clear to us that the transactions between the agent and the bank were not covered by the bond. He made no "deposit" under the facts now presented, and apparently he had no authority to "deposit." For convenience, or perhaps for safety, he transmuted the cash and the individual checks in his hands into a domestic bill of exchange and forwarded the bill to his principal in settlement of his collections. The question is a narrow one, and we think it does not need further discussion.

The judgment is affirmed.

ZILBERSHER v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Third Circuit. October 29, 1913.)

No. 1,486.

1. TRIAL (§ 139*)—DIRECTION OF VERDICT.

Where the evidence would not have sustained a judgment for plaintiff and it would have been the duty of the court to have set aside a verdict for plaintiff if returned, it was the duty of the trial judge to direct a verdict for defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

2. RAILROADS (§ 348*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE.

Where, in an action for injuries in a railroad crossing accident, the issue of contributory negligence depended on whether the watchman at the crossing gave the proper warning and it appeared that the watchman was killed by the same train that struck plaintiff's wagon and that the watchman's body was found at the very place of the collision, plaintiff's evidence that he did not see the watchman was not inconsistent with the direct and positive testimony of other witnesses who swore to the watchman's presence on the crossing and to the discharge of his duty.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.*]

In Error to the Circuit Court of the United States for the District of New Jersey; Joseph Cross, Judge.

Action by Marcell Zilbersher against the Pennsylvania Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Wm. M. Rysdyk, of Jersey City, N. J. (Robert S. Hudspeth, of Jersey City, N. J., of counsel), for plaintiff in error.

Vredenburg, Wall & Carey, of Jersey City, N. J. (Albert C. Wall, of Jersey City, N. J., of counsel) for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

PER CURIAM. The plaintiff was injured, both in person and in property, while driving a horse and wagon over a grade crossing of the Pennsylvania Railroad near the town of Rahway. The case was taken from the jury on the ground that his own negligence had contributed to the accident, and the correctness of this instruction is the only question now presented.

[1] We have therefore examined all the evidence and have no difficulty in agreeing with the statement of the trial judge that, if the jury should find for the plaintiff, the verdict could not be sustained. This justified his instruction, as many cases decide. *Railroad v. Bank*, 123 U. S. 733, 8 Sup. Ct. 266, 31 L. Ed. 287; *Cattle Co. v. Railway*, 210 U. S. 10, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70; *Re Iron Clad Co. (C. C. A.)* 197 Fed. 281, 116 C. C. A. 642.

[2] The declaration and the plaintiff's own testimony narrow the issue to one question, namely, Did the watchman at the crossing give

the proper warning? The plaintiff went no further than to say that he "did not see the watchman." Obviously this ambiguous statement is not inconsistent with the direct and positive testimony of the other witnesses that swore to the watchman's presence on the crossing and to his zealous discharge of duty. And when we also take into account the undoubted physical facts that the watchman was killed by the same train that struck the plaintiff's wagon, and that his body was found at the very place of the collision, it is manifest that a situation is presented different from the ordinary conflict among witnesses, where some of them testify in one way and some in the other. Such a conflict was referred to by this court in *McLaughlin v. Horne* (C. C. A.) 206 Fed. 246, and we do not qualify what was said in that case.

The judgment is affirmed.

VAN BRUNT v. LA CROSSE PLOW CO.

(District Court, W. D. Wisconsin. October 10, 1913.)

No. 45.

1. PATENTS (§ 318*)—SUIT FOR INFRINGEMENT—PROFITS RECOVERABLE.

On an accounting by an infringer, where the patented article is only a part of a machine, but the entire value of the whole machine as a marketable article is properly and legally attributable to the patented feature, the profits are to be calculated on the whole machine, and such entire profits are also recoverable although the salability of the machine is in part due to other features owned by defendant, where it is impossible to determine what proportion of the sales are due to the latter features.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

2. PATENTS (§ 318*)—SUIT FOR INFRINGEMENT—PROFITS RECOVERABLE.

The evidence showed that sales of a grain seeder made by defendant in certain territory were due entirely to the use thereon of a furrow opener which was an infringement of complainant's patent, but that in other parts of the country, with different soil, such furrow opener was not an important factor and the salability of the machine was due more to other features. *Held*, that complainant was entitled to recover the entire profits made by defendant on the machines sold by it in the first territory.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

In Equity. Suit by Willard A. Van Brunt against the La Crosse Plow Company for infringement of the Van Brunt patent No. 659,881, for a furrow opener for use on grain drills. On exceptions to report of special master in respect to accounting for profits. Modified.

Staley & Bowman, of Springfield, Ohio, for complainant.

Fred Gerlach, of Chicago, Ill., for defendant.

SANBORN, District Judge. An account having been directed by the Circuit Court of Appeals (168 Fed. 927, 94 C. C. A. 331), the case was referred to Cameron L. Baldwin, of La Crosse, as special

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

master, to take and report on the accounting for profits. No damages are recoverable, because complainant, the owner of the patent, is not engaged in the manufacture or sale of the patented device. The common rate of royalty charged by the patentee on numerous licenses was 25 cents.

The patent relates to a furrow opener for use upon seeding drills, and the complainant is entitled to recover all profits realized by the defendant for the use of the furrow opener, called the Van Brunt scraper, during the infringing period, July 19, 1905, to March 20, 1909. The total profits of defendant on the grain drills sold during that period, and on which the infringing scraper was used, were \$17,396.17. The question is: What part of these profits were due to the presence of the infringing scraper? We quote from the master's report as follows:

"A grain drill consists of a great many different parts, such as carrying wheels, draft mechanism, seed box, seed measuring mechanism, seed delivery mechanism, adjusting mechanism, and furrow openers; but, broadly speaking, we may say that the machine consists of the furrow opener, the seed planting device, and the devices which deliver the seed in the proper quantities to the furrow opener. It appears from the evidence that furrow openers are detachable, and that grain drills are made by most companies so that the shoe, the double disc, the open delivery type of single disc, and the closed delivery type of single disc, may be interchanged. Complainant or defendant might have fitted out a machine that under certain conditions would properly plant the seed, and have all four of these types on the same machine; so that, while the furrow opener in order to do its work must be used in conjunction with the other parts of a grain drill, it is readily seen that it may be regarded as a mechanism all by itself.

"I find that the entire profit on the furrow openers is legally attributable to the infringing device. This does not include parts of the seeding machines other than the furrow openers, which other parts I hold are equitably entitled to the same percentage of profit as the furrow openers.

"The master furnished a general preliminary draft of his report to counsel for their criticisms, and the replies suggested that the master had overlooked the rule that an infringer is only liable for the increment of profit over and above what might have been made by the use of the nearest device open to the infringer in common use, and which would accomplish the same or similar results. The master has that rule in mind, but cannot find any such device; hence resort must be had to some other method. Plaintiff has proved profits on the entire grain drills. The almost universal judgment of manufacturers of single disc closed delivery furrow openers was that it was necessary to use the infringing device in order to get into the market. What could be more persuasive that there was an increment of profit over other devices that might have been used? The evidence shows that the disc itself was a well-known device, and was open to the public. Under the Packham patents, which have been upheld, there was a disc in combination with a shield on the convex side thereof, the use of which was to hold the furrow open, and which deflected the seed into the furrow. This was known as the 'open delivery disc furrow opener.' This open delivery was adapted to use in the mellow and dryer soils of the middle west and southwest.

"The close delivery type, with the narrow scraper, was most adapted to use in wet, sticky soils of the Northwest. The seeding conditions demanded as much space between the furrow openers as possible, to prevent the accumulation of dirt, stubble, etc., between the furrow openers. Defendant's furrow opener had a patented disc bearing, and also a patented device for adjusting the distance between the discs, so that they might be kept the same distance apart, securing the advantage of sowing the grain in drills equidistant from each other.

"The evidence shows that the use of complainant's scraper upon closed delivery single disc furrow openers was very marked in its effect upon sales. In fact, the evidence shows that in the territory where the closed delivery single discs were used it practically drove other closed delivery single discs out of the market. It was copied by the leading makers of single disc closed delivery drills; Beaver Dam Manufacturing Company, making the 'Ideal'; J. S. Rowell Manufacturing Company, making the 'Tiger'; Monitor Drill Company, making the 'Monitor'; Brennan & Co., Southwestern Agricultural Works, making the 'Kentucky'; Thomas Manufacturing Company, making the 'Thomas'; Peoria Drill & Seeder Company; Hoosier Drill Company, making the 'Hoosier'; Owatonna Manufacturing Company, making the 'Owatonna'; Superior Drill Company, making the 'Superior.' The above includes all of the leading competitors of complainant and defendant in the markets where single disc closed delivery drills were sold.

"It is claimed by defendant that there were other closed delivery single disc furrow openers which were open to it. The Hayes single disc is said to be such a device. This device has a broad, thick scraper, covering about one-quarter of the convex surface of the disc, and is cast integral with the boot; but the evidence shows that only 4,000 seeding machines were ever put on the market of this make. It was open to the public, and surely would have been copied if it had been considered of any value by manufacturers.

"Then there was the Fountain City, Mast or Buckeye (all the same device), a device which had the scraper attached to the disc bearing. The scraper is much broader than the infringing device. This was sold only to a limited extent. The company which made it went into the hands of a receiver, but for what reason is not shown. This device was not copied.

"The defendant claims that the Dowagiac did not infringe, and that it could have used the Dowagiac single disc furrow opener. The defendant offered no evidence to show that it did not infringe, though it did go to the trouble to show that the Hayes furrow opener could have been made without infringement. The record discloses that the Dowagiac shoe had the great bulk of the drill business throughout the entire northwest prior to 1900, but that during the infringing period its single disc furrow openers did not cut much of a figure in the market.

"The wide scraper used after the injunction should be noticed. It is more fully discussed as a standard of comparison. It was not used during the infringing period. It was in the subconscious prior art, only coming into the conscious practical art after the injunction.

"The evidence shows that Joseph Capistran and one or two other farmers near Crookston, Minn., broke off the end of the boot and the scraper, and worked the drills without a scraper at all. This is what defendant would have had to put on the market if it had not added complainant's scraper to the disc, and the suggestion is that if two farmers used it it might have been a success if placed on the market. A conclusive answer is that no manufacturer ever attempted it. Allowing the manufacturers of closed delivery single disc drills ordinary business sense, we may safely say that the single disc closed delivery drills went into the market where there was call for them, and that, if any other kind of a scraper could have succeeded, why was it not used by some of those manufacturers? Why was not the Hayes copied, or the Fountain City, or the Dowagiac, if it did not infringe, or a drill without a scraper placed on the market? Where was there a single disc closed delivery drill, without an infringing scraper, that found its way to a successful market? Each of those successful makes had an individuality of construction, and a variety of advertising and salesmanship.

"There is testimony in the record that in the opinion of several witnesses some other kind of a scraper would have made the single disc closed delivery furrow opener just as salable as the narrow infringing scraper. But the overwhelming judgment of the manufacturers of closed delivery single discs at the time on the field deemed such infringing scraper necessary to success. Opinions that some other device would have done just as well does not weigh very much in the scale as against such overwhelming business practice.

"The master, therefore, concludes that the infringing scraper was the thing that made single disc furrow openers salable during the infringing period, and, while the infringing scraper was a very small part mechanically of defendant's furrow opener, it was the predominant feature in its salability."

After considering the proofs as to various suggested standards of comparison, and examining the law, the master reaches the conclusion that no such standard existed. He finds no device in common or general use open to defendant, to which it would probably have resorted, which would have produced as nearly a similar result as possible, and which was near enough to the infringing device to be of any avail. The infringing device having made the furrow opener marketable, as well as the whole seeding machine, defendant was held liable for all the profits. On this matter the master finds:

"I further find that the furrow opener is a separable part of a seeding machine; that the parts of the seeding machines sold by defendant, other than the furrow opener, belonged wholly to defendant; upon which was a valuable patented device known as the horse-lift; that such horse-lift was a valuable selling feature; that an approximate apportionment between the furrow opener and the other parts of the machine may equitably be made by dividing the entire profits on the machines sold between the furrow openers and the rest of the machine, giving each an equal percentage of profit based upon the shop cost of the furrow openers and of the other parts of the machines; that such approximate apportionment results in dividing the profit, \$6,607.76, to the complainant, and \$10,788.41, to the defendant.

"I find as a conclusion of law: That a decree should be entered for the plaintiff for \$6,607.76; and that as an alternative, in case the court should find the approximate apportionment improper, I recommend that a decree be entered for the complainant for \$17,396.17."

It appears from the record, and the opinion of the Court of Appeals, that the Van Brunt device was particularly adapted to a special use, that of working in the sticky soils of the Red River valley, generally referred to as the Northwest. In other places it was no better than other forms of drills, but in the sticky soils of the Northwestern States, where the spring wheat seeding is done early in the season, often before the frost is out, it had great success; the master finding that it practically drove other single disc forms off the market in the region referred to. In those soils it will go through the ground without clogging. Prior to its introduction the shoe opener was in quite general use, but under certain soil conditions would not scour, or if the ground was hard and trashy would ride over the surface and plant the seed at an uneven depth. Outside the Northwest, or spring wheat section, grain is sowed in the fall, when the ground is dry, so that the narrow scraper blade of the patent is not of particular importance.

The master expressly finds that the Van Brunt scraper on single disc drills practically drove out of the market all other single disc drills and the shoe drill. He does not decide that Van Brunt drove out all drills, only other single disc. No finding is made as to double disc drills, one type of which sold extensively in the Northwest during the infringing period. A number of the witnesses testify that the Monitor double disc drill was the leading type in that region. A thorough reading of the testimony leaves no doubt that the master's

finding is supported by practically all the evidence. From this finding the master concludes that defendant could not have sold any single disc drills except those having the patent scraper in the Northwest; therefore all its profits were due to Van Brunt. Defendant excepts to this conclusion, urging that the chief and distinctive feature of its sales was its patented horse-lift, and that its disc bearing and strong frame were important selling points also.

This horse-lift feature is new with defendant, and is covered by patent owned by it. It is not a part of the furrow opener. Prior to this invention hand levers were used to raise the drag bars or furrow openers out of the ground, and to put them into the ground. The horse-lift does this by utilizing the power from the axle of the drill, thus doing away with the hard manual labor formerly required. The master refers to this and two other patented devices owned by defendant in this way:

"On the furrow opener itself it had a patented disc bearing of its own, and also a patented adjustable drag bar. These are so confused with the infringing scraper, and are so dominated by it as a selling feature, that no separation is possible. The scraper made the furrow opener salable, and the furrow opener the rest of the machine. There was a patented horse-lift for raising the furrow opener, which would be attractive to all those who do not like to work a lever and raise the heavy furrow openers by hand. This is a good talking point, and an aid as a selling feature."

This seems to involve an implied finding that the horse-lift contributed to the profits; but he later expressly finds that the entire profit was due to the Van Brunt scraper, because the profits due to the different features could not be separated.

[1] Under the late case of *Westinghouse E. & M. Co. v. Wagner E. & M. Co.*, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653, the question respecting an infringer's improvements is whether they add to the profits. If they do, "the burden of apportionment was then logically on the plaintiff, since it was only entitled to recover such part of the commingled profits as was attributable to the use of the invention." The case then goes on to hold that, while this burden is on the plaintiff, he meets and overcomes it and casts it upon the defendant, by showing confusion of profits by the act of defendant. When the plaintiff, by data furnished by defendant, taken from its books, or by other proof, shows that no attempt has been made, or perhaps would be possible, to keep separate the profits due to defendant's improvements from those due to the patented feature taken and infringed by defendant, the latter, even though acting in perfect good faith (as in this case), must stand the loss. The profits due to plaintiff's patent and defendant's patents cannot be separated, never could have been separated by the very nature of the case, because no one can tell just what feature of the seeder influenced a purchaser to buy. But since it turns out that defendant was a wrongdoer, even though an innocent one, the loss must fall upon it, rather than the plaintiff, whose property was wrongfully appropriated. This is the meaning of the *Westinghouse Case*, as applied to the case at bar. And the same rule applies to the whole machine, unless a fair

apportionment can be made from the evidence between the furrow opener and the balance of the seeder. This was done by the master in his alternative recommendation above quoted. He recommends that the total profits on all the seeders sold be divided as the cost of the furrow opener is to the cost of the balance of the machine.

The testimony of many witnesses leaves no doubt of the influence on defendant's seeder sales of the horse-lift and the other features patented by it. The dealers talked horse-lift and disc bearing and single disc and toe scraper. To quote from *Westinghouse v. N. Y. Air Brake Co.*, 140 Fed. 545, 72 C. C. A. 61:

"The cases are exceedingly rare in which the whole marketable value of a machine or of a collection of devices can in reason be attributable to a patented feature which embraces merely an improvement in one of its parts. Marketable value is ordinarily the result of various conditions independent of the normal value of the machine itself, and the contribution which the patented part gives to marketable value is necessarily dependent more or less upon these conditions. Enterprise, exploitation, and business methods in introducing and marketing the thing are generally as important a factor in its intrinsic value."

While all defendant's sales of seeders were not induced by the patented feature infringed, yet, as it cannot be discovered what proportion of them were due to the patent and what to defendant's patented features, plaintiff is technically entitled to the whole, because, as between the two, defendant was finally found to have been in fault.

If the Van Brunt scraper had never been invented, the grain growers of the Northwest would not have stopped raising grain, but would have used the best machines they could get to put their seed in the ground. Some would have used one kind of seeder and some another, as they did even after Van Brunt came on the market; but the evidence shows that some of them would have continued to use the Dowagiac shoe, just as a large number did before, and some of them the double disc furrow opener, preferably the Monitor type, during the latter period of the infringement. Very few of them would have used a disc furrow opener with a large scraper, like the Hayes or the Fountain City, because no one thought of using them in the territory in question.

If any standard of comparison is to be adopted, therefore, it would seem clear that it must be the shoe, as contended by plaintiff's counsel, because the Monitor double disc was not open to the public, though the older form of double disc was. The question would then be, in the language of *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664: What were the profits derived by defendant from the use of the Van Brunt device "over what it would have had in using other means then open to the public, and adequate to enable it to obtain an equally beneficial result"? In other words, defendant had the choice of using the Van Brunt furrow opener or the Dowagiac shoe, or possibly the ordinary double disc. Having used the former, without right, it must account for what it made by such use over what it could have made by the use of another form. The master, however, has found that it could not have made anything by the use of the shoe, because that was driven from the market by the Van Brunt device; and this appears to be sustained by the testimony. Nor could it have

made anything by using the old form of double disc, since this was not suited to the soil of the northwest region. Thus there would have been no profit by the use of either, and plaintiff is therefore entitled to all the profit made by defendant either on the whole seeder or on the furrow opener only, if capable of apportionment. The shoe was better than sowing by hand, and Van Brunt was better than the shoe. Since defendant could not have sold seeders with the shoe or double disc in competition with Van Brunt, the master has found that (in one aspect of the case) all the profits on the whole seeder are fairly attributable to the patented device, without which defendant could not have made any profits whatever. Defendant took Van Brunt's discovery and was thereby enabled to make money which it would not otherwise have been able to make. If this is true, the money belongs to Van Brunt.

The rule thus stated is the theory of the master, and of some of the federal courts, like *Novelty Glass Co. v. Brookfield*, 170 Fed. 946, 95 C. C. A. 516; s. c. 172 Fed. 221, 97 C. C. A. 25, and *Pressed Prism Co. v. Continuous Glass Press Co.* (C. C.) 150 Fed. 355; *Garretson v. Clark*, 111 U. S. 121, 4 Sup. Ct. 291, 28 L. Ed. 371, approved in this point in *Westinghouse E. & M. Co. v. Wagner E. & M. Co.*, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653.

"If the improvement is required to adapt the machine to a particular use, and there is no other way open to the public of supplying the demand for that use, then it is clear that the infringer has by his infringement secured the advantages of a market he would not otherwise have had, and that the fruits of this advantage are the entire profits he has made in that market." *Manufacturing Co. v. Cowing*, 105 U. S. 253, 26 L. Ed. 987, cited in *Carborundum Co. v. Electric, etc., Co.* (C. C. A.) 203 Fed. 976, 982.

It is entirely settled by these cases that where plaintiff's patent is only part of a machine, but "the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature," then the profits are to be calculated on the whole machine. No standard of comparison under these conditions can exist. The master finds this situation in regard to the Van Brunt scraper. He finds that it drove out other like forms, and practically dominated the field, so far as single disc seeders were concerned, and the evidence sustains his conclusion.

[2] The master has reported an alternative finding, in favor of allowing all the profits on defendant's seeder business, not only in the Northwest territory, where the Van Brunt furrow opener dominated the trade, but also in other parts of the country where it did not do so. Three-fifths of defendant's sales were in the Northwest. This fact presents some difficulty. In other territory the patented device did not drive out other forms, as it did in the Northwest. Other devices in common use produced as good results, apparently with equal facility and cost. It is easily inferred from the evidence that the horse-lift feature would have sold any form of drill in territory outside the Red River valley or Northwest, where the infringement did not add to defendant's gains. An infringer is only to pay for such advantages of the patented machines over machines that were open to his use.

Columbia Wire Co. v. Kokomo Steel & Wire Co., 194 Fed. 108, 114 C. C. A. 186; Black v. Thorne, 111 U. S. 122, 4 Sup. Ct. 326, 28 L. Ed. 372. Complainant did not make any considerable sales in the territory outside the Northwest. In this territory the evidence seems to show that the principal selling feature of defendant's drill was its patented horse-lift. This point was also an important element in increasing its sales of the infringing drills in the Northwest, but in that region the Van Brunt invention was also a feature which induced sales, so that other points may be ignored. In the Middle West and the Southwest the Van Brunt scraper was not particularly important, and there the chief reason for defendant's sales were the horse-lift, adjustable drag bar, and other features of its patents. In other words, outside of the Northwest the Van Brunt device was no better than other types, was not even as good as defendant's infringing type. It seems quite clear from the opinion of the Court of Appeals in this case that, if the use of the device in the Northwest had not existed, defendant would not have been held an infringer at all.

Defendant should therefore pay three-fifths of its total seeder profits, unless some equitable basis of adjustment can be found between the furrow opener and other parts of the machine. The master decided that plaintiff is entitled to all the profits realized on the complete machines sold by defendant, because it cannot be ascertained how much was due to other features than the patent scraper, and because that scraper dominated the single disc market; but he suggests that the defendant may equitably be allowed to retain that part of the profits made on the seed planting, seed distributing, horse-lift, and those parts of the seeders other than the furrow openers, through a calculation based on the relative gross cost of the different parts. In a certain sense this suggestion seems equitable, since it might possibly compensate defendant for those sales which were induced by the horse-lift. But to cut down the profits from \$17,185.17 to \$6,607.-76, nearly two-thirds, on an absolute uncertainty, is certainly unwarranted. The master does not recommend, but only suggests, that it be done, if the court thinks proper.

By means of the patented scraper and its own horse-lift, defendant was enabled to sell seeders which otherwise it could not have done. Being unable to separate the results due to these two features, the law compels it to account for the profits due to both. This is a hard rule; but, as defendant was finally decided to have been in the wrong in using the patent scraper, it is the only rule which can be applied with justice to each party. Defendant took plaintiff's property without license, and used it so as to leave the result in doubt, so it is less unjust to defendant to compel it to pay more than it ought to pay than it would be to plaintiff if defendant should be compelled to pay less than it ought to pay.

There should be a decree for 60 per cent. of the total profits of \$17,396.17, or \$10,437.70, with interest from the date of the master's report, and costs.

DANIEL GREEN FELT SHOE CO. v. DOLGEVILLE FELT SHOE CO.

(District Court, N. D. New York. November 3, 1913.)

PATENTS (§ 315*)—SUIT FOR INFRINGEMENT—REHEARING—NEWLY DISCOVERED EVIDENCE.

To warrant the reopening and reconsideration of an infringement suit after decree and appeal taken on the ground of newly discovered evidence, due diligence in obtaining such evidence must be shown.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 554-558; Dec. Dig. § 315.*]

In Equity. Suit by the Daniel Green Felt Shoe Company against the Dolgeville Felt Shoe Company. On petition to reopen case. Denied. For prior opinion, see 205 Fed. 745.

Edmonds & Peck, of New York City, for complainant.
Henry Schreiter, of New York City, for defendant.

RAY, District Judge. This cause was commenced in May, 1911, and was argued on final hearing at the Albany term in February, 1913, and decided in June following in favor of the complainant. The decree was entered June 18, 1913. The issue of the injunction was suspended pending appeal, on condition that the appeal, if taken, be diligently prosecuted. An appeal was taken, but at the October term the defendant moved the Circuit Court of Appeals to remand the cause, that a rehearing might be asked on alleged newly discovered evidence. This the Circuit Court of Appeals refused to do, and the defendant now petitions this court to consider the alleged newly discovered evidence, as presented by affidavits, and reopen the case, permit the introduction of such evidence, same to be taken by deposition or in open court, and re-decide the case.

One of the defenses, and the main defense, urged on the final hearing, was alleged prior public use and sale of the patented shoe or slipper more than two years before the filing date of the Green patent in suit. This defense involved the question whether or not in 1904 and 1905, and prior to July 1, 1905, the complainant had made and put on public sale or in public use, not experimental use, the patented slipper made according to complainant's patent.

The parties are competitors in the same town, and on and prior to the final hearing of this cause, referred to, it was easily within the power of defendant to ascertain the name and residence of each and every employé of the complainant in its employ prior to the filing date of the patent. It is sought by defendant to introduce into the record the testimony of Helen Mosher, Phebe Flynn, Amelia Perry Laeck, and Mabel Palmer Cline, residing at Dolgeville, N. Y., where both complainant and defendant have their places of business, and where these alleged witnesses have all the time resided.

The patent in suit relates to the construction of the slipper, especially the sole thereof, and with this the alleged new witnesses had nothing whatever to do. Until 1903, Helen E. Mosher fitted linings and sewed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
208 F.—19

on ornaments, and thereafter she sewed on bindings. Phebe Flynn was employed in sewing and binding. Amelia Perry Laeck sewed on binding, and Mabel Palmer Cline laid on padding and sewed on insoles over the padding. They are now in defendant's employ. This work done by these witnesses did not call on them or demand that they observe or know the construction of these slippers in the details, etc., involved in the patent, and neither of them claims to know or be able to testify that the construction of the slippers on which they worked was that of the patented slipper. They give the style numbers of the slippers on which they worked as Nos. 456, 457, 458, and 459 "Comfys"; but this fails utterly to show that these were the patented slippers. Complainant was working on and improving and experimenting with these slippers a long time before the patent was perfected and applied for, and style numbers were constantly or frequently changing, and the term "Comfy" was a general term used to designate the entire line of slippers made of felt, whether of the patented type or some other.

But no good and sufficient reason is presented for not producing the evidence or testimony of these witnesses on the final hearing of the case, and it is cumulative at best. Due diligence to obtain it is not disclosed. The record presented on the final hearing was voluminous, and the necessity of making a very strong case as to prior public sale or use was apparent.

If a patent case is to be opened and additional testimony taken on a disputed point whenever a new witness is discovered, there will be no end to patent litigations. I think the authorities are against the granting of this application. *New York Filter Co. v. Jewell Filter Co.* (C. C.) 62 Fed. 583; *Hicks v. Ferdinand* (C. C.) 20 Fed. 111; *Novelty Tufting Mach. Co. v. Buser*, 158 Fed. 83, 85 C. C. A. 413, 14 Ann. Cas. 192; *Page v. Telegraph Co.* (C. C.) 18 Blatch. 118, 119, 2 Fed. 330; *Coburn v. Schroeder* (C. C.) 11 Fed. 426; *McLeod v. New Albany*, 66 Fed. 378, 382, 13 C. C. A. 525.

Every reasonable opportunity should be given a litigant to fully present his case and the merits thereof, but to warrant the reopening and reconsideration of a case on the ground of newly discovered evidence due diligence in obtaining the evidence must be shown, and that there was a failure to secure the evidence because of some fact or facts, cause or causes, which the exercise of due diligence would not have overcome. I do not doubt the good faith of the defendant's counsel in making this application, and the stay of issue of the injunction is continued on the same conditions, as the case is now before the Circuit Court of Appeals for argument.

So ordered.

In re THOMAS McNALLY CO.

(District Court, S. D. New York. May 26, 1913.)

BANKRUPTCY (§ 16*) — JURISDICTION OF COURT — DISTRICT OF PROCEEDINGS — PRINCIPAL PLACE OF BUSINESS.

In order that a corporation shall have a principal place of business within a district of another state than that of its incorporation, so as to make it subject to bankruptcy proceedings in such district under Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), it must have been actually doing business at such place during the greater portion of the preceding six months, and where a foreign corporation had in fact done no business in a district for more than three years, owing to the appointment of receivers for its property, the mere fact of its having filed a certificate in a public office, designating a place in the district as its principal place of business, is not sufficient to give the court in such district jurisdiction of proceedings against it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. § 16.*]

In the matter of the Thomas McNally Company, alleged bankrupt. On motion to confirm report of referee recommending adjudication. Motion denied, and petition dismissed.

Myers & Goldsmith, of New York City (E. J. Myers, of New York City, of counsel), for petitioning creditors.

Strasbourger, Eschwege & Schallek, of New York City, for N. Dain's Sons & Co., objecting creditors.

Samuel Strasbourger, of New York City (Max L. Schallek and Samuel Strasbourger, both of New York City, of counsel), for Benjamin B. Odell, Jr., one of the receivers.

HOLT, District Judge. This is a motion to confirm the report of a referee, recommending that the Thomas McNally Company be adjudicated a bankrupt. Section 2 of the Bankrupt Act authorizes courts of bankruptcy to adjudge persons bankrupt—

"who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof."

The alleged bankrupt in this case is a corporation organized under the laws of Pennsylvania. It has at all times maintained its domicile at Pittsburg, in that state, and stockholders' meetings have always been held there. It could therefore be adjudicated a bankrupt in Pennsylvania as the place of its domicile; and the question in this case is whether it can also be adjudicated a bankrupt in this district because it has had its principal place of business here. In 1907 the corporation entered into a contract with the board of water supply of the city of New York for the construction of a section of the Catskill Aqueduct in the counties of Putnam and Westchester, within the Southern district of New York. It then opened an office at Garrison's, in Putnam county, and started operations under the contract. Subsequently a certificate was filed in the office of the comptroller of the city of New York, changing the address of the corporation to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

988 Main street, Peekskill, N. Y. In March, 1909, an action was begun against the corporation in the Supreme Court of the state of New York for Westchester county, under which receivers were appointed. The order directed that all the property of the corporation be turned over to the receivers, which was done. The receivers have since continued to carry out the contract for the construction of this section of the aqueduct. Since the receivers' appointment in 1909 the corporation has done no business whatever in the Southern district of New York. A resolution of the directors was passed at a meeting held October 23, 1912, in the city of New York, making 627 East Eighteenth street, in said city, the principal office of business of the corporation.

One of the grounds of objection to the confirmation of the referee's report is that the alleged bankrupt had not had a principal place of business within the Southern district of New York during the six months prior to the filing of the petition. The petition was filed in December, 1912. The referee relies on the fact that while the corporation was carrying on the business of performing the contract for the construction of the section of the aqueduct, it had a principal place of business, first at Garrison's, and afterwards at Peekskill, and that there has been no subsequent removal of the principal place of business outside the Southern district of New York. There is no proof that any certificate was filed either with the city comptroller or in the Secretary of State's office in respect to doing business at Garrison's. The proof shows that a certificate was filed with the comptroller of the city of New York, as required by the provisions of the contract, of the change of the principal place of business to Peekskill, and that afterwards such a certificate was filed with the city comptroller purporting to change the place of business to New York, and the fact of these designations having been made is, as I understand it, the only fact upon which the referee bases his conclusion that the company had a principal place of business within the Southern district of New York.

In the *Matter of Perry Aldrich Co.* (D. C.) 21 Am. Bankr. Rep. 244, 165 Fed. 249, a Maine corporation was engaged in business in Massachusetts. Receivers were appointed by the state court of Massachusetts, and took possession of the property. The company gave up its large office, but retained a small office, where it received its mail, made some small sales and collections of amounts due it, and attended generally to its interests. The court held that the corporation was not doing business in any proper sense of the word after the date of the appointment of the receivers. In the case of *Tiffany v. Condensed Milk Co.* (D. C.) 15 Am. Bankr. Rep. 413, 141 Fed. 444, the court held, upon a substantially similar state of facts, that the company still had a principal place of business. The referee relied upon the case of *In re Moench & Sons Co.* (D. C.) 10 Am. Bankr. Rep. 656, 123 Fed. 965, affirmed by the Circuit Court of Appeals for the Second Circuit in 12 Am. Bankr. Rep. 240, 130 Fed. 685, 66 C. C. A. 37. In that case the corporation was incorporated by the state of New York under the laws of the state of New York, and I do not see why the court

had not jurisdiction to adjudicate it a bankrupt on the ground that its domicile was within the jurisdiction of the court. The point taken was that it was not principally engaged in the manufacturing business within the meaning of section 4 of the Bankrupt Act as it then stood, because receivers had been appointed who had taken possession of the assets. The court held that the appointment of receivers did not prevent the corporation from being one principally engaged in manufacturing. The question did not arise under section 2 of the act, and the case does not seem to me a very pertinent authority in this proceeding. There are two recent cases in the United States Supreme Court not referred to by the referee, arising under the Corporation Tax Law, which provides that every corporation organized for profit and having a capital stock represented by shares, and engaged in business in any state, shall be subject to pay annually a special excise tax with respect to carrying on or doing business by such a corporation. These cases are *Zonne v. Minneapolis Syndicate*, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428, and *McCoach v. Minehill & S. H. R. Co.*, 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed 842, and in them the Supreme Court held that certain corporations, one a railroad company, which had made leases of their property, but which continued to have an office in which they collected rentals and attended to their investments, etc., were not engaged in business within the provisions of the act. I do not understand it to be claimed that the McNally Company has in fact done any business in the Southern district of New York since the receivers were appointed in 1909. The claim is that it had a principal place of business there. But, in my opinion, the mere fact that a certificate has been filed in some public office designating a place as the principal place of business of the corporation does not make it a place of business unless business is done there. There must not only be a place where business can be done, but business must be done there, in my opinion, in order that a corporation shall have had a principal place of business within the meaning of section 2 of the Bankrupt Act.

My conclusion is that the referee's report recommending the adjudication of the McNally Company should not be confirmed, and an order should be entered denying the petition for adjudication.

IN RE MERWIN & WILLOUGHBY CO.

(District Court, N. D. New York. October 11, 1913.)

BANKRUPTCY (§ 342*) — ORDER DISPOSING OF CLAIM — MOTION TO REOPEN — LACHES.

An order of the District Court disposing of a claim against a bankrupt not appealed from will not be set aside on an application made three months after it was entered and after the trustee has filed his final report to permit the claimant to introduce further evidence of which it had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

knowledge and was given full opportunity to present at the hearing before the referee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 918; Dec. Dig. § 342.*]

In the matter of Merwin & Willoughby Company, bankrupt. On motion to set aside and open the order in the matter of the claim of Lampson Consolidated Stores Company, and which claim on appeal to the District Court from the decision of the referee was allowed at the sum of \$204.75. Motion denied.

Douglas Boyd, of Gloversville, N. Y., for claimant.

Baker, Burton & Baker, of Gloversville, N. Y., for trustee.

John Grant, of Utica, N. Y., for creditors.

RAY, District Judge. The papers show that the evidence which the claimant now seeks to introduce was well known to and in the possession of the claimant prior to and at the time the merits of the claim under objections thereto were tried before the referee in bankruptcy. It was not there produced, nor was any offer or attempt made to produce it, although ample opportunity was given for the purpose. On appeal and review no request was made for leave to introduce such evidence, nor was any application made to have the case sent back to the referee for the introduction of such evidence. From the record it appears that the claim was first presented at the first meeting of creditors, May 16, 1912, but was not left on file and was not formally presented and filed until December 23, 1912. Objections were then filed and a hearing had on the merits March 26, 1913. An adjournment was then taken to April 3d, to enable the claimant to put in evidence of the value of the property if it elected so to do—the same evidence now sought to be introduced. On the adjourned day the claimant did not appear, but later the attorney for the trustee offered to open the case for the admission of evidence as to value. The claimant did not avail itself of this offer. May 8, 1913, the case was decided by the referee. The review was had and argued before this court June 9, 1913. June 24, 1913, the judge rendered his decision, and a copy of the opinion was sent the attorney for the claimant. July 2d, the order was made and entered in accordance with such decision, and July 3d, copies were served on claimant's attorney. No appeal was taken. No motion was made to open or reconsider or for the production of further evidence until October 1, 1913, more than 20 days after the trustee had filed his final account. This court was in session every Saturday during July, at Norwich, and every day during August and September, either at Norwich or Syracuse.

First. The evidence sought to be introduced is not newly discovered evidence, or of that nature. It was well known to the claimant and it had full opportunity to present it. Claimant deliberately elected not to introduce it.

Second. There has been such laches that the court would be very unjust to the trustee and to the creditors should it now open up the litigation over this claim.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Third. There is no pretense of fraud, concealment, surprise, or newly discovered evidence.

Fourth. There should be a reasonably speedy disposition of bankruptcy matters, and no such precedent, as this would be, should be established.

The motion to open, etc., is denied.

REXFORD v. SOUTHERN WOODLAND CO. et al.

(District Court, D. South Carolina, at Charleston. November 3, 1913.)

1. VENDOR AND PURCHASER (§ 54*)—EXECUTORY CONTRACT—EFFECT.

A vendor, who has made an executory contract based on a valuable consideration to convey land on the payment of the purchase price, is regarded in equity as holding the legal title in trust, first, to secure the payment of the price, and, second, to convey to the purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 85; Dec. Dig. § 54.*]

2. SPECIFIC PERFORMANCE (§ 3*)—RIGHT TO RELIEF—REMEDY.

Specific performance is awarded when one party to a contract for the sale of land refuses to perform and the other party is not in default.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 3, 3½; Dec. Dig. § 3.*]

3. SPECIFIC PERFORMANCE (§ 8*)—RIGHT TO RELIEF—DISCRETION.

A vendee's right to specific performance of a contract for the sale of land is not absolute, but the granting of such relief is a matter of sound judicial discretion to be controlled by established principles of equity and exercised on a consideration of all the circumstances of each particular case.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 17, 18; Dec. Dig. § 8.*]

4. SPECIFIC PERFORMANCE (§ 99*)—VENDEE IN DEFAULT—RIGHT TO RELIEF.

A contract for the sale of timber land and timber rights, while in form a bilateral contract, was in fact, so far as its enforcement by legal proceedings was concerned, a mere option. It provided for prompt payment of one-third of the purchase price on September 9, 1907, and the balance in two equal annual installments; the vendee also agreeing to pay the taxes for the current year. The vendee had no means, having been discharged in bankruptcy in the spring of that year, which fact was not known to the vendors when they made the contract. There was no evidence that the vendee took or expected to take possession of the land. He failed to pay the taxes, and on the maturity of the September installment of the price procured an extension, giving notes therefor which were renewed and which were not paid, and the vendors subsequently sold parts of the land to others. *Held*, that the vendee was in default and was not entitled to specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 299-304; Dec. Dig. § 99.*]

5. VENDOR AND PURCHASER (§ 102*)—CONTRACT—ENFORCEMENT—TERMINATION—VENDEE'S DEFAULT—RETURN OF PAYMENTS.

Where, on a vendee's default in payment of one-third of the purchase price, the vendors elected to consider the contract at an end, and in a suit for specific performance pleaded the default in defense without asking any affirmative relief, there was no question of rescission within the rule

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that a party seeking to rescind a contract must restore to the other party the amount received by him in part performance or on account thereof.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 175-177; Dec. Dig. § 102.*]

6. VENDOR AND PURCHASER (§ 148*)—CONTRACT—CONSTRUCTION—DEED—DUTY TO DELIVER.

Where a contract for the sale of land obligated the vendors to deliver a deed on payment of one-third of the price, falling due 90 days from the date of the contract, and the vendors, at the vendee's request, extended the time for the payment of that sum, such extension also extended the time for the delivery of the deed, and they were therefore not in default in failing to tender a deed prior to the payment of such installment.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 290-295; Dec. Dig. § 148.*]

7. LOGS AND LOGGING (§ 2*) — CONTRACT OF SALE — CONSTRUCTION — DUTY TO SURVEY.

Where a contract for the sale of timber land and timber rights provided that the number of acres in each tract were stated with either a reference to a survey or other description, and the vendee requested various extensions of the time for payment of the one-third of the purchase price, which was due September 11, 1907, without making any demand for a survey, the vendors were not bound to have the land surveyed and the exact number of acres ascertained before they were entitled to call for payment of such portion of the price.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 1-5; Dec. Dig. § 2.*]

8. VENDOR AND PURCHASER (§ 98*)—VENDEE'S DEFAULT—TERMINATION OF CONTRACT—RETENTION OF NOTES.

The vendors having received the vendee's notes for one-third of the purchase price, on his inability to pay the same as required by the contract, negotiated the same to certain banks, and were subsequently compelled to take them up, whereupon the contract was forfeited because of the vendee's default. The vendee's attorney was informed that the vendors did not consider the notes of any value and were ready to surrender them, and there was no proposition made at the time to pay the balance due on the contract in order to save the vendee's rights. *Held*, that the vendors' retention of the notes did not negative their intention to terminate the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 163-165; Dec. Dig. § 98.*]

9. EQUITY (§ 427*)—PRAYER—GENERAL RELIEF—SCOPE.

Under a prayer for general relief in a bill, the court will consider every phase of the testimony and award such relief as the complainant is entitled to.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1001-1014; Dec. Dig. § 427.*]

10. SPECIFIC PERFORMANCE (§ 128*)—VENDEE'S DEFAULT—MONEY PAID—RIGHT TO RECOVERY.

Complainant purchased certain timber land and timber rights for \$277,062.50, on two-thirds of which interest was to be computed from September 11, 1907, payable annually. Complainant was in default in failing to pay the one-third of the price, but, assuming that he had complied with his contract on May 13, 1908, the due date of the last extension, the interest then due would have closely approximated the amount due by him. *Held*, that he was not entitled to recover any part of the sum so paid on the vendors declaring the contract at an end.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 412-419; Dec. Dig. § 128.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Bill by W. A. Rexford against the Southern Woodland Company and others, for specific performance of a contract for the sale of land. Bill dismissed.

Lee & Ford and James H. Merrimon, all of Asheville, N. C., and McCullough, Martin & Blythe, of Greenville, S. C., for complainant.

Mitchell & Smith, of Charleston, S. C., for defendants.

CONNOR, District Judge. The cause was heard upon the testimony taken by John P. Arthur, Esq., special examiner. It appears, from the pleadings, that defendants Southern Woodland Company, a South Carolina corporation, and R. P. Tucker, a citizen of Charleston, S. C., on June 11, 1907, entered into a contract with complainant, W. A. Rexford, a citizen of Asheville, N. C., whereby they contracted to sell and convey to him 55,412 acres of land, 19,290 acres of which is situate in Oconee county, S. C., and the remainder in White and Habersham counties, Ga., at the price of \$5 per acre. The land is described in the contract as "certain tracts of land in fee, and also the timber and rights on other lands." The contract provides:

"That the party of the second part, in consideration of the covenants and agreements made by the parties of the first part, hereby agrees to bind himself to purchase from the said parties of the first part all of the timber and timber rights and privileges hereinbefore described, at and for the sum of five dollars per acre for the entire acreage, whether in fee or in timber and rights payable as follows: Twenty-five hundred dollars cash; twenty-five hundred dollars thirty days from the date hereof; one-third of the balance of the purchase price ninety (90) days from the date thereof and the balance of said purchase price in two equal annual installments, with interest thereon at the rate of six per cent. per annum, payable annually, said two last deferred payments to be secured by a mortgage on the property hereby agreed to be conveyed, and said deed to be delivered on the payment of the amount falling due hereunder ninety days from date thereof; all payments to be at the office of R. P. Tucker, Charleston, S. C."

The taxes, for the current year, were to be paid by complainant. He paid on account of the purchase price, on June 7, 1907, \$2,500, and, on July 10, 1907, \$2,500. He alleges that, upon the execution of the contract, he went into possession of the land; this is denied by defendants. The testimony shows that, prior to September 7, 1907, upon the request of complainant, defendants extended the time, and complainant agreed to pay, on September 11, 1907, \$10,000 cash, and the balance on January 1, 1908, "at which time the balance of said payment falling due September 9th, shall be paid, and the transfer of the property made in accordance with the terms of the said contract. This extension of time is, however, made on the distinct understanding that interest at the rate of six per cent. (6%) per annum, on the unpaid portion of the purchase money, is to commence to run from September 9, 1907." Complainant, on September 11, 1907, paid the \$10,000 according to the agreement.

Complainant, December 19, 1907, asked for a further extension, saying:

"I will close promptly for the property at the end of 60 days, perhaps sooner."

Defendant R. P. Tucker wired complainant:

"Strongly advise your coming to Charleston for conference with my associates and self. From assurances in September, we considered payment first of January a certainty and committed ourselves accordingly. Wire time arrival quick."

Further extension was granted, and complainant, on December 30, 1907, executed seven promissory notes for \$10,000 each, and one for \$7,000, due and payable March 18, 1908, being the balance of the one-third of the purchase price. Defendants executed their receipt for said amount and notes, containing the following language:

"Which, when paid, shall be credited to the extent of payment upon the amount now due under the contract made 11 June, 1907, between Southern Woodland Co. and R. P. Tucker and W. A. Rexford. If said notes are not paid, then said contract shall remain, in all respects, as if said notes had not been given."

Complainant, March 9, 1908, wired R. P. Tucker:

"Get bank to extend my note sixty days. I will send check to pay interest."

Tucker replied:

"Banks refuse to extend for full amount. Can probably arrange with them to carry part. Answer quick if you desire me to act, as they must be seen without delay."

Complainant wired:

"Five thousand now. Five thousand thirty days—balance sixty days, best I can do."

Tucker wired, March 10th, that he had seen banks and they had consented to extend "ten thousand now, ten thousand thirty days, balance sixty days—wire immediately to close such an arrangement, as I have only verbal consent." Same day complainant wired:

"Expect to pay all in thirty days. Best can promise is five thousand now, five thousand in thirty days, balance sixty."

Tucker, March 11th, wired:

"I am ready and willing to do all I can for you in the matter, but must have your full co-operation and must request that you exert yourself to utmost limit. Banks will not consider your proposition. Wire me quick another, as near as possible to one I prevailed on them to accept."

Same day complainant wired, from Elmira, N. Y.:

"Here bedside sick father, is why obliged to ask extension. Can fix as soon as can leave. Can't promise more if obliged to sacrifice all."

Tucker wired:

"Have submitted your last telegram to banks. In consideration of father's illness they consent to renew as per your former wire—vizibly five thousand now, five thousand thirty days, balance sixty days. Send New York Exchange immediately. Wire when mailed."

Tucker wired, March 16th:

"Referring to my last telegram, remember notes fall due on the eighteenth, including three days grace. Necessary for remittance to be here then."

Same day complainant wired:

"Sent check Saturday. You should have received this morning if not then, answer."

Tucker wrote, March 16th, acknowledging receipt of check for \$5,000, and saying:

"I will pay this amount on your outstanding notes as agreed and have arranged with the two banks holding said notes to renew for the balance in accordance with your telegram."

He inclosed notes for signature, asking complainant to sign and return with check for \$1,014.09 interest due, concluding:

"I do not think you realize just how hard it is for me to arrange this matter for you, but I am very glad that I have been able to do so."

The notes were signed and returned March 19th; complainant said that he was not able to pay the interest at that time, and thanked Tucker for the kindness shown him.

Complainant wrote, April 16th, Exchange Banking & Trust Co., Charleston, S. C., asking for an extension to the 25th of April, saying:

"Will surely have money ready for you by the above-named time."

Bank replied, by telegram, granting extension, saying:

"Must be met then."

On April 20th, it wrote, confirming wire, saying:

"We shall expect payment at that time."

Bank wired April 27th:

"At your request, and on your positive assurance, we arrange to hold your paper until April 25th. Have you made remittance to cover? Answer quick."

Complainant wired:

"Arranging for money certainly have it to you a few days."

Tucker wired, April 29th:

"Bank calling me to make good your paper due April 18th. Have you remitted, if not, please remit immediately. Answer definitely quick."

Complainant wired, April 30th, from Williamsport, N. Y.:

"Have arranged for money. Will certainly remit Saturday. See letter."

Complainant wrote May 1st, from Baltimore:

"Will mail you check so you will get same Monday." Expresses regret at delay.

Tucker wired, May 5th:

"Promised remittance not received. Please wire definitely and finally, quick."

Complainant answered:

"Absolutely failed to get money as promised. Have it promised this week. Certainly doing my best."

Tucker wired, May 7th:

"Pressing business demands my leaving here this week. Can not do so until your matter fixed. Must have positive date remittance from you."

Same day complainant wired:

"Get note extended few days until I can raise money."

Tucker wired:

"Telegram not clear. Am I to understand you request note extended until end of week during which time you will certainly remit. Answer quick."

Complainant wired, May 7th:

"Disappointed again in getting money. You must get note extended thirty days."

He wired, May 13th:

"Can you get bank to hold notes as they are until I can get there Saturday?"

Tucker wired, July 11th:

"Please answer immediately my telegram, July eighth."

Tucker wired, July 13th:

"Absolutely necessary to have definite assurance of immediate payment of past due amounts. Answer quick, naming day this week for settlement."

Complainant wired, July 20th:

"Will pay you August second for nineteen thousand acres—one third cash, balance one, two, three years, bankable paper, trying to make it all cash."

Tucker wired, July 20th:

"Telegram received. Absolutely necessary for us to have conference immediately. Wire quick what day next week you can be here."

Complainant wired, July 27th:

"Deal will certainly be closed up as per telegram—will notify you later what day we will meet for settlement."

Tucker wired, August 4th:

"Have heard nothing since telegram twenty-seventh which indicated you would see me by August second. Answer quick, giving definite information."

Tucker wired August 11th:

"Please wire me immediately and definitely what you propose doing."

No answer was received to this telegram. Tucker wrote, November 28th, S. T. Graves, who negotiated the original contract, and to whom the abstracts of title and books of plats had been loaned, referring to negotiation with Janes, and asking that they be returned. Complainant, to whom Graves sent this letter, wrote Tucker, January 4, 1909:

"As by your request to Mr. Graves, who is now in Richmond, Va., for him to send to you abstracts and plats of Georgia lands, will say that I am sending you by express to-day prepaid the books of abstracts and the blueprint of the Georgia lands. The book of plats is in Elmira, New York. I have ordered it shipped here and should you think you will need it, I shall ship it to you on request. Hoping that the delay in this matter caused by the absence of Mr. Graves will not cause you any inconvenience, etc."

Tucker acknowledged, January 6, 1909, the receipt of letter and express receipts for plats, saying:

"I beg to thank you for forwarding to me the abstracts to our White Co. Georgia and Oconee county, S. C. properties which were in possession of Mr. Graves and request that you forward the prints as soon after their arrival at Asheville as possible."

Complainant and defendants had no further communication or correspondence.

Mr. J. H. Tucker, an attorney residing in Asheville, N. C., as the representative of complainant, went to Charleston, S. C., January 16, 1909, for the purpose of seeing defendant Mr. R. P. Tucker. He says:

"I informed him that I was the attorney for W. A. Rexford, the plaintiff in this cause, and desired a settlement of matter between them concerning the purchase of the lands in question in this action; the contract concerning same and matters therewith connected. Mr. Tucker was very bitter, and positively informed me that, as attorney for Rexford, he declined to recognize me for any purpose; that he declined to recognize any right that Mr. Rexford had in the premises, and that he declined to discuss the matter with me. This was his most positive declaration. Afterwards, however, he spoke of what he considered the bad treatment he had received from Mr. Rexford concerning this transaction. Said that he did not consider Mr. Rexford had complied with his contract."

Mr. James H. Tucker was asked:

"Did you go over, on that date, to Mr. R. P. Tucker's office prepared to make a settlement?"

He answered:

"Having been informed that Janes and Byrd were there to close the deal out, at \$6.50 per acre, for the land, I went there in the light of that information, prepared to enter negotiations for a settlement of their matters upon that basis."

Defendant R. P. Tucker, in regard to this conversation, says:

"In a general way, he stated to me that he had come down on behalf of his client, Mr. Rexford, and that he thought Mr. Rexford was entitled to some consideration. I stated to Mr. Tucker that I considered the contract between Mr. Rexford and myself null and void and had considered it so for many months past, due to the fact that Mr. Rexford had violated many of the terms of said contract. I stated to him that I did not consider Rexford's notes worth two cents, and that they had always been subject to Rexford's order and that I had always been, and was, prepared to deliver them to Mr. Rexford in person or to any one upon an order from Mr. Rexford so to do."

No further communication was had between complainant, or any one representing him, and R. P. Tucker. Complainant was represented to Tucker, by Graves, as a man of means. "Invariably lived up to his contracts." He had received his discharge in bankruptcy during the spring of 1907. On January 16, 1909, defendants sold the portion of the lands embraced in the contract, situate in Georgia, to Byrd and Janes at the price of \$6.50 per acre, and on November 13, 1909, they sold the portion situate in South Carolina to defendant Oconee Lumber Company at the same price. Complainant, in his bill filed April 28, 1910, alleges that the purchasers took title to the lands conveyed to them with notice of his equities, etc. He alleges that on January 16, 1909, he demanded a settlement of defendants, and "if anything was due them on account of his contract of purchase, he was ready, willing, and able to pay such balance and discharge all obligations resting upon him, including any indebtedness that he might owe defendants, etc."; that defendants refused to comply with this demand or "to settle, or negotiate a settlement under the said contract, or otherwise,

claiming that the plaintiff had forfeited all rights under the contract, etc." He demands judgment:

- "1. For \$100,000.
- "2. For an accounting, etc.
- "3. That defendants, and each of them, be decreed to hold the title to said land and any timber thereon, or removed therefrom, in trust for complainant and to account therefor.
- "4. For other and further relief," etc.

Process was served on defendants, Southern Woodland Company, R. P. Tucker, and the Oconee Timber Company. The defendants Southern Woodland Company and R. P. Tucker filed a joint answer. Defendant Oconee Timber Company filed a separate answer, averring that, on November 13, 1909, it purchased a portion of the lands in controversy situate in Oconee county, S. C., for a full and valuable consideration, without any notice of complainant's alleged equities, etc. This answer is verified by R. P. Tucker, secretary and treasurer of defendant company. No process was served upon J. H. Byrd or H. S. Janes, and no appearance made, or answer filed, by them.

Defendants Southern Woodland Company and R. P. Tucker say, in regard to the prayer of complainant for surrender and cancellation of his notes, that, at all times since the failure to pay them upon the last date agreed upon, they have been held subject to the order of complainant to be delivered to him, or any representative of his, whenever requested, and have never been used, or attempted to be used, in any way, by them, and "they are now ready to be delivered to complainant when requested, and these defendants herewith file the said notes in this honorable court, together with this answer to be treated and dealt with by this court as it sees fit." The answer contains full and specific denials of the material averments of the bill. There is a phase of the controversy in regard to which the evidence is, to a large extent, oral and not so clear as could be desired. Complainant avers, in his bill:

"That it was understood and agreed, at the time the contract was entered into, that he should have the right to sell any or all of the property to a purchaser, acceptable to defendants, and upon terms satisfactory to them, on account of his obligation to purchase, that title would be made to such purchasers, and that, on the 16th day of January, 1901, plaintiff did procure a purchaser for certain of the said lands and timber rights as set forth in the agreement of that date, a copy of which is hereto attached, and marked 'Exhibit B,' and made a part of this complaint, the said sale being made to the defendant, J. H. Byrd and H. S. Janes, to whom plaintiff and his agent, S. T. Graves, introduced the said R. P. Tucker, and plaintiff is informed and believes that the said defendants did purchase the said lands described in the said agreement on plaintiff's account, and that they have paid to the said R. P. Tucker and Southern Woodland Company several thousand dollars, the exact amount plaintiff does not know."

That on the 16th of January, 1909, complainant demanded a settlement. Exhibit B, attached to bill, purports to be a copy of a contract made between R. P. Tucker, of the first part, and J. H. Byrd and H. S. Janes, of the second part, dated January 16, 1909, whereby the first-named party agrees to sell, and the second to buy, that portion of the land in controversy, situate in the state of Georgia. Defend-

ants Southern Woodland Company and R. P. Tucker deny that there was any agreement by which complainant was authorized to sell any portion of the lands until he had paid the purchase money therefor. They admit that he would have been entitled to sell any rights which he had under the terms of said contract, subject to the rights of defendants. They deny that, on the 16th day of January, 1909, or on any other date, complainant procured a purchaser for any of the lands or timber rights. They deny that defendant R. P. Tucker was introduced to his codefendants Byrd and Janes by complainant, or his agent, or that said parties purchased the lands referred to in Exhibit B on account of complainant; but, on the contrary, they aver that the purchase was made long after complainant, by his failure to comply with his contract and after defendants had notified him that they would treat the property as their own.

The evidence in regard to this phase of the case is, to a large extent, that of S. T. Graves and R. P. Tucker. Complainant appears to have had but little knowledge in regard to it. It seems that, after negotiating the contract of June 11, 1907, between complainant and defendants Southern Woodland Company and R. P. Tucker, S. T. Graves acted as "the friend and agent" of complainant. He endeavored to find a purchaser for the lands. He says that some time during the month of February, 1908, he took a trip over the lands with Mr. Marsh and Mr. Janes, for the purpose of trying to sell to them; that he told Mr. Marsh that he wanted to "act as quickly as possible, as our time was getting short and we would probably get in danger if we did not act quickly, that I was in a hurry for the sale to be made." This was on second trip March or April, 1908. He quoted the land to them at \$6.50 an acre; they raised no objection at that time, although it does not appear that any definite proposition to sell was made. That during this time he kept "in touch" with Mr. Rexford. He made a trip to Charleston, S. C., to see Mr. Tucker. He "went there to see Mr. Tucker in the interest of getting the contract extended." Thinks this was May 11, 1908. He is asked:

"Did you inform him of the negotiation with reference to the purchase of the property?"

Answering, he said:

"That matter may have been discussed. The thing we discussed most was extending the time of contract—the contract with Mr. Rexford."

Referring to the negotiation with Mr. Marsh and Mr. Janes, he says:

"There was a good deal of doubt, and I had a letter from Mr. Tucker, expressing his doubt about the matter. * * * There was nothing definite. I made a payment of \$1,000, think it was on May 11, 1908," got the money from R. B. Henley and associates of Richmond, Va., "on an option on the King property. * * * They gave me a check for \$1,000, and I took that check and turned it over to Mr. Tucker. * * * Told him where I got it. I did not tell him how to apply it, supposed it was to go as a credit on Mr. Rexford's indebtedness, am not sure of it, but think so. He made no objection to receiving it on Mr. Rexford's indebtedness. May have seen Tucker two or three times—discussed the negotiations with Byrd and Janes."

He says that he met R. P. Tucker in Baltimore in June, 1908, and introduced him to Janes. In this conversation, Mr. Tucker said:

"I believe I have told you before, Col. Rexford has nothing to do with this deal—that he is down and out, and if you expect to have anything to do with this deal it will have to be done through me. Mr. Rexford has forfeited his contract and it will have to be done through me."

He did not go with them on the land after that.

On cross-examination Graves says that after the conversation in Baltimore, June, 1908, he felt free to enter into a contract with Mr. Tucker to sell the land on a commission. "I did all I could to sell the property after that." He says that Mr. Rexford wired him to go to see Mr. Tucker to try to get an extension. Tucker said, "I have been sweating blood and I don't believe I can," but would communicate with us, thinks this was in May. "Mr. Tucker refused to grant the time, and I notified Col. Rexford. And I also notified him immediately when this happened in Baltimore." Referring to the conversation in Charleston, on May 11, 1908, he says:

"I could get no extension because I was not in a position to make the payments. It was then that Mr. Tucker told me that Col. Rexford had not complied with his contract; that if something was not done, and done at once, or words to that effect, that Mr. Rexford would be down and out; that he had sweated blood over this thing, but he was not going to do it any longer; and asked me about Col. Rexford's ability to carry out these deals, which I assured him was good. I notified Col. Rexford of our meetings and what happened."

Mr. Graves' testimony respecting his relations to Mr. Rexford, after the conversation with Mr. Tucker in June in Baltimore, is confused, and confusing. It seems that, from his viewpoint, if Mr. Rexford was still "in," he was his agent; if "out," he was not. He made no suggestion to Mr. Tucker that he would thereafter act as Rexford's agent. Mr. Graves, a few days after his examination, wrote a letter to Mr. R. P. Tucker in regard to his testimony. Upon a subsequent examination, he identified the letter and admitted that he wrote it. It was then received in evidence, under objection. It is competent, as a part of his subsequent examination, for the purpose of contradicting him, but is not very material, except as showing his attitude towards the transaction and the parties. Mr. R. P. Tucker says that, after the conversation with Mr. Graves in Charleston, May 11, 1908, he met him in Baltimore in June, 1908; that Mr. Graves was then endeavoring to sell the property for him.

"During that conversation (in Baltimore) I requested Mr. Graves to get Mr. Janes, who was an employé of the Empire Lumber Company of Buffalo, N. Y., over the phone, and ask him to come to Baltimore for a conference with me. I realized that Mr. Janes, as an employé of the lumber company, came in contact with a great many men who were interested in lumber and timber, and I thought that he could possibly assist Mr. Graves and myself in our efforts to sell the property."

He says that Mr. Janes came to Baltimore, and, as a result of the conference, Mr. Janes was to try to get some parties in Boston interested in the property. He failed in this effort. It was understood that

Mr. Graves would show him over the property at any time he desired to make an examination.

"As a result, Mr. Janes finally located Mr. J. H. Byrd of St. Louis, Mo., as a possible purchaser and wrote me, on November 5, 1908, giving the name and address of Mr. Byrd. I then arranged with Mr. Graves to show these gentlemen over the property, and he took them on the property, the Thursday after November 11, 1908. They stayed on the property, so far as I know, and I was in communication with them, off and on, until December 22, 1908, when they wired me accepting the property. Mr. Graves was introduced to Mr. Byrd at that time. I then arranged for these gentlemen to meet me in Charleston, to close the matter, on January 15, 1909, and requested Mr. Graves to be present at the meeting."

He says that he first met Mr. Byrd on January 15, 1909. Mr. Janes was unable to buy the land himself. Byrd furnished the money.

The depositions of Mr. Byrd and Mr. Janes were taken and constitute a part of the evidence. Mr. Byrd says that, in negotiating for the land, he never knew, or heard of, complainant, or that he was interested in the property. That he first heard of the land through Mr. Janes, in the summer (June) 1908, while in St. Louis, Mo. That he examined the land with Janes and Graves during the month of November, 1908; that was the first time he had seen Graves; had no correspondence with him. Graves said the land belonged to Mr. Tucker and that there were no options on it; the title was clear. That Janes said same. He paid the purchase money. That his attorney, Mr. McFarland, examined the title before the purchase.

Mr. Janes says that Graves told him that Mr. Rexford had held an option on the property but that it had expired. That he afterwards met Tucker in Baltimore, June, 1908. It is evident, from the testimony, that complainant is in error in saying that he had any transaction, either personally or through Graves, with Byrd and Janes. It seems that on March 24, 1908, Graves, acting as agent for W. A. Rexford, made a contract for the sale of the land situate in Oconee county, S. C., with George C. Wiles, upon which some amount was paid and some extension granted by Graves, but no further action was taken. It seems that Judge Stevens and Mr. R. B. Henley became interested in this contract; the latter paying \$1,250 on account of it. His check payable to S. T. Graves, agent for W. A. Rexford, was delivered to R. P. Tucker by Graves on May 4, 1908. No one seems to be asserting any claims under this contract.

In so far as complainant claims to have any connection, either by himself or through his agent, Graves, with the sale to Janes and Byrd, the evidence shows that Byrd was not known to him, nor did he have any connection with, nor so far as the evidence shows knowledge of, these lands, or the parties dealing with them, prior to the summer of 1908. I am unable to find that any definite proposition, as to terms, was made and accepted for a sale to Marsh and Janes; what occurred was simply "chaffering." Neither of them appear to have been in a position to buy or pay for it. Graves says that he ceased to act as complainant's agent after the conversation with Mr. Tucker in Baltimore in June, 1908, and that he notified complainant of this conversation. It is impossible, therefore, to find that the sale made January 16, 1909, to Byrd

and Janes was on account of, or had any relation to, the contract of June 11, 1907, or the extensions thereof. The testimony of Byrd and Janes negative any such conclusion. Complainant concedes that he cannot have a decree enforcing specific performance of the contract, because Byrd and Janes, who hold the legal title to that portion of the lands situate in the state of Georgia, are not parties to the record. For manifest reasons the court would not decree partial performance of this contract. It is therefore immaterial whether Byrd and Janes or the Oconee Timber Company had notice of complainant's alleged equities. Defendants concede that the lands have been sold and conveyed at the price of \$6.50 per acre. Complainant says that, but for the alleged wrongful conduct of defendants Southern Woodland Lumber Company and Tucker, in conveying the legal title and thereby disabling themselves from performing the contract, he would be entitled to a decree for specific performance, and that therefore he is entitled to have a decree declaring defendants trustees and calling them to account for the proceeds of the property, the legal title to which, by virtue of the contract, was impressed with a trust. If he shall succeed in sustaining his first contention, if he is entitled to specific performance, it follows that defendants are liable to account for the proceeds of the property.

[1] The right of complainant to relief is dependent upon well-settled principles of equity jurisprudence. His learned counsel stress the position, sustained by authority, that in equity a vendor who has entered into an executory contract, based upon a valuable consideration, to convey land, upon the payment of the purchase price, is regarded in equity as holding the legal title in trust, first, to secure the payment of the purchase money, and, second, to convey to the purchaser. A court of equity enforces the execution of the trust by making appropriate decrees, to meet the facts in the particular case. This is elementary. The learned counsel appear to overlook the fact that this equitable conception is based upon the theory that thereby the parties are compelled to perform their contract according to its terms. A court of equity, instead of leaving the complainant party to an action at law for damages for breach of the contract, conceives that, by this means, as said by a learned chancellor, "more perfect and complete justice is done." The basic purpose of the chancellor is to compel both parties to perform their contract according to its terms, not to relieve one party from performance and hold the other. The trust thus declared and enforced by the court of equity is based upon the contract, and jurisdiction is taken because it is conceived that the only remedy which a court of law administers is inadequate. The court of equity, in treating the vendor as a trustee, does not make a new contract, or change the contractual obligations of the parties, in respect to time of performance or otherwise. On the contrary, it enforces specific performance on the part of both the vendor and vendee, according to the terms of the contract, by regarding and treating the vendor as the trustee and the vendee as the cestui que trust, so molding its decree as to afford complete relief in accordance with the facts developed. Jurisdiction was taken in such cases by the court of equity, when land was the subject-matter of the contract, because of its peculiar character. It was thought that a judg-

ment at law awarding damages for a refusal on the part of the vendor to convey land, as he had contracted to do, did not do full and complete justice to the disappointed vendee, who was ready, willing, and able to perform the contract on his part, according to its terms. Usually parties bought land, not for speculation, nor to sell again, but to secure homes, or for cultivation, or improvement, thus promoting those objects which were favorites of the courts, advancing the permanent interest and prosperity of the state.

Prof. Pomeroy says:

"The remedy for the specific performance of contracts is purely equitable, given as a substitute for the legal remedy of compensation, whenever the legal remedy is inadequate or impracticable." Eq. § 1041.

"When land, or any estate therein, is the subject-matter of the agreement, the inadequacy of the legal remedy is well settled, and the equitable jurisdiction is firmly established." Section 1402.

If complainant had tendered, or alleged and proven that he was ready, willing, an able to perform his contract according to its terms, either as originally made, or as extended by the parties, and defendants had refused to perform on their part, the court would have compelled them to do so, either by a decree, commanding the execution of the deed, or declaring them to hold the legal title in trust; the terms of the trust would have been fixed by the terms of the contract, and by this equitable remedy specific performance of the contract would have been enforced.

[2] This remedy is given when one of the parties refuses to perform the contract according to its terms, and the other party is not in default. Complainant has, however, failed to meet and perform the contract, according to its terms, and is therefore compelled to invoke another equitable doctrine. In its desire to effectuate the real intention of the parties to contracts for the sale of land, and to relieve against forfeiture of legal rights, when to enforce them would work hardship and injustice, the chancellor looked beyond the letter of the contract and took into consideration the character or nature of the property involved, the conduct of the parties, both at the time of, and subsequent to, making the contract, and sought to ascertain whether it was their intention that its obligation should, in respect to time, be strictly observed and enforced. He frequently found what he regarded sufficient evidence to satisfy him that such was not their intention; that, by their manner of dealing with the property, or otherwise, they had, by acquiescence, indicated that neither of them intended to enforce strict performance and, upon this ground, and in furtherance of substantial justice, he so declared, giving to the party in default a reasonable time within which to pay the money and demand a conveyance of the property. Hence we find that, by reason of the many cases, in which this condition was found to exist, the maxim that a court of equity does not, in dealing with agreements for the sale of land, regard time as of the essence of the contract, found its way into equity jurisprudence. It was supposed, at one time, that the maxim was of such general and universal application that parties would not be permitted to stipulate otherwise; that, like the maxim, "Once a mortgage, always a mortgage," it was not in

the power of the parties to a contract for the sale of land to provide, by express agreement, otherwise.

Lord Eldon said that this was not so. *Seton v. Slade*, 7 Ves. 265, 3 White & Tudor, L. C. Eq. 434. The reason of the maxim, as applied in many cases, is well expressed by Pearson, C. J., in *Scarlett v. Hunter*, 56 N. C. 84. There, the vendee gave his notes for the purchase money, bearing interest, and went into possession of the land. When the plaintiff sought to enforce the forfeiture by reason of the failure to pay the note when due, the court invoked the maxim, saying:

"It is taken for granted that the parties are content to allow matters to remain in statu quo until a movement is made by one or the other."

It was thought that the interest accruing on the deferred payment of the purchase price was satisfactory to the vendor and he was content to permit the vendee to remain in possession, improving and cultivating the land, until he called for the money. Usually when contracts of this character were made, but a small part of the purchase money was paid in cash. Of necessity, the courts made exceptions to the maxim and held that it did not apply when the terms of the contract, the character of the property, the purpose for which it was purchased, the conduct of the parties, or other "surrounding circumstances," negative the idea that it was understood between them that time was essential. It was always applied upon the theory that it effectuated the intention of the parties.

In *White v. Bennett*, 7 Rich. Eq. (S. C.) 278, Chancellor Wardlaw says:

"Time is not usually regarded in equity as of the essence of contracts, and anciently it was considered that it could not be rendered essential by the stipulation of the parties concerning lands; but the tendency of recent decisions is to require persons concerned in contracts relating to lands, as in other contracts, to regard time as material."

So Mr. Justice Story, in *Taylor v. Longworth*, 14 Pet. 173, 10 L. Ed. 405, says:

"There is no doubt, that time may be of the essence of a contract" in equity "for the sale of property. It may be made so by the express stipulations of the parties, or it may arise by implication, from the very nature of the property, or the avowed objects of the seller or the purchaser."

The maxim, and its exceptions, were carefully considered, and the decisions of the English Chancellors reviewed, by Chancellor Kent, in *Benedict v. Lynch*, 1 Johns. Ch. 370, 7 Am. Dec. 484. After citing many authorities, he says:

"I do not perceive, therefore, that in the more ancient cases there is no (any?) real ground for the opinion that the time stipulated for the performance of a contract is of no real moment in this court, and I am at a loss to conceive how such an extravagant proposition could ever have gained currency. It is certainly, and very justly, exploded in the modern decisions."

Mr. Bispham states the doctrine, as administered in American courts of equity. He says, that, among the exceptions to the maxim are:

"The nature of the property, or the surrounding circumstances, which would make it inequitable to interfere with, or modify, the legal right * * * in regard to the 'surrounding circumstances,' which may render time of the es-

sence of the contract, they must of course depend upon the facts of each particular case; such as whether the value of the property had greatly diminished, whether the vendee has bought to sell again. Indeed, in this country, the fact that land bears a much more commercial character than it does in England, is subject to more fluctuations, and has more of a speculative value, has led to not a few expressions of judicial opinion that time ought, as a general rule, to be considered as of the essence of a contract. But perhaps the safest statement of the law is that the general rule is the same in the United States as in England, but that exceptions, growing out of the circumstances of the individual transactions, are more numerous and looked upon with more favor." Eq. 394.

So Prof. Pomeroy, after stating the general rule, says:

"Time may be essential. It is so whenever the intention of the parties is clear that the performance of its terms shall be accomplished exactly at the stipulated day. The intention must then govern. A delay cannot be excused. A performance at the time is essential; any default will defeat the right to a specific enforcement." Eq. 1408.

Judge Marshall says:

"If, then, a bill for a specific performance be brought by a party who is himself in fault, the court will consider all the circumstances of the case, and decree according to those circumstances." *Brashier v. Gratz*, 6 Wheat. 534, 5 L. Ed. 322.

Judge Story, in *Taylor v. Longworth*, supra, says:

"Relief will be decreed to the party who seeks it, if he has not been grossly negligent, and comes within a reasonable time, although he has not complied with the strict terms of the contract. But in all such cases, the court expects the party to make out a case free from all doubt; and to show that the relief which he asks is, under all the circumstances, equitable; and to account in a reasonable manner for his delay and apparent omission of duty."

Chancellor Kent, in *Benedict v. Lynch*, supra, says:

"From the review which I have taken of the cases, the general principle appears to be perfectly established that time is a circumstance of decisive importance, in these contracts, but it may be waived by the conduct of the party; that it is incumbent on the plaintiff, calling for a specific performance, to show that he has used due diligence, or, if not, that his negligence arose from some just cause, or has been acquiesced in. And it is not necessary for the party resisting the performance to show any particular injury or inconvenience; it is sufficient if he had not acquiesced in the negligence of the plaintiff, but considered it as releasing him."

In *Thompson v. Dulles*, 5 Rich. Eq. (S. C.) 370, the following language is quoted with approval from Story's Eq. § 776:

"Though time is not, generally, deemed in equity to be of the essence of the contracts of sale, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract, yet courts of equity have regard to time, so far as it respects the good faith and diligence of the parties."

In *Falls v. Carpenter*, 21 N. C. 237, 28 Am. Dec. 592, Ruffin, C. J., says:

"It is not denied that time is material in equity. It is always respected here, nor is it denied that time may be of the essence of a contract. Exact punctuality may be of great importance to the interests of a contracting party in many situations. * * * In others, we do not doubt that the instrument may be so framed as to show what is true, namely, that it is a substantial part of the contract. In those cases, a court can no more dispense with that

than any other vital provision. But the parties themselves can dispense with it; and the inquiry, where it has once existed, is whether they have done so."

Specific performance was enforced, upon the facts in that case.

[3] Before proceeding to a discussion of the facts in this record, it will be well to notice another fundamental maxim, or principle, in equity, applicable to bills for specific performance. It is said:

"But, even when a particular contract belongs to such a class, the right to its specific performance is not absolute, like the right to recover a legal judgment. The granting the equitable remedy is, in the language ordinarily used, a matter of discretion; not of an arbitrary, capricious discretion; but of a sound, judicial discretion, controlled by established principles of equity and exercised upon a consideration of all the circumstances of each particular case." Pom. Eq. 1404.

Gaston, J., in *Leigh v. Crump*, 36 N. C. 299, says:

"The specific execution of a contract in equity is a matter not of absolute right in the party, but of sound discretion in the court. * * * Although it be valid at law, and, if it had been executed by the parties, could not be set aside because of any vice in its nature, yet, if its strict performance be, under the circumstances, harsh and inequitable, a court of equity will not decree such performance, but leave the party claiming it to his legal remedy."

In *Lloyd v. Wheatly*, 55 N. C. 267, Battle, J., says:

"Even the mere fact that the contract is a hard one and would press heavily on the defendant will induce the court to withhold its aid, and leave the plaintiff to his remedy at law."

In *Calverley v. Williams*, 1 Vesey, Jr., 201, it is said:

"Nor will a court of equity enforce a contract according to its terms, when to do so would violate the real object of the contract in the minds of the parties when the contract was made, and produce a result not contemplated at the time of the execution of the agreement." *Rudisill v. Whitener*, 146 N. C. 403, 59 S. E. 995, 15 L. R. A. (N. S.) 81; *Hardy v. Ward*, 150 N. C. 385, 64 S. E. 171.

In *Thompson v. Dulles*, 5 Rich. Eq. (S. C.) 370, the chancellor says:

"The principle is sound and just, and demanded alike by morals and by policy, that he who has neglected to perform a duty which he might have performed, and ought to have performed, has no claim upon the court to compel the other party to perform his engagements. Whenever such negligent party comes into this court, he must be told that he has neglected to do equity, and has therefore deprived himself of the equity he claims."

In *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501, cited by complainant, it is said:

"When a contract is of this character, it is the usual practice of courts of equity to enforce its specific execution upon the application of the party who has complied with its stipulations on his part, or has seasonably and in good faith offered, and continues ready to comply with them. But it is not the invariable practice. This form of relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all of the circumstances of each particular case." *Seymour v. Delancy*, 3 Cow. (N. Y.) 445, 15 Am. Dec. 270.

In *Strickland v. Fowler*, 21 N. C. 630, the principle is recognized that the right to relief depends upon the circumstances, and whether plaintiff is in, or out, of possession.

In *Bateman v. Hopkins*, 157 N. C. 470, 73 S. E. 133, Ann. Cas.

1913C, 642, the vendor waived a strict compliance by the vendee, who was ready, willing, and able to comply. The vendor repudiated the contract—insisted that he was not bound.

The impression, to some extent, prevails that a court of equity disregards time in the enforcement of contracts and, in that respect, makes a new and different contract for the parties. This impression has foundation in language used, in some cases, by judges. The value to be attached to such expressions depends largely upon the facts in the case under consideration. The language of Chancellor Kent in *Benedict v. Lynch*, *supra*, states the correct view. He says:

"It may, then, be laid down as an acknowledged rule in courts of equity, and so the rule is considered in the elementary treatises on this subject, * * * that where the party who applies for specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay, and when there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance. This rule appears to me to be founded on the soundest principles of policy and justice. Its tendency is to uphold good faith and punctuality in dealing. The notion that seems much to prevail (and of which the facts in the present case furnish an example), that a party may be utterly regardless of his stipulated payments, and that a court of chancery will, almost at any time, relieve him from the penalty of his gross negligence, is very injurious to good morals, to a lively sense of obligation, to the sanctity of contracts, and to the character of this court."

Chancellor De Saussure, in *Doar v. Gibbes*, Bailey, Eq. (S. C.) 371, well says:

"Specific performance of an agreement to sell lands will not be enforced against the vendor, when the vendee has neglected to comply with conditions stipulated by the agreement, within the time limited by it, and the vendor has, in consequence, sold and conveyed to another purchaser."

In *Brashier v. Gratz*, *supra*, Judge Marshall says:

"This, then, is a demand for a specific performance, after a considerable lapse of time, made by a person who has failed totally to perform his part of the contract; and it is made after a great change, both in the title and in the value, of that which was the subject of the contract, and by a person who could not have been compelled to execute his part of it, had circumstances taken an unfavorable direction."

Brazier was insolvent.

[4] Without further extending the citation of authority, although I have, so far as possible, examined the cases cited by complainant, the merits of the controversy may be dealt with. The evidence fails to show that complainant took, or expected to take, possession of the land. He failed to pay the tax assessed upon it. He had, during the spring of 1907, been discharged of his debts by a bankrupt court. It seems that this fact was not known, or communicated, to defendants; there is no suggestion that he had any resources of his own with which to pay the purchase money. While in the form of a bilateral contract, the transaction, so far as its enforcement by legal proceedings was concerned, was but an option. That prompt payment of one-third of the purchase price, on September 9, 1907, was contemplated by the vendors, is manifest. It is but just to complainant to say that he also contemplated prompt payment; his conduct sustains this view.

The defendants did not hold the land as an investment, or with a view to its cultivation or improvement; it was held for sale; it does not appear what proportion of the acreage was held in fee and in timber "or timber rights." It is equally clear that complainant was contracting to buy for the purpose of immediate resale; he so avers in his bill. The element of pretium affectionis did not enter into the transaction. There is no suggestion that he had the money or resources with which to pay the purchase money otherwise than by a sale, or that he contemplated improving, clearing, or cultivating the land. The transaction was speculative, commercial, and, in this domain of business, time of performance is always essential. The value of timber rights and timber lands, it is well known, fluctuates in response to commercial, industrial, financial, and other disturbing conditions. It is manifest that the payment of the purchase price, at the time it was due, was of importance to the vendors. The telegrams and other correspondence show that they were using the obligation of complainant as a basis for credit, or collateral, in banks. This was known to him.

While defendants complied with every request made by complainant for extension of time, they, on each occasion, insisted, and he promised, that the money should be paid according to the terms of the original contract, as extended. Complainant was, in each instance, notified of the condition existing; that the banks were carrying the paper, or extending accommodation to defendants upon it. Defendants were anxious to consummate the trade and to extend to complainant every reasonable accommodation to enable him to complete the purchase. It does not appear that complainant went to see Mr. Tucker, as he was repeatedly requested to do, or that he expended any time or money in endeavoring to meet his engagements. The only suggestion which he makes, explanatory of his failure to meet his obligation, is the sickness of his father and the "panic of 1907." When he asked for extension on account of his father's illness, on March 11, 1908, after two extensions had been granted, he does not, in his telegram, say that he expected to get the money from his father, but that he is detained at Elmira by his father's sickness; "Can fix as soon as can leave." He is granted the extension asked for on that account. He does not show, by his father, or otherwise, that he (his father) was able, or willing, or expected to aid him. He says that he did not let his father into the contract. The conditions produced by the panic, doubtless, also affected defendants. Tucker states his experience, by reason of complainant's failure to meet his obligation, quite strongly. He writes March 16, 1908: "I do not think you realize how hard it is for me to arrange this matter for you, but I am very glad that I have been able to do so." He told Graves that complainant's failure to meet his obligation had caused him to "sweat blood." Complainant, in his letters to Tucker, does not suggest that he expected to get the money from his father. In asking the bank for an extension on the notes due March 18, 1908, until April 25th, he says: "Will surely have money for you by the above named time." This extension was granted with the statement: "Must be met then."

The president of the bank writes, confirming the telegram, saying: "Will again say that we shall expect payment at that time." No payment was made on April 25th, whereupon the bank, on April 27th, wires him calling his attention to the situation. On April 29th, Tucker wires him that the banks are calling on him "to make good your paper. Answer definitely, quick."

From that day until May 18th, telegrams passed between the parties; defendant Tucker urging payment, complainant promising, and failing, to pay. Tucker continued, up to July 13th, to urge settlement, but after May 13th he received no response, until, July 20, 1908, complainant makes an entirely new proposition, making no reference to the original contract: "Will pay you August second for nineteen thousand acres. One third cash—balance one, two years—bankable paper. Trying to make it all cash." It will be observed that Graves says that, some time before the last date, he had a conversation, in Charleston, with Tucker, trying to get an extension, and failed; that, again in June, in Baltimore, he met Tucker and had conversation with him; both of which are set out in the evidence; and that he notified complainant of both conversations. He therefore knew, when he made the proposition of July 20th, that Tucker regarded the contract of June 11, 1907, and the extensions thereof, at an end—abandoned. It is true that Tucker, on several days during July, had wired, urging him to do something, but to these no response was made. Complainant, in his testimony, is not quite frank in reference to this phase of the matter. He is shown the telegram from Tucker, of July 25, 1908: "Telegram received. Absolutely necessary for us to have conference immediately. Wire quick what day next week you can be here." And when asked, "What was that conference concerning?" says, "I suppose our deal." "That is the only business you had with him?" "Yes, sir." The inference to be drawn from these questions and answers is that the telegram of July 25th referred to the "deal" of June 11, 1907, whereas, when complainant's telegram of July 20th is introduced, it is apparent that Tucker was referring to the proposition contained in it. Although Tucker sent several telegrams after that of July 25th, urging complainant to make good his last proposition, he utterly failed to do so.

Again, complainant says that he was never notified that defendants insisted or claimed that he had forfeited all claims under the contract; whereas, his agent and witness, Graves, says that he notified complainant of the conversations with Tucker in Charleston and in Baltimore. Both were prior to July 20, 1908. He therefore must have known, before that time, that Tucker regarded the contract forfeited; this explains his proposition of July 20, 1908. Notwithstanding his proposition of that date, and Tucker's repeated expression of his willingness to consider it up to August 11, 1908, when he wired, "Please wire me immediately and definitely what you propose doing," he does nothing, makes no response to this urgent request to say what he proposed doing. No further communication is had between the parties until on November 28, 1908, when Tucker writes Graves for the abstracts and plats of the land. This letter is introduced by complainant. In it Tucker refers to the negotiation with Janes; urges Graves to hurry

him up. Thus complainant had notice that he was endeavoring to sell to Janes. On January 4, 1909, he writes Tucker, referring to the letter to Graves, and saying: "I am sending you, by express, to-day, prepaid, the book of abstracts and the blueprint of the Georgia lands. The book of plats is in Elmira, N. Y. I have ordered it shipped here and should you think you will need it, I shall ship it to you on request." On January 6th Tucker acknowledged receipt of the express receipt and requested complainant "to forward receipt as soon after their arrival in Asheville as practicable."

The two grounds upon which defendants rely, as a defense to the bill, are that, time being of the essence of the contract, complainant is not entitled to invoke the equitable power of the court to enforce specific performance, and that complainant, recognizing the fact that he had forfeited his rights under the contract by his failure and inability to pay the purchase money according to its terms as extended, abandoned all rights under it. A careful examination of the evidence discovers that, at the time they entered into the contract, and when defendants granted the several extensions, they understood and expected that the money was to be paid when due; that this was essential to the preservation and enforcement of their obligations; that complainant recognized this to be so, and by his offer on July 20, 1908, to make a new and different contract, his return of the abstracts and plats on January 4, 1909, and his effort through his attorney, Mr. J. H. Tucker, on January 15, 1909, to secure "some consideration" to "get a settlement," and his failure to file his bill until April 28, 1910. All of these acts indicate that he was fully aware of the fact that he had forfeited any rights which he had under the contract. He has never, at any time, offered to pay the money, or shown that he was able; on the contrary, every declaration, coming from him, shows that he was unable to do so. He was not entitled, either at law or in equity, to compel defendants to hold, for an indefinite length of time, a large body of timber land and timber rights, the value of which was fluctuating, when he well knew that they were anxious to sell, compelled to secure credit from the banks to enable them to "carry" the property, and he was unable to raise the money or respond to a judgment for its recovery.

[5] The complainant cites a number of cases discussing the right of one party to a contract to rescind, or ask for a decree of rescission. The question of rescission is not presented, either by the prayer for relief, or the evidence in this case. The duty of one party to a contract, who seeks to rescind, to restore to the other party the amount received by him in part performance, or on account of the contract, is well settled and always enforced. In such cases the actor must "do equity," as the condition upon which he is given relief. Here the defendants are not invoking any aid of the court; they have neither rescinded the contract, nor do they ask the court to do so; they simply stand upon their rights under the contract, relying upon its terms and the failure of the complainant to perform his obligation as a defense to his suit. An application to a court of equity for a decree rescinding a contract is usually based upon some element of illegality, fraud, mutu-

al mistake, or some other invalidating circumstance. The distinction between the principles controlling the equity for rescission and for specific performance is fundamental. Courts and text-writers sometimes speak of the refusal of the vendor to convey, after the vendee has failed to pay the purchase money, as an election, on his part, to rescind the contract, or treat it as rescinded. This language does not accurately describe the conduct of the vendor, nor the status of the contract. The contract, in this case, remains in full force and effect; neither party has changed or modified it, or the legal obligations assumed or created by it. Complainant, relying upon his conception of his remedial rights, under the contract, in a court of equity, demands specific performance on the part of defendants, with a prayer for such other and further relief as, upon the evidence, he is entitled to. Defendants resist this demand, insisting that the obligations, upon the performance of which the equitable remedy invoked depends, has not been performed by complainant, and that therefore he is not entitled to any relief in a court of equity.

In *Glock v. Howard-Wilson Col. Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, Mr. Justice Henshaw, in a well-considered opinion, says:

"While it is essentially true that in case of a rescission the vendee may demand that he be restored to his original condition, it does not follow that a vendor who refuses to convey after such breach by the vendee thereby rescinds. To the contrary, in refusing to convey after the vendee's default, he is not treating the contract as at an end, but is expressly standing upon it, and basing his rights upon its terms, covenants, and conditions."

This is an accurate description of the status of defendants in this case. They are asking no relief of the court; they are standing strictly on the defensive and abiding by the terms of the contract.

[6] Complainant avers that defendants are in default, because they did not tender a deed for the land. By reference to the terms of the contract, it appears that the defendants obligated themselves to deliver the deed of conveyance "on the payment of the amount falling due hereunder 90 days from the date hereof." In extending the time for payment of this amount, the parties expressly kept in full force and effect the terms of the contract of June 11, 1907. Until the payment of the amount due on the 11th day of September, 1907, or on the day to which it was extended, defendants were under no obligation to tender a deed.

[7] To the suggestion that before defendants were entitled to call for payment of the one-third due September 11, 1907, they were required to have the lands surveyed and the exact number of acres ascertained, it is sufficient to refer to the language of the contract; the number of acres in each tract is stated with either a reference to a survey, or other description; it is manifest that no further survey was contemplated. The frequent requests for extension, and the execution of notes for the one-third of the purchase money, without any suggestion that a survey was demanded or expected, together with the failure on the part of complainant in the bill, or in his testimony, to make such suggestion, excludes the idea that it was in the minds of either of the parties.

[8] Complainant calls attention to the failure of defendants to return his notes. It is true that the retention of notes given by a vendee for the purchase money of land is usually considered as a strong circumstance tending to negative the idea that the vendor regards the right of the vendee as forfeited, or his rights abandoned, and, with other sustaining evidence, would properly have great weight in the mind of the chancellor. It is in evidence here, however, that R. P. Tucker said to complainant's attorney that he did not consider the notes of any value and was ready to surrender them. This offer is repeated in the answer. All of the evidence tends to show that they are of no value. The failure of defendants to return them is not sufficient to overbalance the abundant evidence that, by their conduct as well as Tucker's declarations, the parties regarded the rights of complainant as at an end. Complainant made no offer, nor did he express any purpose, to pay for the land, after May 13, 1908; his attorney, January 16, 1909, simply said that he thought that he was "entitled to some consideration," and wished to have a settlement. There was never any controversy as to the amount due, but one settlement could be made according to the terms of the contract as extended—payment of the balance then due; this was not proposed by his attorney. It will be further noted that, under the terms of the agreement to extend the time of payment of the one-third, no extension had been asked or granted as to the balance of the purchase money; on the contrary, it was expressly stipulated that, in all other respects, the terms of the contract remained in force. Hence there was due on September 11, 1908, the second installment of the purchase money and interest thereon from September 11, 1907. The language used by Lord Chancellor Loughboro in *Floyd v. Collett*, 4 Bro. Ch. 469, is very appropriate: "If a given default will not do, what length of time will do?" I am clearly of the opinion that the complainant is not entitled to specific performance, nor to an accounting for amount received by defendant for the land.

[9] The sole question, remaining for consideration, is whether, upon the evidence, complainant is entitled to recover the amount paid on account of the purchase money. No such relief is demanded, nor is the bill drawn with such object. The prayer for general relief, however, invites a consideration of every phase of the testimony.

[10] The entire purchase price amounted to \$277,062.50, upon two-thirds of which interest was to be computed from September 11, 1907, payable annually. Assuming that complainant had complied with his contract on May 13, 1908, the due date of the last extension, the interest then due would have closely approximated the amount paid by him.

In *Hansbrough v. Peck*, 5 Wall. 497, 18 L. Ed. 520, it appeared that, under a contract to convey real estate upon the payment of the purchase money (\$134,000) in stipulated installments, time being declared essential, the plaintiff paid \$28,000 interest and \$10,000 on account of the notes in addition to a large outlay for improvements. After forfeiture for failing to make payment according to the terms of the contract, he brought suit to recover the amount paid. The court dismissed the bill. Mr. Justice Nelson said:

"No rule in respect to the contract is better settled than this: That the party who has advanced money, or done an act in part performance of the agreement, and then stops short and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed, * * * according to the contract, will not be permitted to recover back what has been advanced or done. * * * We have thus gone carefully over the case as presented, and considered every ground set up on the part of the plaintiffs for the relief prayed for; but, with every disposition to temper the sternness of the law as applicable to them, we are compelled to say that, according to the settled principles both of law and equity, a case for relief has not been established. The truth of the case is that these plaintiffs improvidently entered into a purchase beyond their means, and, doubtless, relied very much upon the rise of the value of the estate, and of the income, to meet the payments and expenditures laid out upon it. Their anticipations failed them, etc."

In *Glock v. Howard-Wilson Colony Co.*, supra, the question is discussed and the same conclusion reached. It is said:

"Upon his (plaintiff's) failure to make payment the vendee committed a breach, and no affirmative act upon the part of the vendor was necessary to bring about this result. Months after, and without any equitable showing to relieve the default, the vendee makes tender, and because of its refusal claims the right of recovery. But the vendor, in refusing to accept the tender and repay the money, is neither violating his contract nor rescinding it, nor treating it as at an end. He is standing squarely upon its terms, * * * and a court of equity, no more than a court of law, will relieve a vendee, under such circumstances, from penalties arising from the breach of such condition, in the absence of any equitable showing to excuse his default."

In the instant case, no tender of the balance due was made by complainant.

Sanders v. Brock, 230 Pa. 609, 79 Atl. 772, 35 L. R. A. (N. S.) 532, is very much in point. Plaintiff entered into a contract with defendant for the purchase of a lot in the city of Philadelphia, paying \$1,000 cash and \$1,000 in addition, for an extension. Plaintiff failed to pay the balance when due, although defendant was ready to comply and tendered a deed. Defendant sold the lot for an advanced price. Plaintiff sued in assumpsit for the amount paid. The court held that he was not entitled to recover. The opinion is sustained by citation of abundant authority. The learned justice pertinently asks:

"Must he (the vendor) forever continue to hold the property to await the offer and convenience of the purchaser, giving to the latter an opportunity to complete the purchase if the property advanced in price, or refuse if its value diminished, and, in the meantime, subject the vendor to the risk of a loss, possibly imperiling his financial standing?"

The law imposes no such unreasonable requirement on a party who has, in good faith, kept and offered to perform the stipulations of the contract. It is true that many cases may be found, some of them cited by counsel for complainant, in which the court has required the vendor, who has received a portion of the purchase money, to account for it—when the vendee has forfeited his right to demand strict performance. It will be found that they rest upon the peculiar facts in each case rendering it inequitable for the vendor to retain the money. In such cases either the amount paid was a very large proportion of the contract price, or the vendee had taken possession and made improvements upon the land, or the vendor had repudiated, or refused to perform, the con-

tract according to its terms, or disclosed other equitable elements appealing to the conscience of the chancellor.

Of the cases cited by complainant, *Lewis v. Hawkins*, 23 Wall. 120, 23 L. Ed. 113, was a bill by the vendor to subject the land to sale for the payment of the balance due on the purchase price; the vendee was in bankruptcy. In *Brown v. Guaranty Trust Co.*, 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468, the court found abundant evidence of acquiescence in delay of payment excluding the idea that either party regarded time as of the essence of the contract. It is uniformly held that, in such cases, the vendee is relieved from strict performance, as, when the vendor relies on the statute of frauds, the contract not being in writing, the court will require him to account for the enhanced value of the land by reason of improvements and the amounts paid in the purchase money, before ejecting the vendee. Gaston, J., says that, in such cases, "it is against conscience that they (the vendors) should be enriched by gains thus acquired to his (vendee's) injury." *Albea v. Griffin*, 22 N. C. 9. All of these cases are based upon the fact that the vendor has either refused to perform, repudiated his contract, or been guilty of unjust and inequitable conduct. None of these elements are found in this evidence. The defendants not only did not refuse to execute the contract, according to its terms, but granted every indulgence and extension requested by complainant, reserving always the provision that he was expected to meet his engagements promptly, and this complainant always promised, and always failed, to do. Certainly this indulgence should not, now, be imputed to defendants as inequitable or unrighteous. It never misled complainant into supposing that he was to have an unlimited time to pay for the land.

Upon a careful examination of the evidence, exhibits, and very helpful briefs of counsel for the respective parties, I am brought to the conclusion that complainant is not entitled to a decree for specific performance, and is therefore not entitled to any other relief in this court. I have not discussed the question of laches urged by defendants. The complainant certainly knew in June, 1908, that defendants regarded the complainant as in default and refused to further extend the time. He was informed by his agent, S. T. Graves, that no further extension would be granted. He had in his possession defendants' letter to Graves, November 28, 1908, in which he expressly stated that he was negotiating with Janes for a sale of the land, and therefore wished a return of the plats and abstracts. On January 15, 1909, his attorney knew that Janes and Byrd were in Charleston for the purpose of closing the negotiation for the purchase of the property. Notwithstanding all of this, he remains quiescent until April 28, 1910, when he files his bill—all of this without any explanation or assigning any reason therefor. He has never tendered the purchase money, nor does he allege or show that he ever intended or was able to do so.

In view of all of the circumstances, there was unreasonable delay. The bill will be dismissed, at complainant's cost. I will hear a motion to divide the allowance, to the special master, for taking the testimony. A decree may be drawn in accordance with this opinion.

BARKLEY et al. v. HAYES et al.

SYNOD OF KANSAS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA et al. v. MISSOURI VALLEY COLLEGE et al.

(District Court, W. D. Missouri, W. D. August 16, 1913.)

Nos. 3,540 and 3,546.

1. RELIGIOUS SOCIETIES (§ 18*)—CHURCH PROPERTY—RIGHT OF CONTROL.

A member of the Presbyterian Church or of the Cumberland Presbyterian Church, under their form of organization, has no individual ownership in any property of the church which has been purchased or conveyed for the general use of a congregation or for general use for religious purposes, nor has the congregation which uses it, but the same is vested in the general church, which through its general assembly has the ultimate power of control, although the conveyance may have been to the trustees of the particular congregation.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 111-129; Dec. Dig. § 18.*]

2. RELIGIOUS SOCIETIES (§ 25*)—NECESSARY PARTIES—PERSONS SUING AS REPRESENTATIVES OF A CLASS—OFFICERS OF CHURCH ORGANIZATION.

Officers of the general assembly of the Presbyterian Church in the United States of America, which is the elective governing body of such church, as representatives of the general membership may maintain a suit in equity to determine property rights of the church.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 154-167; Dec. Dig. § 25.*]

3. RELIGIOUS SOCIETIES (§ 34*)—POWER OF CHURCHES TO EFFECT UNION.

A Christian church, in the absence of anything in its constitution to the contrary, has inherent power to unite with another church, involving the surrender of the name and organization of one of them, where there is sufficient identity of faith to warrant their union.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 209-211; Dec. Dig. § 34.*]

4. RELIGIOUS SOCIETIES (§ 12*)—SUITS RESPECTING PROPERTY RIGHTS.

Where controversies in the civil courts concerning property rights of religious societies of the associated class, having representative bodies vested with ecclesiastical control over the subordinate bodies, are dependent on questions of doctrine, discipline, ecclesiastical law, or church government, as a general rule the decision of such highest tribunal of the organization will be accepted by the courts as conclusive.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 87-98; Dec. Dig. § 12.*]

5. RELIGIOUS SOCIETIES (§ 34*)—UNION OF CHURCHES—LEGALITY—PROPERTY RIGHTS.

Both the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church, which separated from the former in 1813, were of the associated or representative class, each having a central representative general assembly, which was the final arbiter on all questions of doctrine, faith, and discipline and with the concurrence of the several presbyteries determined all questions of church government. The division was caused by the dissent of the Cumberland Presbyterians from the Westminster confession of faith, but the doctrinal standards of the older church were altered from time to time, and, after several years of conference, a plan of "reunion and union" was submitted by the general assembly of each church to its presbyteries, and, having been adopted by the requisite votes, the union was effected at the next meeting of the general assemblies; the united church taking the name of the "Presbyterian Church in the United States of America." *Held*, that the union was within the powers of the bodies which effected it and, on the evidence,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that such powers were regularly and lawfully exercised; that there was no such variance of doctrine between the two churches as to prevent their union; and that its effect was to vest in the united church all property rights of the constituent churches.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 209-211; Dec. Dig. § 34.*]

6. COURTS (§ 365*) — FEDERAL COURTS — AUTHORITY OF DECISIONS OF STATE COURTS.

A single decision of the Supreme Court of a state upon the question of property rights arising out of such church union cannot be held conclusive on a federal court even as to property in such state in a subsequent suit between different parties and involving different property; the question being one of general law and involving property in all the states.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969-971; Dec. Dig. § 365.*]

In Equity. Suits by James M. Barkley and others against Hugh Hayes and others, and by the Synod of Kansas of the Presbyterian Church in the United States of America against the Missouri Valley College and others. On final hearing. Decrees for complainants.

Frank Hagerman, of Kansas City, Mo., and Virgil V. Huff, of Marshall, Mo. (J. W. Suddath, of Warrensburg, Mo., W. M. Williams, of Boonville, Mo., and John M. Gaut, of Nashville, Tenn., of counsel), for complainants.

W. C. Caldwell, of Trenton, Tenn., S. B. Ladd, of Kansas City, Mo., R. M. Reynolds, of Marshall, Mo., and T. B. Allen, of St. Joseph, Mo., for defendants.

VAN VALKENBURGH, District Judge. These are cases brought by representatives of the Presbyterian Church in the United States of America to define the status of a large number of church properties in the state of Missouri. The first commonly called the "Church Case," is brought by the moderator and stated clerk, who are, respectively, chairman and secretary of the Executive Commission of the General Assembly of the Presbyterian Church in the United States of America, who act individually and as such officers and representatives of the members of said Presbyterian Church, against certain representative members of those who claim to form the Cumberland Presbyterian Church, to which church it is conceded that the property which is the subject of this litigation originally belonged. This property consists of numerous churches located in various parts of this state, and used for purposes of congregational worship.

The second suit is brought by the Synod of Kansas of the Presbyterian Church in the United States of America, a religious corporation organized and existing under the laws of Kansas, and also by certain individuals who are officers, members, and representatives of the Synod of Kansas, a voluntary organization and part of said Presbyterian Church, against the Missouri Valley College, a corporation organized and existing under the laws of Missouri, and certain individual defendants as members, agents, and representatives of what formerly was, and is by them still claimed to be, the Missouri Synod of the Cumberland Presbyterian Church in the State of Missouri, a voluntary religious organization. The controversy arises out of the alleged reunion and union in 1906 of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church. The former church claims that by virtue thereof the property, church, educational,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and otherwise, of the Cumberland Church, passed into the ownership and control of the united church represented by complainants. The defendants, and those whom they represent, deny the validity of the merger, and consequently such resulting effect upon the property involved. The object of the bills is to quiet the title to all the property therein described in the united church, to wit, the Presbyterian Church in the United States of America, fixing and determining the interest acquired therein by virtue of said alleged contract of merger; that the defendants, and all persons acting in concert with them, be enjoined from in any wise interfering with the use by complainants and the members of said united church of any of said property in Missouri held by trustees for the benefit of the Cumberland Church at the time of said merger; that an account be taken of all the property in Missouri heretofore held in trust by the Cumberland Church, and the same be impressed with the right of the united church to the use of the same. In the College Case the relief prayed is to this same effect, varying only to conform to the peculiar nature of the property therein under consideration.

This merger between the two churches, and the title to property claimed thereunder, has been the subject of decision by courts of last resort in twelve states, Alabama, Arkansas, California, Georgia, Illinois, Indiana, Kentucky, Mississippi, Oklahoma, Texas, Tennessee, and Missouri; also, by the District Courts of the United States for the Middle and Western Districts of Tennessee.* Certain preliminary questions have been dealt with by the Supreme Court of the United States.† In all of these jurisdictions except two, to wit, the state Supreme Courts of Tennessee and Missouri, the contentions submitted have been resolved favorably to the complainants in this case. The Supreme Court of the United States, however, has not yet considered what may be termed the full merits of the controversy.

Exhaustive opinions in the several cases heretofore decided should make unnecessary, and indeed unwarranted, a similarly extended discussion in the case at bar. Further accumulative repetition, either of argument or citation, must impose but additional burden upon those seeking the light of precedent. The very great learning, ability, and industry of those who have voiced the judgment of their respective courts have left little that can be supplied with profit in support of the divergent views expressed. These views have been read and considered with the care and interest which their merit and the vast importance of the interests demand, and I shall content myself with announcing

*Harris v. Cosby, 173 Ala. 81, 55 South. 231; Sanders v. Baggerly, 96 Ark. 117, 131 S. W. 49; Permanent Committee of Missions v. Pacific Synod, 157 Cal. 105, 106 Pac. 395; Mack v. Kime, 129 Ga. 1, 58 S. E. 184, 24 L. R. A. (N. S.) 675; First Presbyterian Church of Lincoln v. First Cumberland Presbyterian Church of Lincoln, 245 Ill. 74, 91 N. E. 761, 19 Ann. Cas. 275; Fussell v. Hail, 233 Ill. 73, 84 N. E. 42; Fancy Prairie Church v. King, 245 Ill. 120, 91 N. E. 776; Pleasant Grove Congregation v. Riley, 248 Ill. 604, 94 N. E. 30; Ramsey v. Hicks, 174 Ind. 428, 91 N. E. 344, 92 N. E. 164, 30 L. R. A. (N. S.) 665; Bente v. Ulay, 175 Ind. 494, 94 N. E. 759; Wallace v. Hughes, 131 Ky. 445, 115 S. W. 684; Carothers v. Moseley, 99 Miss. 671, 55 South. 881; First Presbyterian Church v. Cumberland Presbyterian Church, 34 Okl. 503, 126 Pac. 197; Brown v. Clark, 102 Tex. 323, 116 S. W. 360, 24 L. R. A. (N. S.) 670; Boyles v. Roberts, 222 Mo. 613, 121 S. W. 805; Landrith v. Hudgins, 121 Tenn. 556, 120 S. W. 783; Helm et al. v. Zarecor et al. (D. C. M. D. Tenn., No. 3,590) 213 Fed 648; Sherard et al. v. Walton et al. (D. C. W. D. Tenn., No. 669) 206 Fed. 562.

†Helm et al. v. Zarecor et al., 222 U. S. 32, 32 Sup. Ct. 10, 56 L. Ed. 77; Sharpe v. Bonham, 224 U. S. 241, 32 Sup. Ct. 420, 56 L. Ed. 747.

the conclusions I have reached with no more elaboration than is thought to be required for clearness of understanding. Even so, the discussion is unavoidably extended.

The Cumberland Presbyterian Church had its origin in 1810, through certain ministers of the Presbyterian Church who had separated themselves from the parent organization because of differences in doctrinal belief. The church grew until it embraced many churches, presbyteries, and synods, and a general assembly. From time to time throughout the succeeding century a reunion of the two churches was considered and desired by both associations. Their form of organization and methods of administration were practically identical. They were kept apart by what seemed to be distinctive and controlling differences in faith. In 1903, the Presbyterian Church, through the authoritative voice of its general assembly, made such an explicit revision and interpretation of its doctrinal standards as, in the opinion of the general assembly of both churches, removed all substantial differences between them and rendered their reunion not only possible, but desirable. In 1906 that union was declared to be effected. It did not meet with unanimous approval in the Cumberland Church. A strong minority opposed it from the outset, and still contests its validity; and it is claimed that the properties, church and educational, of the Cumberland Church as it theretofore existed, remain in and should be devoted to the use of those who still adhere to the separate organization and claim to be the legitimate representatives of the latter church.

[1] In resolving the many questions presented, some of which meet us at the threshold of the case, it will aid materially if we first determine the essential character of Presbyterian—and by this I mean also Cumberland Presbyterian—property; how it is held, by and for whom, and in what such Presbyterian property rights consist. In this church the religious congregation or ecclesiastical body holding the property is but a subordinate member of the general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control, more or less complete, in some supreme judicatory over the whole membership of that general organization. The local congregation is itself but a member of a much larger and more important religious organization, is under its government and control, and is bound by its orders and judgments. Therefore, when the property held by the church is that purchased or conveyed for the general use of the religious congregation, not devoted forever by the instrument which conveyed it nor by any specific declaration of its owner to the support of any special religious dogmas, or any peculiar form of worship, it is and remains the property of the general church which exercises such general and ultimate power of control. It does not belong to the particular congregation which uses it, much less to the individual members of such a congregation. It does not belong to the presbytery or the synod, nor, in a strict sense, to the general assembly. It belongs to the church which is composed of its entire membership; that membership being governed and controlled by the organic law of the church, the administration of which is lodged in certain judicatories rising, in regular succession, to the general assembly or court of last resort, embracing in itself legislative, administrative, and

judicial powers. The government of the Presbyterian Church is republican and representative in character. Its administration is vested, not in the individual members, not in the congregations, but in the general assembly and the presbyteries; and the church as a whole, acting through its supreme governing bodies, exercises the ultimate rights of ownership and control over all its properties.

The Constitution of the United States and of the several states guarantees to the individual absolute independence of religious belief and worship. He need associate himself with no religious organization if he does not wish to do so, and he need remain identified with one no longer than he may desire; but when he does unite with a church, and becomes a member of that ecclesiastical body, he voluntarily surrenders his individual freedom to that extent. So long as he desires to avail himself of such a relationship, and to enjoy the privileges and benefits flowing from that association, he must conform to the laws by which it is governed. He cannot complain if its articles of faith be changed, nor if its property—in which he has no individual ownership—be transferred under constitutional forms; in such case, he has no personal or property rights which the civil courts can or should protect. Any other view would be entirely subversive of the very theory of organization. The church would be dissolved into a mere aggregation of individual views and theories. It is impossible that all men, or even many men, should exactly agree upon all the incidental details of standards or policies. It is the substance that is important; and it is essential that the power of decision in such matters should be lodged somewhere, and should be final.

It is otherwise where property is devoted forever by the instrument which conveys it, or by specific declaration of its owner, to the support of any special religious dogmas or any peculiar form of worship. But, in this case, no such question is involved. The deeds to the various properties in the Church Case convey substantially in this form: "To ——— trustees of the ——— Cumberland Presbyterian Church of ——— and their successors." It is broadly argued by defendants that the conveyance of property to particular trustees or officers of a particular congregation of that church in its denominational name would be presumed and held to have created a specific trust for the benefit of that congregation, and for the support therein of the distinctive doctrines of that church. If by this is meant that this form of words creates a specific trust for the teaching of special religious dogmas, or a peculiar form of worship which shall be forever insusceptible of change or of being conducted by any legitimate successor in any other name, I am unable to agree with counsel for defendants. The grant is general in its nature, and, so long as any existing religious congregation can be ascertained to be that congregation or its regular or legitimate successor, it is entitled to the use of the property. Such is undoubtedly the overwhelming weight of decision, both federal and state.

[2] I have discussed this proposition at somewhat unusual length, because to my mind the conclusion reached has a controlling effect upon the solution of several other points in controversy. The question of essential parties to this litigation is immediately suggested. In over-

ruling the pleas to the jurisdiction, which were broadly construed as objections for want of indispensable parties, this court permitted defendants in their answer to avail themselves of the defenses urged by such pleas, and its order was made without prejudice to the right to join them with other matter in any appropriate manner that might be desired. In the memorandum filed I said that I could not on plea take judicial notice of the extent of the custody, control, and management vested in such omitted parties by the church under its rules and ordinances; that the nature of the interest and character of the possession claimed, or asserted, depended upon the construction to be placed upon the church organizations involved, and their power over the church properties concerned. The evidence presented confirms me in the opinion that the properties of the church are held in the manner stated. *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666; *Westminster Church v. Trustees of New York Presbytery*, 142 App. Div. 855, 127 N. Y. Supp. 836-850. Therefore the plaintiffs are entitled to sue in their representative capacity as members of a class without the joinder of other parties, who, as mere title holders, are not indispensable. *Sharpe et al. v. Bonham*, 224 U. S. 241, 32 Sup. Ct. 420, 56 L. Ed. 747; *Helm v. Zarecor*, 222 U. S. 32, 32 Sup. Ct. 10, 56 L. Ed. 77. Independently of other considerations, diversity of citizenship confers jurisdiction.

The same reasoning applies to the College Case. There, out of abundance of caution, the Synod of Kansas, as an incorporated body, was joined with members of the voluntary association, who sued as members of a class. In my opinion, the latter alone were sufficient if my view as to the character of church ownership be correct. The reports of the committee on education to the Missouri Synod of the Cumberland Presbyterian Church in 1874, and the action of the synod thereon, disclose the reasons for the establishment of Missouri Valley College:

"The educational conflict of the day is between secular education, which regards man as simply a skilled producer, and a mere social animal, and Christian education in which the way of salvation is scripturally pointed out, and in which no instruction is given, which is opposed to the principles of the gospel. With the triumph of the latter, we may reasonably expect the church to prosper; with that of the former she must be circumscribed in her influence and usefulness.

"We therefore infer the imperative necessity of a college of high grade for the success of our church in this valley.

"We as a synod are unable to maintain such an institution, as the history of the past clearly teaches.

"That you propose to the other synods of Missouri, and such adjacent synods as may not be officially connected with other institutions, to unite in establishing and maintaining a first-class college to be under the joint control and management of said synods."

The synod adopted the suggestion made. For convenience the college was incorporated, and upon the synods of Missouri and Kansas were conferred supervisory control and visitorial power. The college did not indeed belong to the synods or either of them. It belonged to the general church of which they were subdivisions. The case, in this respect, falls directly within the doctrine announced in *Helm et al. v. Zarecor*, 222 U. S. 32, 32 Sup. Ct. 10, 56 L. Ed. 77. The college as

incorporated lost none of its essential qualities as an agent of denominational service when it became an artificial person, clothed with power to hold property in a corporate capacity. The following language of Mr. Justice Hughes has special application here:

"It is thus evident that the controversy transcends the rivalries of those claiming membership in the board and the assertion of rights inhering in that corporation itself. It embraces the fundamental question of the rights of these religious associations, said to be represented by the respective parties, to use and control the corporate agency and to have the benefit in their denominational work of the corporate property. * * *

"The board is simply a title holder; an instrumentality, the mastery of which is in dispute. But, as it is the holder of the legal title, the complainants seek a decree defining, in the light of the proceedings alleged in the bill, the equitable obligations arising from the nature and purpose of the corporate organization."

It is manifest that the bringing in of additional parties is desired, not for the purpose of a more complete determination of the controversy, but to defeat the jurisdiction of this court. Fortunately, however, this entire matter has been foreclosed by the decision of the Supreme Court in the cases cited.

The decision of these cases must rest upon the answers to be made to the following questions:

First. Had the Cumberland Church power, express, implied, or inherent, to unite with the Presbyterian Church?

Second. If so, was that power properly and legally exercised? And, as corollary to the latter question,

Third. Was there sufficient identity of faith to warrant union?

[3] The first of these questions has been answered in the affirmative by all courts which have dealt with this controversy—the Supreme Court of Missouri alone excepted. The Supreme Court of Tennessee, which decided in favor of the Cumberland Church upon other grounds, has stated the rule with especial force and completeness. It said:

"The implied power of union of one Christian church with another, involving the surrender of the organization of one of them, exists, where there is no explicit pronouncement to the contrary in their constitution, religious standards, or forms of government. There is nothing in the constitution or organization of the Cumberland Presbyterian Church to indicate that it was intended to be a perpetual organization, so that it had or has the power, if properly exercised, to unite with the Presbyterian Church in the United States of America." *Landrith et al. v. Hudgins et al.*, 121 Tenn. 556, 120 S. W. 783.

I think there can be no doubt of the correctness of this conclusion. To support it, it is unnecessary to seek express authority in the constitution itself. It is not necessarily, nor even preferably, based upon the power conceded to be lodged in the general assemblies and presbyteries to amend and alter the standards of faith; nor that in the general assembly to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of the church. The power to unite with another church is inherent in sovereignty. It is repugnant to all conceptions of progress and development, with the increased vitality and power for good in larger fields that flow therefrom, to hold that a church once formed must exist forever as a separate entity, under a separate name, and without prac-

tical verbal change in its declarations of faith. It is true probably that name and doctrinal standards may be altered and amended by procedure expressly indicated in the constitution, but here the specific thing thus provided for is not in terms attempted. It cannot, on that ground, be insisted that some other action, clearly within the inherent powers of the church, and consummated by the sovereign powers of the church acting within the limits of necessarily implied authority, must be invalid. Unnecessary circuitry is not demanded. If, as an incident to this union, the name of the church is changed, and the verbiage of its confession of faith in some degree altered, it does not follow that the union is void.

[4] It remains to be seen whether this union was regularly effected by the sovereign powers of the church. The Supreme Courts of Missouri and Tennessee were of opinion that it was not. All other courts thus far have decided that it was. The latter conclusion has been reached largely, though not exclusively, upon the principle that the Cumberland general assembly, its court of last resort, had jurisdiction to decide this question, and decided in the affirmative, and that the civil courts are bound by this decision. The same supreme judicatory of the Cumberland Church also decided that the doctrinal standards of the two churches were in such substantial accord as to warrant the union. By the constitution the general assembly is given final power to decide in all controversies respecting doctrine and discipline. Concerning the Presbyterian Church in the United States—in this respect no different from the Cumberland Church—the Supreme Court, in *Watson v. Jones*, 13 Wall. 679, 727 (20 L. Ed. 666), said:

"In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority, is that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."

It is unnecessary to prolong the discussion upon this phase. I think the question of regularity in effecting this union, and of substantial identity in the faith of the two churches, was finally and conclusively determined by the general assembly of the Cumberland Church.

The Supreme Court of Missouri, in *Boyles et al. v. Roberts et al.*, 222 Mo. 613, 121 S. W. 805, held that property rights were here involved, and that in such case civil courts do not register as their own the church decrees, even on matters of doctrine and of faith, but investigate them for themselves. And if, in determining the civil or property rights of the parties, it becomes necessary to investigate the articles of faith of a church and the written documents of its judicatories, that will be done, even to the extent of determining whether or not those judicatories have put the right meaning upon these articles. The same doctrine was announced by the Supreme Court of Tennessee in *Landrith v. Hudgins*, *supra*. In order to maintain this proposition it was necessary to discredit the doctrine announced by the Supreme

Court in *Watson v. Jones*. The principles announced by Mr. Justice Miller for the latter court can be most succinctly, but comprehensively, stated by quoting from the syllabus:

"Controversies in the civil courts concerning property rights of religious societies are generally to be decided by a reference to one or more of three propositions: (1) Was the property or fund which is in question devoted by the express terms of the gift, grant, or sale by which it was acquired, to the support of any specific religious doctrine or belief, or was it acquired for the general use of the society for religious purposes, with no other limitation? (2) Is the society which owned it of the strictly congregational or independent form of church government, owing no submission to any organization outside the congregation? (3) Or is it one of a number of such societies, united to form a more general body of churches, with ecclesiastical control in the general association over the members and societies of which it is composed?"

"In the first class of cases the court will, when necessary to protect the trust to which the property has been devoted, inquire into the religious faith or practice of the parties claiming its use or control, and will see that it shall not be diverted from that trust.

"If the property was acquired in the ordinary way of purchase or gift, for the use of a religious society, the court will inquire who constitute that society, or its legitimate successors, and award to them the use of the property.

"In case of the independent order of the congregation, this is to be determined by the majority of the society, or by such organization of the society, as by its own rules constitute its government.

"In the class of cases in which property has been acquired in the same way by a society which constitutes a subordinate part of a general religious organization with established tribunals for ecclesiastical government, these tribunals must decide all questions of faith, discipline, rule, custom, or ecclesiastical government.

"In such cases, where the right of property in the civil court is dependent on the question of doctrine, discipline, ecclesiastical law, rule, or custom, or church government, and that has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive, and be governed by it in its application to the case before it.

"The principles which induced a different rule in the English courts, examined and rejected as inapplicable to the relations of church and state in this country, and an examination of the American cases found to sustain the principle above stated."

As we have seen, the property in dispute was acquired for the general use of the body for religious purposes, with no other limitation. The church is of the associated and not of the congregational class. Therefore the right of property involved is dependent on questions of doctrine, discipline, ecclesiastical law, rule, custom, and church government, which have been decided by the highest tribunal within the organization, and the civil courts will accept that decision as conclusive, and be governed by it in its application to the case before it. In other words, the property right here involved is an incident merely to questions within the jurisdiction of the Cumberland general assembly which have been finally decided by that court of last resort; and so, with but two exceptions, the courts have held.

"It may be that cases may arise wherein the decision of the ecclesiastical tribunal is so palpably erroneous, or so manifestly in excess of its jurisdiction, that the civil courts ought to decline to be bound thereby. Such, however, is not the case here." *Carothers v. Moseley*, 99 Miss. 671, 678, 55 South. 881, 882.

Such a situation was ably discussed in *Mack et al. v. Kime et al.*, 129 Ga. 1, 23, 58 S. E. 184, 194 (24 L. R. A. [N. S.] 675). It was there said:

"There is a radical difference between an abandonment of all the teachings and doctrines of a church and a mere difference of opinion among the members of an organization as to what are the true doctrines and teachings of the organization. There may be cases where an entire abandonment will be attempted, and such intention would be clear and palpable. But the cases which are most apt to arise are those which are upon the border line, when it is hard to determine, in the particular case, whether the action of the constituted authorities of the church is an abandonment of its original teachings or merely a judicial determination as to what are the true teachings of the church. The fact that there are cases lying so near to this border line is the reason that there are apparently conflicting decisions by the courts in this country as to when it is proper for the civil courts to interfere in the affairs of an ecclesiastical organization. It is true, in this class of cases, as it is in every case arising under the law, that the civil courts have generally laid down the correct rule, that they will not interfere with the affairs of an ecclesiastical organization, where the rights of property are involved, unless there has been a palpable attempt by the governmental authorities of the church to abandon altogether the teachings of the original organization."

The exception to the rule is thus stated in *Brundage et al. v. Dear-dorf et al.* (C. C.) 55 Fed. 839:

"The decisions of the supreme judicatory of a religious denomination of the associated class, having a constitution and governed by local, district, state, and national bodies, are not conclusive upon the courts, when they are in open and avowed defiance, and in express violation, of the constitution of such body."

In *Ramsey et al. v. Hicks et al.*, 174 Ind. 428, 442, 91 N. E. 344, 350 (30 L. R. A. [N. S.] 665), the principle is thus stated:

"The recital of portions of the constitution of the Cumberland Church and the proceedings of its general assembly in this opinion was not for the purpose of reviewing the facts and determining for ourselves the correctness of the conclusion reached, but chiefly to show that the question considered and decided was wholly ecclesiastical, that the proceedings were fairly regular and not founded upon a naked usurpation of authority. If church judicatories proceed palpably without jurisdiction, and their action is clearly *ultra vires*, neither the church membership nor the civil courts should respect their decisions; but when the matter in controversy is purely of ecclesiastical cognizance, and the church tribunal proceeds in manifest good faith under color of authority, its decision upon the question of its own jurisdiction, as well as upon subsidiary questions, is binding upon the civil courts."

The same court, in *Bentle v. Ulay*, 175 Ind. 494, 496, 94 N. E. 759, has thus further elaborated its statement:

"That both bodies are representative in form and character, and not independent or congregational, is the controlling fact in the case. It is not denied, but is in fact conceded, that, upon all questions of doctrine, faith, and discipline, the highest judicatory in each of the former organizations was the final arbiter. When the highest judicatory in each therefore agreed upon the unity of the doctrine and faith of each, the practice already being virtually the same, and this was followed by a submission of the question of union in the manner provided by the organic law of each organization for the submission of all questions, through the designated representatives, there necessarily resulted in fact, as well as in law, a union under the adopted name, and with it passed the title to all property not impressed with some other trust, such as might distinguish it."

See, also, *Brown v. Clark*, 102 Tex. 323-333, 116 S. W. 360, 24 L. R. A. (N. S.) 670.

[5] While it is thus established by undoubted weight of authority that the decision of the supreme judicatory of the Cumberland Church that a valid union was effected, both in form and in substance of doctrinal standards, is conclusive and must be accepted by the civil courts, it is unnecessary to base this conclusion wholly upon that ground. I think it conclusively appears, from what has preceded, that that church had inherent power to enter the union. In what body or bodies of the church was that power lodged? By whom is the sovereignty of the church properly exercised?

"Presbyterian church government is representative in form. Neither the constituent churches nor the members thereof legislate directly for themselves. The congregation of a church only elects the ruling elders who compose the church session, and the session in turn selects one of its members as a representative in presbytery. The sovereignty of the church is exercised by the general assembly and the presbyteries acting together; the assembly proposing legislation, and the presbyteries approving or disapproving. They act for the whole church, and the will of a majority of all the presbyteries, acting with the general assembly, expresses the will of all the particular churches. It is essentially a government of the majority. All things which are done by the church as a whole are, according to the letter of the constitution, done by the assembly and presbyteries, and all of the inherent powers of the church as a whole reside in those representative bodies. They constitute the residuum of all the powers, executive, legislative, and judicial, not expressly lodged elsewhere by the constitution. Therefore, when the union was decreed by those bodies, the will of the whole church was spoken." *Sanders v. Baggerly*, 96 Ark. 117, 129, 130, 131 S. W. 49, 54, 55.

See, also, *Landrith v. Hudgins*, *supra*; *Fussell v. Hail*, 134 Ill. App. 634; *Committee of Missions v. Pacific Synod of the Presbyterian Church, etc.*, 157 Cal. 105, 106 Pac. 395.

But it is insistently urged that, even though the church had the power to unite, that power was unconstitutionally and irregularly exercised. The various steps in the procedure covered a period of years. A committee on fraternity and union was appointed by the general assemblies of both churches. They made a report, submitting a plan of reunion and union of the two churches, together with concurrent declarations to be adopted by their respective general assemblies meeting in 1904, and other recommendations. This plan of reunion and union of the two churches was as follows:

"We believe that the union of the Christian churches of substantially similar faith and polity would be to the glory of God, the good of mankind, and the strengthening of Christian testimony at home and abroad.

"We believe that the manifest providential developments and leadings in the two churches since their separation, together with present conditions of agreement and fellowship, have been and are such as to justify their reunion.

"Therefore, we cordially recommend to your respective general assemblies, that the reunion of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church be accomplished as soon as the necessary steps can be taken, upon the basis hereinafter set forth.

"1. The Presbyterian Church in the United States of America, whose general assembly met in the Immanuel Church, Los Angeles, Cal., May 21st, 1903, and the Cumberland Presbyterian Church, whose general assembly met in the First Cumberland Presbyterian Church, Nashville, Tenn., May 21st, 1903, shall be united as one church, under the name and style of the Presbyterian

Church in the United States of America, possessing all the legal and corporate rights and powers which the separate churches now possess.

"2. The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards, and the Scriptures of the Old and New Testaments shall be acknowledged as the inspired word of God, the only infallible rule of faith and practice.

"3. Each of the assemblies shall submit the foregoing Basis of Union to its presbyteries, which shall be required to meet on or before April 30th, 1905, to express their approval or disapproval of the same by a categorical answer to this question:

"Do you approve of the reunion and union of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church in the United States on the following basis: The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards; and the Scriptures of the Old and New Testaments shall be acknowledged as the inspired word of God, the only infallible rule of faith and practice?

"Each presbytery shall, before the tenth day of May, 1905, forward to the stated clerk of the assembly with which it is connected, a statement of its vote on the said Basis of Union.

"4. The report of the vote of the presbyteries shall be submitted by the respective stated clerks to the general assemblies meeting in 1905, and if the general assemblies shall then find and declare that the foregoing Basis of Union has been approved by the constitutional majority of the presbyteries connected with each branch of the church, then the same shall be of binding force, and both assemblies shall take action accordingly."

This plan was submitted to the presbyteries in the following form:

"Presbyterial Vote on Organic Union.

"To the Presbytery:

"Dear Brethren: By referring to the minutes of the last meeting of the general assembly (pages 25, 55a, 30, 55, 48), you will see that, in the constitutional manner, the assembly has submitted to the presbyteries a proposition pertaining to the reunion and union of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church, and you are asked to give due consideration to the same and to vote thereon. This proposition is to be put before the presbytery in the following terms:

"Do you approve of the reunion and union of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church on the following basis: The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards, and the Scriptures of the Old and New Testaments shall be acknowledged as the inspired word of God, the only infallible rule of faith and practice?

"To this question the presbytery is to give categorical answer. While the vote is taken simply upon this question, your action thereon will mean the acceptance or rejection of the entire plan, embracing the Basis of Union, Concurrent Declarations, and recommendations, without amendment or alteration in any part. (See Minutes, pages 62a-65a.)

"For the information of the presbyteries, the amendments to the Westminster Confession of Faith and the Brief Statement of the Reformed Faith have been printed in the assembly minutes. (See pages 72-77.)

"The vote of the presbytery is to be taken on or before April 30, 1905, and the accompanying certificate of the vote is to be returned to the assembly's stated clerk before the tenth day of May, 1905.

"W. E. Settle, Moderator,

"J. M. Hubbert, Stated Clerk.

"Marshall, Mo., September 6, 1904."

It is argued that the categorical question thus submitted for answer did not include the proposal that the churches should be united as one church under the name and style of the Presbyterian Church in the United States of America; that the presbyteries voted only upon the doctrinal basis. Even if this were true, it would scarcely be sufficient to defeat the union as a whole. The name to be borne by the united church was of secondary importance. It must be assumed that that church would have some name. If there were an entire change of name, that of the Cumberland Church would obviously be abandoned. If that of either of the churches entering the union were to be retained, it could hardly be anticipated that that of the parent church with its 1,300,000 communicants would give way to that of the smaller organization with less than 200,000. But I am of opinion that the entire plan was submitted by this categorical question, and the circular letter which placed it before the presbyteries. In the letter this appears:

"To this question the presbytery is to give categorical answer. While the vote is taken simply upon this question, your action thereon will mean the acceptance or rejection of the entire plan, embracing the Basis of Union, Concurrent Declarations, and recommendations, without amendment or alteration in any part. (See Minutes, pages 62a-65a.)"

Reference to pages 62a to 65a of the minutes of the general assembly of the Cumberland Church discloses the entire plan of reunion and union of the two churches, including the proposed adoption of the name and style of the Presbyterian Church in the United States of America as that of the united church. The practice of submitting long and involved propositions in abbreviated form by categorical questions to be answered by yes or no is very common. As was well said in *Sanders v. Baggerly*, 96 Ark. at page 139, 131 S. W. at page 57:

"Is it conceivable that the ministers and members composing the presbyteries did not understand, when they voted an answer to the question set forth in the letter of the moderator and stated clerk, that they were approving or disapproving the whole plan of union on the basis of taking the name and adopting the doctrinal and ecclesiastical standards of the Presbyterian Church? We think not. * * *

"The proceedings were not conducted along technical lines, and should not be subjected to a technical scrutiny which would defeat the obvious intention of those who participated. The presbyters are presumed to have been men of at least average intelligence; and it is also to be presumed that they possessed themselves of all the facts concerning the whole plan of union and the effect of the votes which they were called on to cast. Nothing, it seems to us, could be plainer than the manner in which the plan was submitted, and we are unwilling to say that it was or could have been misunderstood by the members of the presbyteries. We say that the whole plan was submitted to and adopted by the presbyteries."

But it is further insisted that the doctrinal and ecclesiastical standards of the churches are so far at variance that no valid union was possible. To this, again, as a matter of independent decision, I cannot agree. When the Cumberland Presbyterian Church was founded, its first synod, which met in 1813, formulated and established a brief statement setting forth the points wherein Cumberland Presbyterians dis-

sented from the Westminster Confession of Faith. They were as follows:

"1. That there are no eternal reprobates.

"2. That Christ died not for a part only, but for all mankind.

"3. That all infants dying in infancy are saved through Christ and the sanctification of the Spirit.

"4. That the Spirit of God operates on the world, or as coextensively as Christ has made atonement, in such a manner as to leave all men inexcusable."

It may readily be conceded that the Westminster Confession of Faith, in terms, as well as in original construction, did not bear such interpretation; but the power to construe and declare its doctrinal standards was vested in the general assembly of the Presbyterian Church. Those standards were from time to time materially modified and altered. In 1903 the general assembly of the Presbyterian Church in the United States of America issued a declaratory statement, together with new chapters, in which, among other things, it was said:

"The Presbyterian Church in the United States of America does authoritatively declare as follows:

"First, with reference to chapter III of the Confession of Faith: That concerning those who are saved in Christ, the doctrine of God's eternal decree is held in harmony with the doctrine of His love to all mankind; His gift of His Son to be the propitiation for the sins of the whole world, and His readiness to bestow His saving grace on all who seek it. That concerning those who perish, the doctrine of God's eternal decree is held in harmony with the doctrine that God desires not the death of any sinner, but has provided in Christ a salvation sufficient for all, adapted to all, and freely offered in the Gospel to all; that men are fully responsible for their treatment of God's gracious offer; that His decree hinders no man from accepting that offer; and that no man is condemned except on the ground of his sin.

"Second, with reference to chapter X, section 3, of the Confession of Faith: That it is not to be regarded as teaching that any who die in infancy are lost. We believe that all dying in infancy are included in the election of grace, and are regenerated and saved by Christ through the Spirit, who works when and where and how He pleases. * * *

"The dispensation of the Gospel is especially committed to Him. He prepares the way for it, accompanies it with His persuasive power, and urges its message upon the reason and conscience of men, so that they who reject its merciful offer are not only without excuse, but are also guilty of resisting the Holy Spirit."

It is upon the basis of this declaration that the union was adopted. In my opinion, those utterances completely met all the points of difference between the two churches. It is true that the Confession of Faith was not rewritten. It is true that some of the phraseology that had previously been regarded as objectionable was left unchanged. Nevertheless, all such standards are the subject of authoritative interpretation. Perhaps certain sections were left untouched from sentimental considerations; just as certain former Cumberland Presbyterians desire to retain the name "Cumberland" and their literal form of confession for similar reasons. It is the substance and spirit, and not the mere letter, which governs. It is true that some subsequent general assembly might change such declarations and construction; but this is possible in any general assembly with respect to any doctrinal standard, and such power is expressly recognized in the several

constitutions. If I am wrong in my interpretation, it is but a demonstration of the soundness of the established rule that judges of the civil courts should leave such questions to those more learned in ecclesiastical law, and more competent to decide them aright. The general assembly of the Cumberland Presbyterian Church, in accordance with its constitutional powers, undertook to discharge this duty, and I concur in its decision.

Counsel for defendants urge that some fraud and misrepresentation appears on the part of those representing the Presbyterian Church, in that the effect of the vote in presbytery was misstated, and that a vote in assembly was unduly precipitated. This feature of the case received no attention at the oral argument. It does not seem to have been presented in earlier cases in other jurisdictions. It probably has its origin in individual misunderstanding; sincere, no doubt, but scarcely justifying such serious consideration. As was intimated in a former decision, and is undoubtedly the general rule, the presence of fraud would justify a court in taking cognizance of a question otherwise left for final determination to some other tribunal; but a charge of fraud against a great religious organization should not be entertained except upon clear proof. The evidence in this case does not measure up to that standard.

[6] Finally, it is urged that the decision of the Supreme Court of Missouri in *Boyles v. Roberts*, supra, should be binding upon this court in the cases at bar. That decision cannot be accorded such force. There is identity neither in parties, subject-matter, nor relief prayed. Furthermore, a single case cannot establish a rule of property, and that decision was rendered long after the rights of the parties under this union had accrued. *Kuhn v. Fairmount Coal Co.*, 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228, and cases cited. It is claimed, however, that a rule of property was established in Missouri by a consistent line of previous decisions. *Watson v. Garvin*, 54 Mo. 353; *Russie v. Brazzell*, 128 Mo. 93, 30 S. W. 526, 49 Am. St. Rep. 542; *Fulbright v. Higginbotham*, 133 Mo. 676, 34 S. W. 875. The only principle laid down in those cases which could in any way be urged as a rule of property applicable to this case is that, where property rights are involved, the civil courts will not be bound by the decisions of the ecclesiastical courts, even on matters of doctrine and faith. If this be a rule of property, it must, to be effective here, constitute a rule of real property, and, as such, affect the rights of the parties, the modes of the transfer, and the solemnities which should accompany them. *Suydam v. Williamson*, 24 How. 427-433, 16 L. Ed. 742. This is not such a rule. It indicates merely a practice of the Missouri courts which establishes no rights, modes, or solemnities, but affects the procedure by which such rights may indirectly be determined. It applies, moreover, if at all, to church property, and no other. The Presbyterian Church, as, indeed, all other associated ecclesiastical bodies, owns property throughout the various states of the Union. It has a code of ecclesiastical law, which is general and not local, and the interpretation thereof, and the fundamental nature of the organi-

zation, it would seem, are matters of general law not subject generally to conclusive local construction.

In such cases, the federal courts will exercise their independent judgment. *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Burgess v. Seligman*, 107 U. S. 20-33, 2 Sup. Ct. 10, 27 L. Ed. 359; *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; *Kuhn v. Fairmount Coal Co.*, 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228. However, the Supreme Court of Missouri in *State ex rel. Watson v. Farris et al.*, 45 Mo. 183, adopted the rule herein announced. The case of *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666, was based in part upon the authority of that decision, which is expressly cited. In such case, this court would not feel at liberty to change the rule in any event, but is constrained to follow that laid down by the Supreme Court in *Watson v. Jones*, *supra*. *Pease v. Peck*, 18 How. 595-598, 15 L. Ed. 518. We have here no case involving a state statute nor long established local customs having the force of law. State law, especially of this character, is not to be applied by United States courts, when sitting as courts of equity, as rules of decision. *Bucher v. Cheshire R. Co.*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; *Michie's Encyc. of U. S. Sup. Ct. Rep.* vol. 4, p. 1051. Entertaining, as I do, profound respect for the Supreme Court of this state as well as for the able jurist who wrote the opinion in *Boyles v. Roberts*, I am firmly of the conviction that the doctrine therein announced is in conflict with the great weight of authority, state and federal; and that it is founded upon a misapprehension of the true rule which should govern the civil courts in their treatment of decisions of ecclesiastical courts of last resort in cases such as are now before us.

The Cumberland Church separated from the mother church because of specific doctrinal differences. These differences have been removed. The Cumberland Church, from the outset, has cherished hopes of reunion, and has several times in the past century made and entertained overtures to that end. The title "Plan of Reunion and Union" significantly describes the attitude and feeling of the two churches. They had inherent power to reunite; they made a reasonable and bona fide attempt to exercise this power, and I believe successfully. We should not demand from church judicatories the literal exactness and precision in matters of procedure that are expected and required in the civil courts under more technical rules of practice. The united church is better equipped to spread its doctrines and to advance the cause of civilization and religious education. This union was conceived and consummated with that worthy object in view. As indicated by the Supreme Court in *Helm v. Zarecor* this controversy transcends the rivalries of the contending parties. It embraces the fundamental question of the right of these religious associations to use and control and have the benefit of these agencies in their denominational work. It involves the success or failure of an ambition century-old, that all those who have embraced substantially the tenets of Presbyterianism should work together with greater power and vitality for universal betterment. The case should receive a broad and liberal construction in harmony with this beneficent purpose.

It follows, from the conclusions reached, that in the Church Case the title to all the property therein described should be quieted in the Presbyterian Church in the United States of America; that the defendants, and each of them, and all other members of the former Cumberland Presbyterian Church, whom they represent, be enjoined from in any wise interfering with the use by complainants, and the members of the Presbyterian Church in the United States of America, of any of the property in Missouri therein described, held by trustees for the benefit of said Cumberland Church at the time of the union of said churches; that in the College Case it be adjudged that the defendants, except the Missouri Valley College, and all those claiming under and represented by them, have no right or title in or to said real estate, and no right or title, legal or equitable, to said trust funds therein described, and no right to the control or possession thereof; that said Missouri Valley College be adjudged to be vested with the legal title to said property, real and personal, in trust, for the benefit of complainants and those whom they represent, to wit, the Presbyterian Church in the United States of America; that the defendants, except said Missouri Valley College, and every person claiming under and represented by them, be forever estopped, debarred, and enjoined from in any way claiming or asserting any title thereto, or in any way interfering with or attempting to interfere with, manage, or control, said property—all to the effect that said Presbyterian Church in the United States of America may use and control, and have the benefit of, said properties in its denominational work.

Decrees may be prepared in conformity with this opinion.

PHILLIPS SHEET & TIN PLATE CO. v. AMALGAMATED ASS'N OF IRON,
STEEL & TIN WORKERS et al.

(District Court, S. D. Ohio, E. D. September 27, 1913.)

No. 12.

1. INJUNCTION (§ 228*)—CONDUCT CONSTITUTING VIOLATION—DIRECTING OFFICERS OF LABOR STRIKE.

The directing officers of a labor union whose members are on a strike and have been enjoined from intimidation will themselves be deemed guilty of a violation of the injunction if they do not prevent, if they reasonably can do so, its violation by those under their control, or if they countenance acts of intimidation and refrain from using, so far as good faith would suggest, the means which they possess of preventing such acts.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 484-495; Dec. Dig. § 228.*]

2. INJUNCTION (§ 230*)—CONTEMPT—NATURE OF PROCEEDING FOR PUNISHMENT —“CRIMINAL PROCEEDING.”

A proceeding against members of a labor union to punish them for contempt for prosecuting a criminal conspiracy to violate an injunction granted by the court in a civil suit restraining the defendants therein from interfering with the business and employes of the plaintiff, to which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

suit the persons proceeded against were not parties, is a criminal proceeding.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502-516; Dec. Dig. § 230.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1751-1753; vol. 8, p. 7623.]

3. INJUNCTION (§ 230*)—CONTEMPT—PROCEEDINGS FOR PUNISHMENT—PLEADINGS.

To authorize remedial relief to the complaining party in a proceeding for contempt for violation of an injunction granted in a civil suit and at the same time to vindicate the authority of the court by fine or imprisonment, there must be a complaint which lays the foundation for both compensation and punishment and evidence which shows that the accused is a party defendant in the main case against whom the injunction ran.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502-516; Dec. Dig. § 230.*]

4. CONTEMPT (§ 50*)—FORM OF PROCEEDINGS—WAIVER OF DEFECTS.

The jurisdiction of the court is not affected in a contempt proceeding by the form of the charging papers, and while proceedings for a criminal contempt in a federal court should properly (though not necessarily) be in the name of the United States as the charging party, or be entitled "In re ———," where such proceedings for violation of an injunction granted in a civil suit are instituted by motion entitled in the main case, the defect is waived if the accused goes to trial without objection and is given a full hearing on the merits of the charge.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 137-139; Dec. Dig. § 50.*]

5. INJUNCTION (§ 230*)—CONTEMPT—PROCEEDINGS FOR PUNISHMENT—CRIMINAL CONTEMPT—ATTORNEYS CONDUCTING PROSECUTION.

A proceeding for contempt in a federal court for violation of an injunction granted in a civil suit, although for a distinctly criminal contempt, need not be prosecuted by the district attorney but may properly be conducted by the attorneys for the complaining party.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502-516; Dec. Dig. § 230.*]

6. CONTEMPT (§ 54*)—PROCEEDINGS FOR PUNISHMENT—CHARGING PAPER—WAIVER OF DEFECTS.

The charging paper in a proceeding for contempt must not be defective in substance but must show on its face facts sufficient to constitute a contempt and to justify the relief sought and must also have an appropriate prayer, and defects in such respects are jurisdictional and not waived by the accused by going to trial without objection.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143-149; Dec. Dig. § 54.*]

7. WORDS AND PHRASES—"PROPER."

"Proper" means consistent with propriety, appropriate, or suited to.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5687, 5688.]

In Equity. Suit by the Phillips Sheet & Tin Plate Company against the Amalgamated Association of Iron, Steel & Tin Workers and others. Proceedings for contempt against various persons for violation of injunction. On final hearing. Proceedings dismissed.

P. P. Lewis, of Steubenville, Ohio, and Karl E. Burr, of Columbus, Ohio, for complainant.

Belcher & Connor, of Columbus, Ohio, and Jay S. Paisley, of Steubenville, Ohio, for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

SATER, District Judge. At the close of the hearing the accused in three of the contempt proceedings were dismissed. The charges against two others were held to be sufficiently proved, but no order was entered regarding them because their respective cases were taken under advisement along with others submitted at the same time. None of the defendants prior to or in the progress of the trial challenged in any respect the sufficiency of the charges, or the form in which they were preferred, or the entitlement or prayer of the motions, or raised a query as to whether the proceedings were civil or criminal. The court did not therefore then make the critical examination of the moving papers which a detailed study of the submitted cases required. The result of such study was a request that counsel argue orally and on brief certain specific questions and any others by them deemed deserving. This was done. Considering the existing condition, the atmosphere may be clarified by an expression of views on practically every contention made.

The claim that the troubles considered in the contempt proceedings are attributable to the guards employed by the plaintiff is mere assertion and barren of support from the evidence. Some of the acts of violence were openly and others were impliedly admitted; the effort of the defense being to affix the responsibility for them on other than the accused. The troubles which have been aired in these contempt proceedings originated with strikers and strike sympathizers, and in every instance the aggressor was the one or the other. With one exception the accused are all union men. There have been some manifest exhibitions of lawlessness and disregard of the temporary injunction heretofore granted, which injunction ran against not merely the defendants named in the bill, but also against the members of the respective unions, their agents, confederates, aiders, and abettors. The assault on unoffending Kia, in which his nose was broken, was unprovoked, cowardly, and brutal. Of all the strikers and sympathizers that were present when it occurred, not one entered a protest or endeavored to bring the assailant to justice. When called upon to point him out, they protected him by standing mute. Some of them appeared here as witnesses to screen the guilty party. The court was impressed at the hearing with the appearance, first in one case and then in another, of certain overindustrious witnesses and always to prove an alibi or its equivalent. The assaults which were the most reprehensible and vicious occurred in proximity to and in view of the strike headquarters. In so far as the present record discloses, no effort has been made by organized labor to bring any assailant of any of plaintiff's employes to justice. The managers of the strike were not on trial, and none of them were offered as witnesses. They will not be condemned unheard, but a word of warning is timely.

[1] The strike committee, the officers of the union, and the managers of the strike have an active duty to perform. That duty does not end in instructing strikers or sympathizers, or both, to observe and not to violate the injunction, even though the instructions be given in good faith. The rational rule prevails that a labor organization, or its officers, or a committee which selects members to act as pickets during a

strike may become responsible for the unlawful acts of such pickets or their violation of an injunction, although they were instructed in good faith to observe the injunction and do no unlawful act, where, with knowledge that the instructions have been disobeyed by particular persons, such persons are still kept in service. The directing officers of a union, whose members are on a strike and have been enjoined from intimidation, will themselves be deemed guilty of a violation of the injunction if they do not prevent (if they reasonably can do so) its violation by those under their control, or if they countenance acts of intimidation and refrain from using, so far as good faith would suggest, the means which they possess of preventing such acts. *Allis-Chalmers Co. v. Iron Moulders Union*, 150 Fed. (C. C.) 155, 184; *Re McCormick*, 132 App. Div. 921, 117 N. Y. Supp. 70; *Martin*, *Modern Law of Labor Unions*, 292, 304; *Rapalje on Contempt*, § 45, p. 59. Mere passive personal obedience to an injunction order is not enough. Inexcusable inattention and negligence resulting in its violation by agents and employes are reprehensible and punishable. *Poertner v. Russel*, 33 Wis. 193, 202. The constant and regular maintenance of pickets and in considerable numbers, after repeated acts of violence by them, their use of insulting and abusive epithets and threatening language, their creation of an unfriendly atmosphere surrounding workmen, their following of them upon the streets, rise to the dignity of a conspiracy among the pickets unlawfully to intimidate and coerce workmen. *Allis-Chalmers Co. v. Iron Moulders Union* (C. C.) 150 Fed. 181, 182. The weight of the evidence before me is that when Kia was assaulted the workmen at the mill were required to pass on the sidewalk between rows of strikers. A worse species of intimidation could scarcely be devised, and yet there is not a syllable of evidence in the record that those in charge of the strike expressed a word of disapproval or sought the punishment of any guilty party who violated either the injunction order of this court or, by their assault, the law of the state. The court has allowed picketing, but not unlawful picketing. It should be done in a peaceful manner and by such limited numbers as not to awaken the fear and lead to the intimidation of workmen. Such picketing only was in contemplation when the injunction issued. It has been said (150 Fed. 172) that peaceful picketing is very much of an illusion, but it is practically as well as theoretically possible. When the injunction was granted, attention was drawn by the court to the fact that among strikers and strike breakers there is usually found a lawless element, and that managers of the strike on the one hand and the employer on the other are charged within all reasonable bounds with the responsibility of restraining the lawless from deeds of violence and other unlawful acts. Neither can safely do less. My purpose is to reinforce the views then expressed.

In *Bessette v. Conkey Co.*, 194 U. S. 324, 328, 24 Sup. Ct. 665, 666 (48 L. Ed. 997), Mr. Justice Brewer, speaking for the court, approved the following definition of civil and criminal contempts as given in *Re Nevitt*, 117 Fed. 448, 458, 54 C. C. A. 622, 632 (C. C. A. 8):

"Proceedings for contempts are of two classes: Those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. * * * A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little, if any, interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings."

Whether a particular act shall be classified as a civil or a criminal contempt is not always easy of determination, because it may partake of the characteristics of both. Contempts are neither wholly civil nor altogether criminal. *Bessette v. Conkey Co.*, 194 U. S. 329, 24 Sup. Ct. 665, 48 L. Ed. 997; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 441, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. In cases of civil contempt, the order made is interlocutory and remedial to indemnify the injured suitor or coercively to secure obedience to a mandate in his behalf, and the remedy of the accused is by appeal from the final decree rendered in the cause. *Re Merchants' Stock Co.*, 223 U. S. 641, 32 Sup. Ct. 339, 56 L. Ed. 584; *Doyle v. London Guarantors Co.*, 204 U. S. 599, 27 Sup. Ct. 313, 51 L. Ed. 641; *Ex parte Heller*, 214 U. S. 501, 502, 29 Sup. Ct. 698, 53 L. Ed. 1060; *Clay v. Waters*, 178 Fed. 385, 391, 392, 101 C. C. A. 645, 21 Ann. Cas. 897 (C. C. A. 8). But where the order made against the accused is punitive, it is a final judgment in its nature and reviewable on writ of error without awaiting such final decree. *Re Merchants' Stock Co.*, *supra*; *Bessette v. Conkey Co.*, 194 U. S. 338, 24 Sup. Ct. 665, 48 L. Ed. 997; *In re Christensen Engineering Co.*, 194 U. S. 458, 461, 24 Sup. Ct. 729, 48 L. Ed. 1072; *Grant v. U. S.*, 227 U. S. 74, 76, 33 Sup. Ct. 190, 57 L. Ed. 423. The teaching of *Re Christensen Engineering Co.* is that, where a court is proceeding to vindicate its authority, the criminal element dominates. In the *Bessette Case* the Circuit Court granted an order temporarily restraining the defendants, their confederates, agents, and servants, from interfering with the operating of the plaintiff's printing and publishing house. Thereafter complaint was made to the court that *Bessette* and others had knowingly violated the order, but it was not charged that in so doing he had conspired or acted in privity with any other person. The manner of violation was, as in the present cases, fully described. *Bessette*, like the accused in this case, excepting *Coyle*, was not named as a party defendant in the original bill. He was found guilty of an act in resistance of the order of the court and was fined. It was held that he could not appeal from the order made against him and that his only

method for testing the validity of the order was by a writ of error. The contempt proceedings against him were therefore necessarily criminal. His case was regarded like misconduct in a courtroom or disobedience of a subpoena and as among those acts primarily directed against the power of the court and consequently as one of criminal rather than of civil contempt. All the present proceedings, save that against Coyle, are necessarily ruled by the Bessette Case and are distinctively criminal, unless the fact that Bessette acted independently in resistance of the court's order renders the rule announced in his case inapplicable here. Each of the moving papers in the present proceedings alleges that the accused did certain acts prohibited by the injunction order and, with some redundancy, that the accused combined, associated, mutually undertook, and concerted with other persons for the purpose of doing such acts and causing them to be done.

[2] The charge thus made is that of a criminal conspiracy. But a proceeding against members of labor unions (and all of the accused in the present instance save Kintosky are such) to punish them for contempt for prosecuting a criminal conspiracy to violate an injunction granted by the court in the civil suit restraining them from interfering with the business and employes of the plaintiff therein is a criminal proceeding. *Hammond Lumber Co. v. Sailors' Union* (C. C.) 167 Fed. 809, at page 823. In that case it was rightly said that:

"The doctrine of the Bessette Case is that contempt proceedings are always to be regarded as criminal in respect to one not a party to the suit, since no coercive or remedial relief can be had against a stranger but only a judgment punishing him for a violation of the injunction committed with knowledge of its existence."

See, also, *Martin*, *Modern Law of Labor Unions*, 314, 315; *Garrigan v. U. S.*, 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295 (C. C. A. 7); *Re Reese*, 107 Fed. 942, 47 C. C. A. 87 (C. C. A. 8); *Oswald*, *Contempt of Court*, 106, 107. The proceedings against Coyle are of the same character as those against the other accused, for the reason that the plaintiff does not allege any financial loss on account of the acts charged against him (or against any of the accused, for that matter) or pray for compensation or remedial relief. In whatever aspect viewed, the present proceedings are all criminal and not civil, and the penalty imposed must be a fine or imprisonment. I do not mean by this to sustain the contention that the imposition of a fine or an award of compensation for the benefit of the complaining party may not be adjudged against a contemnor at the same time that a jail sentence or a fine to be paid to the government is imposed on him.

[3] To afford remedial relief to the complaining party and at the same time to vindicate the authority of the court by fine or imprisonment requires a complaint which lays the foundation for both compensation and punishment, a course of procedure on the hearing which shows that both were in contemplation by both parties, and that the accused shall have been in the main cause a party defendant against whom the injunction or restraining order ran. *Kreplik v. Couch Patents Co.*, 190 Fed. 565, 111 C. C. A. 381 (C. C. A. 1); *Merchants' Stock & Grain Co. v. Board of Trade*, 201 Fed. 20, 30, 31, 120 C. C.

A. 582 (C. C. A. 8); *Morehouse v. Giant Powder Co.*, 206 Fed. 24 (C. C. A. 9); *Chicago Directory Co. v. U. S. Directory Co.* (C. C.) 123 Fed. 194; *Continental Gin Co. v. Murray Co.*, 162 Fed. 873, 89 C. C. A. 563 (C. C. A. 3); *Sabin v. Fogarty* (C. C.) 70 Fed. 482; *Hendryx v. Fitzpatrick* (C. C.) 19 Fed. 810; *Brougham v. Oceanic Steam Nav. Co.*, 205 Fed. 857 (C. C. A. 2); *Christensen Engineering Co. v. Westinghouse Air Brake Co.*, 135 Fed. 774, 68 C. C. A. 476 (C. C. A. 2); *Id.*, 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072; *Re Merchants' Stock Co.*, 223 U. S. 639, 32 Sup. Ct. 339, 56 L. Ed. 584; *Cary Mfg. Co. v. Acme Flexible Clasp Co.*, 187 U. S. 427, 23 Sup. Ct. 211, 47 L. Ed. 244. If both remedial relief and punishment be given, the latter gives color to and dominates the proceedings. The announcement made in the *Kreplik Case*, the decision of which antedated that of the *Merchants' Stock Co. Case*, 223 U. S. 639, 32 Sup. Ct. 339, 56 L. Ed. 584, still holds true that:

"In saying that the criminal element dominates the proceeding, the Supreme Court does not say that such domination excludes the remedial element from being considered or prevents a judge in a case like the one before us from vindicating the court's authority by punitive action and at the same time applying remedial relief."

Contempt proceedings of the dual character above mentioned have usually arisen out of patent cases but are not restricted to such. *Merchants' Stock & Grain Co. Case*, 201 Fed. 20, 120 C. C. A. 582. The plaintiff might perhaps have invoked against Coyle the course of procedure in the above-mentioned cases in which punishment and remedial relief were both accorded, but it could not have done so in any other instance because none of the other accused was a party defendant in the main cause.

Each of the contempt proceedings was instituted by a "motion for attachment against —— [the name of the accused being here inserted] for contempt of court." In each instance, as in the *Gompers Case*, the caption is that of the main cause:

"Between Phillips Sheet & Tin Plate Company, a Corporation, Complainant, and Amalgamated Association of Iron, Steel & Tin Workers et al., Defendants."

Each proceeding purports to be "in equity." Each motion bears the number of the main cause. In each the initial statement is:

"Now comes the complainant, Phillips Sheet & Tin Plate Company, and moves the court for a rule upon —— [the name of the accused being here inserted] to show cause why he should not be attached for contempt for violation of the injunction heretofore granted in this cause on the 15th day of August, 1913, for the reason," etc.

The language, "the injunction heretofore granted in this cause on the 15th day of August, 1913," is subsequently referred to five times as "the said order of injunction." The prayer is:

"Wherefore the complainant prays for said rule to show cause as aforesaid"; i. e., "to show cause why he [the accused] should not be attached for contempt for violation of the injunction heretofore granted in this cause."

The pleadings in the main cause and the evidence taken on its hearing for a temporary injunction were not mentioned in the motions or

used on the hearing of the contempt charges. The motions were each signed by the plaintiff. The order served on each of the accused bears the title of the main cause. The contempt charges were prosecuted by the plaintiff through the same counsel that represented it at the hearing for a temporary injunction. The defendants therefore contend that the charges must all be dismissed because: (1) The proceedings are wrongly entitled and are made a part of the main cause as if between the original parties and are therefore civil in nature, whereas they should have been instituted, if designed to be at law for criminal contempt, independently of the main cause and in the name of the United States, thereby making it manifest that they are between the public and the defendants; (2) the charging papers are of a misleading character and are insufficient in that, although they allege contempt of court and disobedience of its order and pray that the accused shall be attached, there is no prayer for the punishment of the accused or for other than their attachment; and (3) that the moving papers do not so inform the accused of the nature of the charges against them as to show whether it is a charge or a suit which they are respectively called upon to answer, and that there is consequently a doubt as to whether the object in view is relief or punishment. The soundness of these propositions is controverted by the plaintiff. Its insistence is that none of the objections interposed by the accused was made until first suggested by the court after it had taken the cases under advisement, and that therefore the objections now made come too late; that the accused could not in any event have been misled, because, not being defendants in the main cause (excepting Coyle), the proceedings against them are necessarily criminal; and that they were all fully apprised that the object in view was punishment for the reason that the order which issued on each motion and was served on each of the accused directs that he appear on a day and at an hour certain and show cause why he "should not be attached and committed for violation of the injunction heretofore ordered and issued in this cause."

There is no merit in the contention that contempt proceedings may not be instituted by motion (*Gray v. Chicago, I. & N. R. Co.*, Fed. Cas. No. 5,713, 1 Woolw. 63; *Worcester v. Truman*, Fed. Cas. No. 18,043; *Foster's Fed. Prac.* [4th Ed.] 1094; *Aaron v. U. S.*, 155 Fed. 833, 84 C. C. A. 67 [C. C. A. 8]), or that the stating portion of the respective motions does not set forth facts sufficient to constitute a contemptuous violation of the court's order.

The several proceedings, each of which is criminal in character, were each instituted in the main cause. In view of the teachings of the *Gompers Case*, it would have been proper and, according to some decisions, was necessary to entitle the motions "*United States v. Coyle*," or "*Monias*," etc., or "*In re Coyle*," or "*Monias*," etc., as the name of the accused might be. The entitling of the charging instrument, it was said (221 U. S. 446, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. [N. S.] 874), is not a mere matter of form, for the reason that the accused, by a mere inspection of the papers in the proceeding, ought to be able to see whether it is instituted for private litigation or for public prosecution, whether it seeks

to benefit the complainant or to vindicate the court's authority, and that he ought to be free from doubt as to whether relief or punishment is the object in view and to know that he is to meet a charge and not a suit. It was the evidential or informing feature resulting from entitling the papers in the name of the United States that the court had in mind. The announcement thus made accords with what seems to be the logical practice, to wit, that, if the proceeding is for civil contempt for the benefit of the plaintiff, the title should be that of the main cause out of which the alleged contempt arose, but, if for criminal contempt alone, the proceedings should be in the name of the United States. 9 Cyc. 36, 37. That there has been and, we may confidently say, is no uniform rule as to the entitling of contempt proceedings is apparent from an inspection of many reported cases, state and federal, and from the text and cases cited to support it in *Rapalje on Contempt*, § 95; 9 Cyc. 36, 37; 4 Ency. Pl. & Pr. 772, 773; 5 Standard Ency. Proc. 396; 13 L. R. A. (N. S.) 594, note; and *Bates, Pl., Pr. & Forms*, 726. But the word "proper" was not used by the court in the *Gompers Case*, as synonymous with the word "necessary."

[7] "Proper" means "consistent with propriety"; its other significance, "appropriate" or "suited to," being included and swallowed up in the word "necessary." *Martin's Executors v. Martin*, 20 N. J. Eq. 421, 434; *Griswold v. Hepburn*, 2 Duv. (Ky.) 20, 25. The Supreme Court did not say that the only or necessary way of instituting a proceeding for criminal contempt is in the name of the United States or to entitle it "In re ———." The following language employed in the *Krepik Case*, 190 Fed. 571, 572, 111 C. C. A. 387, although uttered when the court was considering the question of whether remedial relief and punishment might both be properly awarded in the same proceeding or not, is pertinent to the point now under discussion:

"Under the principles announced in that [the *Gompers*] case, it must, of course, appear in a cause in equity that, before imposing a sentence for criminal contempt, the court distinctly gave the defendant his day in court and allowed him a full and fair hearing upon a criminal charge. In that case the Supreme Court recognizes that the practice with reference to contempt proceedings has been unsettled. * * * We do not find that the Supreme Court has ever said that any particular form of proceeding is required, providing the defendant is left in no doubt as to what charge is made against him."

[4] The jurisdiction of the court is not affected in a contempt proceeding by the form of the title of the charging instrument. *Hughes v. Territory of Arizona*, 10 Ariz. 119, 85 Pac. 1058, 6 L. R. A. (N. S.) 572; 5 Standard Ency. Proc. 397; *Manning v. Securities Co.*, 242 Ill. 584, 90 N. E. 238, 30 L. R. A. (N. S.) 725; *Telegram Newspaper Co. v. Commonwealth*, 172 Mass. 294, 52 N. E. 445, 44 L. R. A. 159, 70 Am. St. Rep. 280. If the charging papers in a proceeding for criminal contempt bear the caption of the main cause, the court would doubtless feel constrained, especially if they do not fully advise the accused that he is required to meet such a charge, to sustain a timely and appropriate objection made on that account. If such a proceeding be brought in the name of and be prosecuted by the plaintiff, it

is nevertheless for the benefit of the government, which is the real prosecutor and party in interest (9 Cyc. 35); if a fine be imposed as a punishment, it is paid to the government; if a prison sentence be inflicted, it is to preserve the power and vindicate the dignity of the court and punish disobedience of its order. *Fanshawe v. Tracy*, 8 Fed. Cas. pp. 997, 1,000; *Rapalje on Contempt*, § 131. If it is not brought in the name of the real party, the defect will be waived by failure to object at the proper time or by conduct which in legal contemplation implies an intention to overlook it. 31 Cyc. 722, 737, 717. A waiver is made as to formal defects in a proceeding for criminal contempt where the accused appears and goes to trial without appropriate objection. 9 Cyc. 39; 4 Ency. Pl. & Pr. 795, 786; *Foster's Fed. Prac.* (4th Ed.) 1095; *People ex rel. Barnes v. Court of Sessions of Albany County*, 147 N. Y. 295, 296, 41 N. E. 700. Cases of criminal contempt which have been instituted in the main cause and not in the name of the United States and have been finally disposed of by reviewing courts have heretofore been cited, and many others, both state and federal, might be mentioned. The accused in the present proceedings by their silence before they went to trial and until after the submission of the cases waived their right to object to the entitlement of the plaintiff's motions and to the institution of the contempt proceedings in the main cause.

[5] Nor is there merit in the claim that the cases should have been conducted by the United States district attorney and not by the complaining party's counsel as representatives of the government. In *Re Star Spring Bed Co.*, 203 Fed. 640 (C. C. A. 3), decided subsequently to the *Gompers Case*, the petition charging contempt was, without objection, entitled as in the main cause, and the proceeding was prosecuted by the receiver through his attorneys and not by the United States through its district attorney. The situation was such that all possibility of affording remedial relief had passed beyond the court's power. The only order which it could make, if it found the accused guilty, was, as in this case, of a punitive character. A punitive sentence was given and sustained. In *Durant v. Washington County*, Fed. Cas. No. 4,191, Mr. Justice Miller said that a prosecution for contempt of court is a criminal proceeding in which the government is interested as plaintiff, and that, whenever it becomes necessary for the government's attorney to appear to vindicate its authority as represented in the court, it is his duty to do so; but he prefaced the above statement with the remark that he was not aware of any instance in which the attorney for the government had appeared to present a case for contempt originating in the refusal of a witness or other person to yield obedience to a writ issued in a suit between private parties. My attention has not been directed to any contempt proceeding arising out of an order made in the main cause of a purely civil character, in which the government's counsel has appeared to prosecute, even though the prosecution was for distinctively criminal contempt.

[6] The charging paper, whether it be a petition, motion, or affidavit, of which the complaining party avails himself to invoke the court's action, must not be defective in substance but must show on its face

facts sufficient to constitute a contempt and to justify the relief sought and must also have an appropriate prayer. 9 Cyc. 38; Gompers Case. If it fails in either of these respects, the accused may avail himself of such defect, even if he did not prior to the hearing of his cause object by motion, demurrer, or answer. 31 Cyc. 722, 723; State v. Gallup, 1 Kan. App. 618, 42 Pac. 406. In the Gompers Case, 221 U. S. 441, 31 Sup. Ct. 498, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, the court said:

"Whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order and a prayer that he be attached and punished therefor."

So important did the court deem the form of the prayer that it subsequently repeated the above statement (221 U. S. 448, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. [N. S.] 874) and still later said (221 U. S. 449, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. [N. S.] 874) that, if the plaintiff had asked that the defendants be forced to pay a fine to the government or be punished by confinement in jail, there could have been no doubt that punishment pure and simple was sought. As to the proper form of prayer, see, also, Loveland, Bank. (4th Ed.) 1247. In *Rapalje on Contempt*, § 98, p. 131, it is said that:

"If the breach has been committed by a person who was not named in the writ or order or notice, the motion must be that he may be committed for contempt in knowingly assisting in the breach."

The import of other language employed by him in that section is that a motion that the defendant stand committed for contempt should be made in every case, whether the accused is a party defendant in the main cause or a stranger to it. A contempt proceeding is *sui generis* (*Bessette v. Conkey Co.*), and the Supreme Court has specified the form, or at least the essential substance of the form, of prayer for this particular kind of a proceeding, whether punishment or remedial relief, or both, be sought, and has ruled that punishment cannot be inflicted unless there is a prayer for it. See, also, *Re Kahn*, 204 Fed. 581 (C. C. A. 2); *Anargyros v. Anargyros* (C. C.) 191 Fed. 208. None of the motions filed by the plaintiff prays for the punishment of the accused or for other than his attachment, nor is this fatal defect remedied by the recital in the order granted on the filing of the motion and served upon each of the defendants that he show cause why he should not be attached "and committed for violation of the injunction heretofore ordered and issued in this cause." The language quoted is that of the pleader, escaped the attention of the court when the order was approved, and is in excess of the averments and prayer of the motion. As the proceedings are necessarily criminal, the accused must be presumed to have known the law and were each chargeable with knowledge that, if put on trial on a charge properly framed and found guilty, punishment by fine or imprisonment would follow; but, as no relief was sought save their attachment, they were not apprised that their punishment was the object in view. The only purpose an attachment could serve would be to bring the parties into court. *State v. Matthews*, 37 N. H. 450; *Jackson v. Smith*, 5 Johns. (N. Y.) 115, 117; *Rapalje on Contempt*, § 100, p. 134. As they

have all appeared, its issuance is unnecessary (U. S. v. Greene, 3 Mason, 482, Fed. Cas. No. 15,256), and, in view of the defective character of the charging papers and the precedent established by the Gompers Case, the court is powerless either to grant remedial relief or to impose punishment.

The power to punish for contempt of court is to be used sparingly and with great caution and deliberation. Gompers Case; Oswald, Contempt of Court, 17. The purpose in invoking the exercise of such power is the enforcement of law and of lawful orders and the punishment of acts of disobedience. A court thus called upon to enforce the law may itself keep well within its limits. It is not a party to the proceeding. In punishing for contempt, the judge acts impersonally and has no interest or concern other than that the law should be obeyed and enforced. U. S. v. Shipp, 203 U. S. 563, 574, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265; Oswald, Contempt of Court, 262a. To justify punishment, whether of a remedial or punitive character, for a violation of the court's order or for aiding and assisting in its violation, the charge against the accused and the course of procedure must meet legal requirements, and the proof must conform to the settled rules of evidence. This is the rule in both England and America. Oswald in his work (page 211) says:

"Applications affecting the liberty of the subject are matters *strictissimi juris*; and although an irregularity in the course of proceedings for attachment or committal does not render the proceedings void, and the court has power to condone the irregularity, yet slips in the practice, where the liberty of the subject is concerned, are seldom allowed by the court to be got rid of under this power, and in many cases delay and expense have been incurred, and even justice defeated, by slips and irregularity in the proceedings. A direct noncompliance with the rules of practice as to committal and attachment ought not to be condoned by the court. * * * But in a proper case, and for the purpose of justice, and where valid reasons are given for it, an irregularity may be condoned or insistence upon it may not be permitted."

When all legal requirements are met, punishment should be sure, fitting, and as swift as due deliberation admits, for, as said in the Gompers Case, 221 U. S. 450, 31 Sup. Ct. 501, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874:

"The power of courts to punish for contempt is a necessary and integral part of the independency of the judiciary and is absolutely essential to the performance of the duty imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory. If a party (the accused) can make himself a judge of the validity of orders which have been issued and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the 'judicial power of the United States' would be but a mere mockery. * * * Without authority to act promptly and independently, the courts could not administer public justice or enforce the rights of private litigants."

The several proceedings are dismissed, but without prejudice to the institution of new proceedings, if that be deemed advisable, or to the court's right to punish by proper proceedings contempts, if any, committed against it.

SHAVER TRANSP. CO. v. COLUMBIA CONTRACT CO. et al.

(District Court, D. Oregon. September, 1913.)

No. 5,420.

1. COLLISION (§ 105*)—TOWS MEETING—NARROW CHANNEL RULE.

A collision in the Columbia river at night between one of three stone barges made fast to a tug in the form of a spike tow and a meeting steamer also with a tow alongside *held*, on the evidence, due solely to the fault of the tug on the ground that she was on the wrong side of the channel, although the vessels had exchanged passing signals when half a mile apart and the channel was 2,500 feet wide at the point of collision.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 105.*]

2. COLLISION (§ 132*)—ACTION FOR DAMAGES—VALUATION OF VESSEL.

The measure of damages recoverable for the loss of a vessel sunk in collision considered.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 286; Dec. Dig. § 132.*]

In Admiralty. Suit by the Shaver Transportation Company against the steam tug Samson and three barges, Columbia Contract Company, claimant, and the Standard Oil Company. On final hearing. Decree for libelant against the libeled vessels. Dismissed as to Standard Oil Company.

For former opinion, see *The Samson*, 197 Fed. 1017.

Wood, Montague & Hunt, of Portland, Or., for libelant.

Rogers MacVeagh and Teal, Minor & Winfree, all of Portland, Or., for claimant.

Snow & McCamant and George B. Guthrie, all of Portland, Or., for respondent.

CUSHMAN, District Judge. Claimant relies on the following authorities: *The Merchant Prince*, Law Repts. (1892) 1 Prob. Div. 179, in Court of Appeal 1892; *The Olympia*, 61 Fed. 120, 9 C. C. A. 393 (C. C. A. 6th Cir. 1894); *The F. W. Wheeler*, 78 Fed. 824, 24 C. C. A. 353 (C. C. A. 6th Cir. 1897); *The Ohio*, 91 Fed. 547, 33 C. C. A. 667 (C. C. A. 6th Cir. 1898); *The Fontana*, 119 Fed. 853, 56 C. C. A. 365 (C. C. A. 6th Cir. 1903); *The Edmund Moran*, 180 Fed. 700, 104 C. C. A. 552 (C. C. A. 2d Cir. 1910); *Nicholas Transit Co. v. Pittsburgh S. S. Co.*, 196 Fed. 65 (Dist. Ct. W. D. N. Y. 1912); *The Lackawanna*, 201 Fed. 773 (Dist. Ct. W. D. N. Y. 1913); *Union S. S. Co. v. N. Y. & Va. S. S. Co.*, 65 U. S. (24 How.) 307, 16 L. Ed. 699 (U. S. Sup. Ct. 1861); *The Bywell Castle*, Law Repts., 4 Prob. Div. 219, in the Court of Appeal 1878; *The Maggie J. Smith*, 123 U. S. 349, 8 Sup. Ct. 159, 31 L. Ed. 175 (U. S. Sup. Ct. 1887); *The Phoenix*, 50 Fed. 330 (Dist. Ct. S. D. N. Y. 1892); *The Lake Shore*, 201 Fed. 449 (Dist. Ct. N. D. Ohio 1912); *The Centurion*, 100 Fed. 663, 40 C. C. A. 634 (C. C. A. 6th Cir. 1900); *The Maria Martin v.*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Northern Trans. Co., 79 U. S. (12 Wall.) 31, 20 L. Ed. 251 (U. S. Sup. Ct. 1871); *The Columbia*, 23 Blatchf. 268, 25 Fed. 844 (C. C. E. D. N. Y. 1885); *W. Va. Central & P. Ry. Co. v. The Isle of Pines et al.*, 24 Fed. 498 (Dist. Ct. S. D. N. Y. 1885); *The A. W. Thompson*, 39 Fed. 115 (Dist. Ct. S. D. N. Y. 1889); *The Louise*, 52 Fed. 885, 3 C. C. A. 330 (C. C. A. 4th Cir. 1892); *The Lisbonense*, 53 Fed. 293, 3 C. C. A. 539 (C. C. A. 2d Cir. 1892); *The George W. Childs*, 67 Fed. 269 (Dist. Ct. E. D. Pa. 1895); *The Victory*, 68 Fed. 395, 15 C. C. A. 490 (C. C. A. 4th Cir. 1895); *The Maryland*, 182 Fed. 829 (Dist. Ct. E. D. Va. 1910); *The Laura Lee*, 24 Fed. 483 (Dist. Ct. E. D. La. 1885); *The City of Alexandria*, 40 Fed. 697 (Dist. Ct. S. D. N. Y. 1889); *The Havilah*, 50 Fed. 331, 1 C. C. A. 519 (C. C. A. 2d Cir. 1892); *La Normandie*, 58 Fed. 427, 7 C. C. A. 285 (C. C. A. 2d Cir. 1893); *The James Gray v. The John Fraser*, 62 U. S. (21 How.) 184, 16 L. Ed. 106 (U. S. Sup. Ct. 1859); *The Sturgis v. Boyer*, 65 U. S. (24 How.) 110, 16 L. Ed. 591 (U. S. Sup. Ct. 1860); *The J. H. Gautier and The Herbert Manton*, 5 Ben. 469, Fed. Cas. No. 7,319 (Dist. Ct. S. D. N. Y. 1872), affirmed 14 Blatchf. 37, Fed. Cas. No. 6,399 (C. C. S. D. N. Y. 1876); *The John Cooker and The James W. Eaton*, 10 Ben. 488, 13 Fed. Cas. 665, Fed. Cas. No. 7,337 (Dist. Ct. E. D. N. Y. 1879); *The Doris Eckhoff*, 32 Fed. 555 (Dist. Ct. S. D. N. Y. 1887); *The Umbria*, 166 U. S. 404, 17 Sup. Ct. 610, 41 L. Ed. 1053 (U. S. Sup. Ct. 1897).

This question was before the court on the question of the right of libellant to maintain a suit for collision in rem against one of the vessels and in personam against the owners of another, charged to be involved in the collision. *The Samson* (D. C.) 197 Fed. 1017. The cause is now for decision, after evidence taken, and is brought to recover for the wreck of the steamer *Henderson* in a collision with the tow of the tug *Samson*; the collision occurring on the Columbia river between Astoria and Portland. The suit is in rem against the *Samson* and the three barges forming her tow and in personam against the Standard Oil Company; the owner of the oil barge being towed by the *Henderson* at the time she was struck.

[1] The collision took place between 1:30 and 2 a. m., July 22, 1911, in the main channel of the Columbia river, between Puget Island and the Oregon shore, near Bugby's Hole, during the flood season on the river, with a nine-foot tide at half ebb. The night was dark, but clear, with no moon.

The *Henderson*, a stern wheel steamer, 158 feet long, with a 31-foot beam, was coming upstream, lashed to the port quarter of her tow, overlapping the stern of her tow some hundred feet, and with her bow turned slightly in towards the tow. The oil barge was without propelling power of her own.

The tug *Samson*, 110 feet long, was going downstream with a tow of three scows, each about 150 feet long, 36-foot beam, and each loaded with about a thousand tons of rock. Her scows were arranged in what is known as a "spike" tow, one scow on her port quarter, another on her starboard quarter, and the third between the other two, projecting in front of them some 50 feet and immediately ahead of

the Samson; the port and starboard scows flaring from the center scow, making a flotilla, in general outline, not unlike the "club" upon a playing card.

The collision occurred upon the upper "reach" of an approximately straight stretch of channel, some three or more miles long. This stretch of channel was marked with certain range lights (two at the foot, on the Washington side, and one at the head of it, upon the Oregon shore) and is known as the "Hunting Island Range." At the place of the collision, the channel was about 2,500 feet wide. The Henderson and tow met and passed to starboard of the steamer Kern about two miles below the point of collision. The Samson rounded the point of Puget Island over a mile above the point of collision, thus coming into view from the Washington side of the river.

After sighting the Samson, while two miles apart, the oil barge, whose captain was directing her towing, whistled once, when the vessels were about a half mile apart, thus signaling passage port to port, or on the Oregon side of the Samson. The Samson answered promptly, accepting the signal. Both sets of vessels were properly equipped with lights.

From this point the testimony is conflicting and cannot be reconciled. The captain of the oil barge, considering the Samson was not complying with the signal with sufficient promptness, repeated it when the vessels were about 500 feet apart.

The situation, as stated, discloses that the point of collision, with reference to the width of the channel, is the controlling factor in determining who was responsible for the collision. For the libellant it is contended that this point was to the Oregon side of the range marks, and by the claimant that it was on the Puget Island side.

Much testimony has been introduced concerning the maneuvering of the vessels immediately preceding the collision; how the lights appeared from one upon the other; and the subsequent signals given by the boats as well as the handling of helms just before the collision. But none of it is of a character to shift or divide the responsibility for the relative position of the vessels with reference to the marked channel, after the giving of the first signal and its acceptance in ample time and with ample room to have avoided the collision, with the vessels involved under control.

It is probable that it was the port stone barge which struck and crushed the Henderson's port bow; a hole being made in her bow about 14 feet across and beginning about 35 feet back from her stem. That the Henderson was not struck further aft by the center stone barge is probably explained by the flare of the stone barges, the exact extent of which cannot be known; but whether the Henderson was struck by the center scow or the port scow is deemed unimportant, for the angle of the courses of the encountering vessels would have been substantially the same in either case.

The Henderson, when cut away and free from the oil barge, sank almost immediately and, without any control of her movements, drifted downstream. The oil barge dropped her anchors. The Sam-

son carried her tow astern of the oil barge after the collision, got the lines off the stone barges, and anchored them.

There is a great deal of conflict in the testimony of the witnesses upon the vessels concerned about how long a time elapsed after the collision before the oil barge dropped her anchors. Libelant contends that they were dropped immediately. The witnesses of libelant on the Henderson and oil barge are corroborated on this point and that of the place of collision by a number of drift net fishermen, who were on the river a short distance below the collision. These fishermen, in putting out their drift nets, used the range lights primarily marking the channel for the benefit of vessels.

The oil barge, when anchored, was within a short distance of the Oregon shore, with no more room than was required to swing at anchor. Claimant undertakes to account for her position upon the theory that she had such headway as to carry her upstream, across the range, and over to the Oregon shore. The fact that she was only making three miles an hour at the time of the collision, coupled with the further facts that it was ebb tide, with a strong current, that the Henderson had been backing full speed astern for half a minute before the collision, that the force of the collision was such as to break the five heavy lines fastening the Henderson to the oil barge, renders it improbable that she would go a quarter of the distance from the range to the Oregon shore even without dragging her anchors, whereas she was anchored three-quarters of the way in from the range towards that shore. This was an old and good anchorage ground. It is unlikely that the anchors dragged. The evidence shows that they were dropped in not to exceed 30 seconds after the collision; one anchor weighing 7,000 pounds and the other 6,300 pounds.

The stone barges were anchored to the Oregon side of but near the range. These stone scows were evidently carried thus far towards Puget Island after the collision before the lines of the Samson were gotten off them, then drifted down the channel to the point of anchorage. The momentum of the stone barges, going down the river at six or seven miles an hour, with a favorable current, would naturally carry them further towards the Washington shore than the oil barge would go towards the Oregon shore, traveling at the rate of three or four miles per hour, when struck, with an adverse current.

That the point of collision was well to the Oregon side of the channel is still further shown by the point to which the Henderson drifted. While it cannot be determined how great was the momentum of the oil barge or the stone scows, nor how far across the stream they would be carried by it, the crushing and immediate sinking of the Henderson left it inert to be carried by the current, uninfluenced by any other force. It drifted and lodged in the shoals on the shore of Tenas Illihee Island, which was upon the Oregon shore of the main channel of the river, about 3,500 feet below the point of collision.

The testimony of those aboard shows that the Henderson bumped on the bottom as she drifted, which could only have been upon the shoals to the Oregon side. Claimant seeks to explain the position in which the Henderson was left by contending that she was drawn to-

wards the Oregon side of the river by the waters of Clifton Channel, which separates Tenas Illihee Island from the main Oregon shore. The deepest parts of this channel are 12 to 15 feet, not one-third the depth of the main channel, and could have had no appreciable effect upon the Henderson unless she was well in towards the Oregon side when she was struck.

After anchoring her barges, the Samson and one of her boats went to the Henderson and shoved and pulled her upon the shoals of Tenas Illihee Island. The captain of the Samson testified that, in going to the relief of the Henderson, he crossed the range. Therefore it is clear that the Henderson could not have been on the Washington side, while the Samson, through her movement and that of her stone barges, subsequent to the collision, might have been.

It is contended by claimant that it is by this action on the part of the Samson in towing and shoving the Henderson that she was gotten over to the Oregon side of the river. But it cannot thus be accounted for. The Henderson would not drift across the main current, and if in the center of the main current of the river, marked by the range lights, she would have drifted further down in the time required by the Samson to get her lines off her tows, anchor them, and go to the Henderson. If the Samson had found her upon the Washington side of the channel, she would probably have towed her to that shore and not to the Oregon side, across the deep channel, taking the chances of her sinking.

It is clear that the fault was with the Samson. The failure of the oil barge or the Henderson to give a danger signal, as provided by rule 1 prescribed for pilots in inland waters, and the repeating of the oil barge's first signal are not shown, by the evidence, to have helped to cause the collision. The pilot of the Samson understood the first signal and had his tow under control. If it was unwieldy, he should have known it and acted in time. The giving of a danger signal would not, in any event, have avoided the collision, because it would not have helped him control his tow, if unwieldy.

Having concluded that the sole fault was that of the Samson the supplemental libel against the Standard Oil Company, the owner of the oil barge, whose captain was in charge of her towing up the river, will be dismissed. The relief asked by the answer, in the nature of a cross-libel against libelant and the respondent Standard Oil Company, is also dismissed for the same reason.

It has already been held herein that the three stone barges would be responsible with the Samson for any damage from the latter's fault. The John Cooker, Fed. Cas. No. 7,337. In view of the fact that the Samson and the stone barges were both owned and claimed by the present claimant, taken in connection with other circumstances of the case, the court must adhere to the former ruling.

[2] The Henderson was raised, brought into the dry dock, and practically rebuilt. There was salvage of a portion of her machinery. Therefore the value of the Henderson, less the net salvage, is the measure of libelant's damage.

There is a wide range in the testimony as to the value of the Henderson; the amounts varying from \$20,000 to \$45,000, in the opinion of the different witnesses. The evidence shows that, at the time of the wreck, the Henderson was ten years old and in good condition. There is evidence by her builder that the Henderson and her equipment cost upwards to \$51,000; that in 1911 labor and material were higher than in 1901, when she was built. Some of the witnesses testified that there had been an advance of 25 per cent. She was built as a passenger and freight boat, but, owing to the extension of railroad lines or other reasons, it appears that she had ceased to be of use in the passenger service.

A number of the witnesses who have testified as to the value of the Henderson have made lump valuations. Capt. J. H. Johnson, who built the Henderson, and whom the evidence shows to have been a man of much experience in building boats, went greatly into detail in his estimate of the cost and depreciation of the Henderson, placed the value of the Henderson at the time of the wreck at \$43,888.21. The testimony of this witness has been accorded great weight, yet it does not appear that sufficient allowance has been made in his estimate for depreciation during the ten years the Henderson was in use. Among the items affected are: The painting, house, boilers, engines, furniture, and other minor items. The testimony of this witness shows, in estimating the depreciation, he took into consideration the present efficiency alone, without regard to the probable length of life of the articles valued, fixing the depreciation as low as 2 per cent. on one item; his contention being that the depreciation might be considered as resembling the quadrant of a circle, while at the last the falling off would be rapid—a perpendicular drop. At the beginning, for a considerable period, it would be very little below the high level of the article when new. It is concluded that this witness, in disregarding, in his estimate of value, the relation borne by the first cost to the probable length of life of the different items, placed the valuation \$5,000 too high. The total value is therefore fixed at \$38,888.21.

The gross value of the salvage is found to be \$16,835. There is a dispute concerning the amount that should be charged against this on account of the cost of salvage. The work of salvaging was done by other of libellant's boats. It is contended that more boats than were necessary engaged in this work and that too great a charge has been made for them. It is not probable that more men or boats were used during a busy season than appeared necessary, merely for the purpose of seeking recovery at the end of a long lawsuit. The evidence fails to disclose that any of them were unnecessary. While the amount charged for the boats appears high, as compared with their ordinary employment, yet, when considered that the need was immediate and urgent, that libellant had to interrupt other employments in which the boats were engaged, to secure their services, the charge does not appear excessive.

The cost of salvage is found to be \$8,414.84, from which should be deducted \$100, which was afterwards realized on certain timbers used in the salvage work, making \$8,314.84. The net value of the salvage

from the vessel is therefore found to be \$8,520.16. Deducting this from \$38,888.21, the value of the Henderson as found, there would remain \$30,368.05, the amount of libellant's damage occasioned by the loss of the Henderson. To this should be added the value of the supplies and provisions aboard the Henderson at the time of the wreck. \$418.71 and \$83.99, respectively, making the total recovery to which libellant is entitled \$30,870.75, with interest at the legal rate from July 22, 1911. Libellant to recover costs. The costs of respondent Standard Oil Company to be divided equally between libellant and claimant.

JARVIS v. JOHNSON et al.

(District Court, N. D. West Virginia. October 2, 1913.)

1. TAXATION (§ 848*)—FORFEITURE FOR NONPAYMENT OF TAXES—WEST VIRGINIA STATUTE.

Under the decisions of the Supreme Court of Appeals of West Virginia, land is not forfeited to the state if the owner for five successive years fails to cause himself to be charged with the taxes and pay the same, where during such years it was assessed to the record owner's grantors and the taxes were paid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1664; Dec. Dig. § 848.*]

2. EVIDENCE (§ 383*)—RECITALS IN ANCIENT DEEDS—PRESUMPTION OF CORRECTNESS.

Recitals in a deed 70 years old purporting to have been executed by an attorney in fact of the record owner of the land, setting forth the grantor's authority, will be assumed to be correct so far as necessary to sustain the grantee's title as against a stranger.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1660-1677; Dec. Dig. § 383.*]

3. ADVERSE POSSESSION (§ 103*)—EXTENT OF POSSESSION—OVERLAPPING GRANTS—CONSTRUCTION OF STATUTE—"LAND IN CONTROVERSY."

Code W. Va. 1906, c. 90, § 19 (section 3354), provides that "in a controversy affecting land when a person claiming under a patent, deed or other writing shall enter upon and take possession of any part of the land in controversy under such patent, deed or writing for which some other person has the better title such adversary possession * * * shall be taken and held to extend to the boundaries embraced or included by such patent, * * * unless the person having the better title shall have actual possession of some part of the land embraced by such patent," etc. *Held*, that under such statute in order to give the holder of the junior of two grants, the boundaries of which overlap, title by adverse possession as against the senior grantee, he must have been in the actual possession for the required length of time of some part of the interlock, which is the "land in controversy" within the meaning of the statute.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 590-594; Dec. Dig. § 103.*]

In Equity. Suit by Claude S. Jarvis against Robert Johnson and another. On final hearing. Decree for complainant.

W. B. & E. L. Maxwell, of Elkins, W. Va., and Arthur S. Dayton and F. O. Blue, both of Philippi, W. Va., for plaintiff.

Talbott & Hoover, of Elkins, W. Va., and Chas. M. Murphy, of Philippi, W. Va., for defendants.

DAYTON, District Judge. Plaintiff claims, through successive conveyances, lot 56 of land patented to Claiborne in 1797. The contesting defendants claim, by successive conveyances, a 470-acre tract patented to Levi and Wm. Johnson on July 1, 1850. These lands overlap to the extent that defendant Harris claims 64.35 acres and defendant Johnson 126.45 acres as covered by their junior patent, included and embraced in plaintiff's lot 56, older patent. When sawmill contractors went, under plaintiff, upon the disputed land to cut the timber, defendant Johnson caused the arrest of four of the men employed for this purpose. The plaintiff thereupon brought this suit to enjoin interference on the part of defendants Johnson and Harris with the timber cutting and to remove the cloud of their title from his land. The defendants have for defense set up (a) forfeiture of plaintiff's title for nonpayment of taxes for five successive years; (b) failure on the part of plaintiff to connect his title with the commonwealth so as to make out the older title; (c) open, notorious, exclusive, hostile, and adverse possession under their junior patent for longer period than required by statute; and (d) lack of such possession by plaintiff or his vendors, as to warrant equity to take jurisdiction.

[1] Touching the forfeiture asserted, it is sought to be shown by the certificate of the county clerk (by statute made *prima facie* evidence) to the effect that for the years 1894, 1895, 1896, 1897, and 1898 the only lands assessed to George M. Whitescarver, plaintiff's grantor, in Barbour county where the disputed lands lie, either to him personally or to him jointly with others, is for the years 1894, 1895, and 1896 "320 acres part of lot No. 50." A further certificate of the clerk, however, shows that for these years 1894, 1895, 1896, 1897, and 1898 Bunker, Allen, and Morrall had been assessed with 315 acres, 420 acres, and 140 acres in Glade district, Barbour county, where the disputed land lies. By reference to the deeds to Whitescarver, it will be perceived that he bought in 1890 from the heirs and devisees of Bunker and Allen the unsold, undivided interests in this Claiborne patent of 1,000 acres; that by reason of conflict in title, compromise between Morrall and Bunker and Allen had been effected, whereby Morrall had an undivided half interest in 420 acres of the land which also in May, 1890, his trustee, Woods, had conveyed to Whitescarver; that for the year 1899 Whitescarver is charged with taxes upon a tract of 875 acres in the same county and district noted on the book as "from W. B. Allen &c & consolidated." It would seem fairly clear from this that, because the several undivided interests acquired by Whitescarver from these three different sources were not run out and consolidated until 1900, they were in these prior years allowed to be assessed in the names of these former owners. This insured payment of the taxes to the state and county and was sufficient to prevent forfeiture of the land to the state under recent decisions of the Supreme

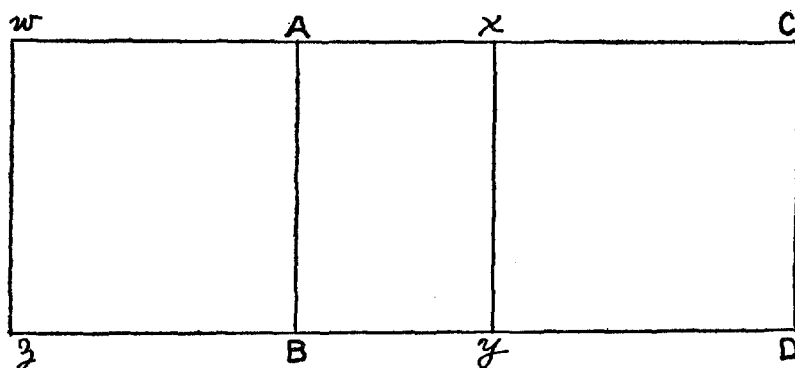
Court of Appeals. *State v. West Branch Lumber Co.*, 64 W. Va. 673, 63 S. E. 372.

[2] As to the second defense, that the plaintiff has failed to connect his title with the Claiborne patent, I regard it as not well taken. The boundaries of this patent have been fairly well made out by its calls and corners and by reason of adjoining tracts and parcels sold from it calling for its lines. It is shown that in the more than 150 years since the patent issued the land has been incorporated, in whole or in part, in the four counties of Monongalia, Preston, Randolph, and Barbour. While the land was in Preston county and after it had been conveyed by Claiborne, the patentee, to John Hopkins and George Pickett, Wm. McCoy, attorney in fact, by deed dated April 18, 1835, conveyed it to Israel Baldwin. No power of attorney to McCoy is shown; it is claimed to have been destroyed by a later fire that burned the courthouse of Preston county. Be this as it may, McCoy's deed as attorney in fact many years antedates defendant's patent and claim of title. It sets forth McCoy's authority to convey on behalf of Hopkins & Pickett; it is an ancient deed, and as such its recitals will be assumed to be correct so far as necessary to show Baldwin's right to the Claiborne land as against a stranger. This brings us to the question of possession which has given rise to very positive disagreement between counsel as to the law governing. There is little disagreement as to the facts. This remainder of the Claiborne 1,000 acres now owned by plaintiff has never been cleared or improved. It was allowed to remain in a state of nature until a very short time before the bringing of this suit, when plaintiff, through Mason and Dennison, undertook to cut and manufacture the timber on it. When they sought to extend their operations over the line of the lap, their men were arrested and this injunction was sued out. On the other hand, while the defendants, Johnson and Harris, have improved parts of the 470-acre junior patent and have been in possession of such improvements for a period excluding the statutory period of ten years—of some parts thereof, in fact for 40 years—they have never taken actual manual possession of any part of the ground embraced in the interlock. The nearest approach to doing so was by defendant Johnson, who strung a couple of strands of wire around it or part of it through the woods some four or five years before suit was brought.

[3] The plaintiff claims that by reason of his old patent and deeds antedating those of defendants a half century he has the better title, and in consequence and by reason thereof the law clothes him with a constructive possession entitling him to hold to the limit of the boundaries called for by his paper title; that he is by law in possession of every foot of the ground so bounded until he is ousted by a junior claimant actually taking possession of some part of his land covered by these boundaries and maintaining such possession openly, notoriously, continuously, and adversely for ten consecutive years under our statute; that until such holding on the part of the junior claimant has matured he, as the better owner in constructive possession, may at any time enter upon his land, take possession of any part of it, for any purpose of enjoyment of it, and maintain his suit in equity to

remove the cloud upon his title arising from any unmatured junior claim of right or title to it or any part of it.

To illustrate this contention by diagram:



If plaintiff has the older title to A B D C and the defendants have junior title to W X Y Z, such defendants can make no claim, it is contended, as against plaintiff's constructive possession, to the interlock embraced in A X Y B by holding possession of W Z B A or any part of it for *any* number of years, but must actually enter upon A X Y B and hold it or some part of it openly, notoriously, exclusively, and adversely for ten years under title or color thereof before he can deny plaintiff's constructive possession thereof by reason of his older and better title. I am thus careful in illustrating the situation because, on the other hand, the defendants just as earnestly contend that when they procured their junior patent and went into possession of it anywhere within its limits, say inside of W Z B A, they went into constructive possession of all the land embraced in their calls including the interlock A X Y B, unless the holder of the older title was in possession of the interlock or some part of it, and that when they held in actual possession any part of the land embraced in the boundaries of their junior patent for the statutory period of ten years, they became not only vested with possession but complete and perfect title of and to the whole land included in and bounded thereby, including the interlock, as against the holder of the older title and the world. They base this contention upon an act of the Legislature of West Virginia approved March 10, 1879 (chapter 61, Acts 1879, p. 91) amending section 19, c. 90, Code 1868, which has now been incorporated into, as section 19, c. 90, or section 3354, of the present Code of the state (1906), and reads as follows:

"In a controversy affecting land, when a person claiming under a patent, deed or other writing shall enter upon and take possession of any part of the land in controversy under such patent, deed or other writing, for which some other person has the better title, such adversary possession under such patent, deed or other writing, shall be taken and held to extend to the boundaries embraced or included by such patent, deed or other writing unless the person having the better title shall have actual possession of some part of the land embraced by such patent, deed or other writing."

This section 19, c. 90, Code of 1868, taken from the Virginia Code 1860, prior to this amendment, reads:

"In a controversy affecting real estate, possession of a part shall not be construed as possession of the whole, when an actual adverse possession can be proved."

Defendant's counsel cite in support of their contention under this statute the cases of *Taylor v. Burnside*, 1 Grat. (42 Va.) 165-192; *Adams v. Alkire*, 20 W. Va. 480; *Core v. Faupel*, 24 W. Va. 238; *Swann v. Young*, 36 W. Va. 57, 14 S. E. 426; *Maxwell v. Cunningham*, 50 W. Va. 298, 40 S. E. 499; *Garrett v. Ramsey*, 26 W. Va. 345; and *State v. Harman*, 57 W. Va. 477, 50 S. E. 828.

An examination of these cases discloses that in none of them do the facts present the exact question presented here. *Garrett v. Ramsey* comes the nearest. There an interlock was shown, but adverse possession *within the interlock* was claimed by the junior title. What construction should be placed upon this statute in its use of the words "when a person claiming under a patent * * * shall enter upon and take possession of *any part of the land in controversy*," etc.? Using the illustration again, what land is in controversy, W Z Y X, or A B Y X, subject to the terms of this statute? Certainly no one disputes the junior patentee's right to W Z B A. How by possession of his undisputed holdings can he obtain possession of A B Y X as against the holder of the older and better title thereof? How could such possession be hostile? Above all, how could it be open and notorious? It is common experience that local identity of land on the ground can in most cases only be determined by actual survey. As a result, the holding by the junior claimant of the undisputed part of his patent would not ordinarily, except by actual survey of his lines, disclose that such holding was meant to cover an interlock. Would not such construction of the statute require every owner of an old and settled title to survey out, in most cases, all the claims and holdings of his adjoining owners to see if any of them overlapped his land whereby he might be by such holding deprived of parts of his land? And in case he found his neighbors' lines extended so over his own as to create an overlap or interlock, would he not be driven to one of two things in order to save his boundary intact—sue or proceed to clear and take *pedis possessio* of some part of each and every such overlap that he might find? Long and earnest study of this statute and of the principles governing adverse possession of real estate has led me to the conclusion that no such construction can be placed upon the terms of this statute and that the contention of the plaintiff in this case is the true one, to the effect that there can be no adverse possession of the interlock except by taking *pedis possessio* of such interlock or part thereof by the junior claimant.

In this position, as I read them, I am fully sustained by the principles laid down by the Circuit Court of Appeals for this circuit in *Davis v. Seybold*, 195 Fed. 402, 115 C. C. A. 304, and by the Supreme Court of Appeals of West Virginia in *Camden v. Lumber Co.*, 59 W. Va. 148, 53 S. E. 409, and the very recent case of *Chilton v. White*, handed

down in May last and reported in 78 S. E. 1048. In the Davis-Seybold Case it was held that where one had surrounded by purchase a tract of land owned by Seybold with all the adjoining tracts, had then had all the tracts, including Seybold's, run into one boundary, by deed had conveyed the boundary as a whole, and the purchaser had taken possession for ten years or more of the adjoining tracts but not of Seybold's in the center, such holding was not adverse holding of Seybold's tract. In the Camden-Lumber Co. Case, speaking of the one having the older and better title, Poffenbarger, Judge, at page 155 of 59 W. Va., page 412 of 53 S. E., says:

"Such owner * * * need never to have had the actual possession. It suffices for him to show title in himself, because title gives a right of entry, a right to the possession, a right against which a mere trespasser can make no defense. *Duff v. Good*, 24 W. Va. 682; *Garrett v. Ramsey*, 26 W. Va. 345; *Billingsley v. Stutler*, 52 W. Va. 92 [43 S. E. 96]; *Olinger v. Shepherd*, 12 Grat. (53 Va.) 462."

Again at page 157 of 59 W. Va., page 413 of 53 S. E., he says:

"Thus, in the case of an interlock, if the owner of the elder title be in the actual possession of a part of the land covered by his patent, but outside of the interlock, and the holder of the junior patent be in possession of a part of the land covered by his patent, but outside of the interlock, the actual possession of the holder of the better title is deemed to extend to, and cover, every part of the interlock."

And he points out that the only modification of this common-law rule is the one made by *Garrett v. Ramsey*, supra, to the effect that, if the junior patentee takes possession of a part of the interlock and holds it adversely for the required period, his holdings will include the whole of the interlock if his patent calls for it, provided in the meantime the holder of the older title has been in actual possession of no part of the interlock. If he has been in such possession, then the junior claimant takes only such part of the interlock as he has held in actual possession.

Again it is said in this case at page 158 of 59 W. Va., page 413 of 53 S. E.:

"In ejectment law, however, a possession for less than ten years is utterly worthless and unavailing as a basis of recovery. It must go down before a good paper title."

And at page 159 of 59 W. Va., page 414 of 53 S. E.:

"There seems to vest a perfect paper title in the defendant, and such title, without actual possession, puts every foot of land within the boundaries fixed by the paper title constructively in the possession of the owner. This possession cannot be broken except by the possession of some other person within those bounds."

The Chilton-White Case reaffirms and re-enforces the principles set forth above, especially as to the constructive possession vested in the holder of the better title against which never runs a constructive possession in favor of the junior claimant unless he has had in actual adverse possession some part of the land in controversy. It would seem clear from these two cases, the latest utterances of the Supreme Court of Appeals of the state upon the subject, that the true owner is *con-*

structively always in possession of his land until ousted by a ten years' adverse holding by another and this by reason of his older and better title; that at any time he may protect the timber by injunction from the trespass of another, though that other may have a younger and worthless title to the land; that he can at any time before such bad title matures by adverse possession assume actual possession of his land as in this case and bring his suit in equity to remove the cloud of the worthless title therefrom.

Let there be decree for the plaintiff to this end entered in this case.

CADY v. BARNES et al.

(District Court, N. D. Ohio, W. D. March 1 1913.)

No. 2,351.

1. COURTS (§ 310*)—FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP—PARTIES.

Complainant, who was a resident of the district, brought suit to foreclose a mortgage on land lying within the district against mortgagors who were residents of another district. The mortgage was given to secure the debt of a third person, who was a resident of the district. *Held* that, while the resident debtor was a necessary party, he was not an indispensable party; and hence the court might proceed without him, and his residence within the district was insufficient to oust the court of jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 857; Dec. Dig. § 310.*]

2. COURTS (§ 327*)—FEDERAL COURTS—AMOUNT IN CONTROVERSY—ACTION—ACCRUAL.

Where a suit to foreclose a mortgage involving more than \$2,000, but less than \$3,000, accrued prior to the taking effect of the Judicial Code in January, 1912, federal jurisdiction was preserved by section 299 (Act March 3, 1911, c. 231, 36 Stat. 1169 [U. S. Comp. St. Supp. 1911, p. 246]), providing that the repeal of existing laws or amendments thereto shall not affect any right accruing or accrued, pending at the time of the taking effect of the act, but suits and proceedings for causes arising or acts done prior to such date may be commenced and prosecuted within the same time and with the same effect as if the repeal or amendments had not been made.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 889; Dec. Dig. § 327.*]

In Equity. Suit by Edward M. Cady, as trustee for the Ohio Savings Bank & Trust Company, against John E. Barnes and another. On demurrer to bill. Overruled.

King, Tracy, Chapman & Welles, of Toledo, Ohio, for complainant.
Lasley & Lasley and Ben W. Johnson, of Toledo, Ohio, for defendants.

KILLITS, District Judge. The complainant is mortgagee of property situated in this district, wherein complainant also resides. The mortgagors are residents of another district and are sole defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The mortgage was given by them to secure the debt of a third party, whose abode is within this district. The amount involved is more than \$2,000 and less than \$3,000, being an action to foreclose the mortgage for default arising before the taking effect of the act increasing the jurisdictional amount from \$2,000 to \$3,000.

A demurrer is interposed on two grounds: (1) That the debtor whose debt is secured by the mortgage in question is an indispensable party. (2) That this court has no jurisdiction for want of a jurisdictional amount involved equal to \$3,000 or more. Sustaining the demurrer on either of the grounds would oust the court of jurisdiction of the case.

[1] As usual in such controversies, the question of parties gives the court the most difficulty. Is the debtor, a resident of this district, a necessary or an indispensable party to the case? If he is but a necessary party, then the case must proceed without him.

The Circuit Court of Appeals of the Eighth Circuit (*Chadbourne v. Coe*, 51 Fed. 479, 2 C. C. A. 327, opinion by Caldwell, J.), after reciting that the Supreme Court has divided parties to suits in equity into three classes, formal, necessary, and indispensable, and that formal parties are those who have no interest in the controversy between the immediate litigants, but have an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, who may be parties or not, at the option of the complainant, says:

"'Necessary parties' are those who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by a decree which does complete and full justice between them. Such persons must be made parties if practicable, in obedience to the general rule which requires all persons to be made parties who are interested in the controversy, in order that there may be an end of litigation; but the rule of the federal courts is that if they are beyond the jurisdiction of the court, or if making them parties would oust the jurisdiction of the court, the case may proceed to a final decree between the parties before the court, leaving the rights of the absent parties untouched, and to be determined in any competent forum. * * * 'Indispensable parties' are those who not only have an interest in the subject-matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting their interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

Foster's Federal Practice, vol. 1, § 52 et seq., discusses at length the distinction between necessary and indispensable parties with reference to the classification as explained by Judge Caldwell in the case just cited and illustrates by concrete examples culled from the reports the line of demarkation.

In this case, it would be highly convenient doubtless, and also conducive to a quick adjustment of all interests and possible litigations, to have the debtor made a party to the controversy which complainant has brought into court. The interest, however, of the debtor in the case, is one which attaches itself, so far as this suit is concerned, only to the defendant mortgagors. It is a matter of no consequence to the complainant whether he gets his money from the mortgagors or from the principal debtor. A court in equity in a foreclosure suit has full

power to demand and have an accounting of the actual amount due so as to determine the amount of the claim and to bind the complainant mortgagee thereto. But it is obvious, the debtor not being made a party, that that determination will not in any particular affect his rights; he still may contest with the mortgagors notwithstanding the decree of foreclosure for the certain amount due as the result of the accounting.

[2] It would appear therefore that the debtor is but a necessary party within not only Judge Caldwell's definition but within the classification of concrete cases made by Foster, to which we have referred above. The demurrer then must be overruled on the first ground.

Going now to the second ground, is the jurisdiction of the court preserved by section 299 of the Judicial Code, in effect January, 1912, and may it entertain this suit with a sum of less than \$3,000 involved; the cause of action having accrued prior to the 1st of January of last year?

Section 299, so far as it affects this situation, reads:

"The repeal of existing laws, or the amendments thereof, * * * shall not affect * * * any right accruing or accrued, * * * pending at the time of the taking effect of this act, but * * * suits and proceedings for causes arising or acts done prior to such date, may be commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendments had not been made."

The District Court of the Eastern District of Oklahoma, in *Taylor v. Midland Valley Railway Co.*, 197 Fed. 323, has decided that this language retained jurisdiction in this court of causes of action accruing prior to the taking effect of the act involving an amount less than \$3,000. The opinion of Judge Youmans in that case and his analysis of *Home for Incurables v. Security & Trust Co.*, 224 U. S. 486, 32 Sup. Ct. 554, 56 L. Ed. 854, seem to us to be well and conclusively reasoned in support of the court's holding, and suggests that the demurrer on the second ground should likewise be overruled.

CADY v. BARNES et al.

(District Court, N. D. Ohio, W. D. October 13, 1913.)

No. 54.

1. EQUITY (§ 345*)—HEARING—ANSWER AS EVIDENCE—INFORMATION AND BELIEF.

Where, in a suit to foreclose a deed of trust as a mortgage, the bill did not waive answer under oath, and the answer, though under oath, pleaded defendant's view of the facts concerning the consideration of the deed on information and belief only and not positively, the answer did not compel complainant to prove the issue by two witnesses or by one witness, and corroborating circumstances.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 715-724; Dec. Dig. § 345.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MORTGAGES (§ 526*)—FORECLOSURE—REDEMPTION.

In proceedings to foreclose a mortgage in Ohio, the mortgagor retains an equity of redemption after foreclosure decree and order of sale until actual confirmation of the sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1530-1534; Dec. Dig. § 526.*]

3. MORTGAGES (§ 497*)—FORECLOSURE DECREE—EFFECT—BAR.

Proceedings to foreclose a prior mortgage on certain land having been instituted, complainant's petition charged that defendants C. and wife had or claimed to have some interest in the premises, and prayed that they be compelled to set up the same or be forever shut off from asserting it. C. appeared, but defaulted for answer, and a foreclosure decree was entered declaring that C. and wife had no interest in or lien on or claim to the premises or any part thereof. Before sale, however, the mortgagor conveyed the property to his brother, who paid the first mortgage debt and procured a dismissal of the suit. *Held*, that C.'s default operated only as an admission of the first mortgagee's prior interest in the land; and hence the decree was not a bar to C.'s second mortgage lien.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1469, 1471-1473; Dec. Dig. § 497;* Judgment, Cent. Dig. §§ 1060, 1164, 1294.]

4. SUBROGATION (§ 15*)—PURCHASER FROM MORTGAGOR—FORECLOSURE—PAYMENT OF DEBT.

Suit having been instituted to foreclose a first mortgage on certain land, and decree having been entered barring the interest of a second mortgagee, who was made a party to the suit, but failed to answer, the mortgagor before sale conveyed the property to his brother, who paid the first lien and procured a dismissal of the suit. *Held*, that the grantee, having elected to take the property in privity with the mortgagor rather than to acquire the first lienholder's interest by a purchase at a sale under the decree, was not entitled to subrogation to the rights of the first lienholder as against the second mortgagee.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 40, 44; Dec. Dig. § 15.*]

In Equity. Bill by Edward H. Cady, trustee for the Ohio Savings Bank & Trust Company, against John E. Barnes and others. Decree for complainant.

King, Tracy, Chapman & Welles, of Toledo, Ohio, for plaintiff.

Lasley & Lasley and Ben W. Johnson, of Toledo, Ohio, for defendants.

KILLITS, District Judge. About April 1, 1908, the Barnes Grain & Commission Company, of which one Charles W. Barnes was president and manager, was indebted to the Ohio Savings Bank & Trust Company, in the sum of about \$2,900, on several promissory notes. In order to secure this indebtedness and such further advances as the bank might make, said Charles W. Barnes, his wife joining him, and his father, executed and delivered to Edward H. Cady in trust for the bank a deed conveying the property involved in this litigation; it being understood that the deed, although absolute in form, should be treated as a mortgage. At this time the land in question had already been conveyed by mortgage still subsisting to the Fremont Savings Bank Company, of Fremont, Ohio, and whatever rights then were required by Cady as trustee were subject to said mortgage.

In so stating the facts the court is finding adversely to the claim of the defendant upon the facts that the deed to Cady was given to secure future advances only. Were there very much room in the testimony to hesitate on this point, the court would feel required to resolve its doubts in favor of the bank on the theory that it was absurd to suppose that the bank would neglect to insist on security for its loans then effected to the Barnes Company before agreeing to future advances, but the letter shown in evidence from the bank to Mr. Barnes, stating the terms upon which the deed was accepted, is evidence in favor of the court's conclusion of too positive a character to be lightly regarded.

[1] We may at this time also dispose of the defendant's contention that in view of the fact that the answer is sworn to, the oath not having been waived in the bill, the complaint is not sustained by the requisite quantum of evidence to meet the burden of proof cast upon the plaintiff respecting this point, for, touching the question of the consideration of the deed, the answer pleads defendant's view of the facts upon information and belief only and not positively; wherefore the rule does not apply. *Simpkins*, Suit in Equity, p. 437. Besides, the letter referred to above, stating the terms on which the deed is received, is corroborative evidence of so high a character as to suffice to satisfy the rule if it were applicable.

All the parties in interest prior to December 18, 1911, were residents of Ohio and within the jurisdiction of this court. The Fremont Savings Bank Company brought an action in the court of common pleas of Sandusky county to foreclose its mortgage, making Charles W. Barnes and wife and Cady and wife parties defendant. Cady entered his appearance but defaulted for answer. Barnes answered, taking issue solely with the plaintiff in the action and raising no issue between himself and Cady. Plaintiff's petition in the case, touching the Cady interest, simply alleged:

"That the defendants Edward H. Cady and Emma W. Cady have or claim to have some lien or interest in or to said premises, and plaintiff asks that they be compelled to set the same up or be forever shut off from asserting the same."

A decree of foreclosure was entered in favor of the plaintiff bank, in which a finding was had against the Cadys in these terms:

"And the court further finds that the said defendant Edward H. Cady and the defendant Emma W. Cady have no interest in or lien on or claim to said premises or any part thereof."

An order of sale was allowed and issued and the property advertised to be sold December 19, 1911.

[2] By principles familiar to all Ohio lawyers, an equity of redemption remained in Charles W. Barnes notwithstanding the decree of foreclosure and order of sale until an actual confirmation of a sale had. With his interest thus subsisting in the property, on the 18th of December Barnes effected a sale of this property to his brother, John E. Barnes, of Chicago, one of the defendants in the case here. Having agreed upon the terms of sale, the two brothers visited Fremont,

consulted an attorney, who assured them that the record effectually shut out as to all persons the Cady interest, and consummated their business by paying up and causing to be entered as satisfied on the court records the judgment in behalf of the bank, merging the mortgage, and having the action, after payment of the costs by them, dismissed without further procedure and obtaining a release and discharge of the mortgage from the bank and causing the same to be entered of record in the office of the county recorder. Thereupon a conveyance was made of this property by Charles W. Barnes and wife to John E. Barnes.

There can be no question whatever upon the record before us but that the payment of the bank's judgment and court costs by John E. Barnes was part of the consideration for the conveyance of this property to him. A small balance remaining after the payment of these claims was paid to Charles W. Barnes.

Cady, as trustee, thereafter commenced in this court the action now being determined to foreclose the lien in the nature of a mortgage held by him upon this property by virtue of the deed to him above referred to, and the facts we have just recited are set up by way of defense by John E. Barnes and wife, with the further claim that out of these transactions grew a right of subrogation to Barnes of the lien of the Fremont Savings Bank Company.

Three questions were presented on the hearing. The first one of fact the court has already disposed of. The other two are: (1) Were the rights of Cady under his deed foreclosed in favor of the defendant John E. Barnes, as a successor in interest to Charles W. Barnes, by the proceedings in the Sandusky common pleas court? (2) Is John E. Barnes, under the circumstances, subrogated to the rights of the Fremont Savings Bank Company in its decree foreclosing its mortgage?

[3] First, as to the scope of the decree. Does it go further than to simply adjudicate the rights of the plaintiff in the Sandusky county case (the bank) against Cady, to the end that Cady's interest in the property was foreclosed in favor of his codefendant Charles W. Barnes?

Chief Justice Chase, in *Graham v. Railroad Co.*, 3 Wall. (70 U. S.) 704, on page 711 (18 L. Ed. 247), said:

"It is true that it is the constant practice of courts of equity to decree between codefendants upon proper proofs, and under pleadings between plaintiffs and defendants, which bring the respective claims and rights of such codefendants between themselves under judicial cognizance. In the case of *Farquharson v. Seton*, cited by counsel, the pleadings showed that Farquharson, as a codefendant with Seton in another suit, had, by answer, set up the same case against him that he afterward set up by bill. In the former suit the decree had been against Farquharson, and he afterward sought to renew the litigation by an original proceeding, and it was held properly that the former decree, though between codefendants, was a bar. So in the case of *Chamley v. Lord Dunsany*, the general litigation was for the settling and marshaling of incumbrances, and it was held that where a case was made out between defendants, by evidence arising from pleadings and proofs between plaintiffs and defendants, a court of equity was entitled to make a decree between the defendants. In this case the decree was between de-

fendants who asserted adverse interests in the incumbered estate. But neither of these cases assert the doctrine maintained here for the appellants, that a court of equity may decree between defendants when neither pleadings nor proofs show any controversy or adverse interest between them. Nor have we been referred to any case which does assert that doctrine."

So it was held by the court, as stated in the syllabus:

"The language of a decree in chancery must be construed in reference to the issue which is put forward by the prayer for relief and other pleadings, and which these show it was meant to decide. Hence, though the language of the decree be very broad and emphatic—enough so, perhaps, when taken in the abstract merely, to include the decision of questions between codefendants—yet where the pleadings, including the prayer for relief, are not framed in the way usual in equity when it is meant to bring the respective claims and rights of codefendants before the court, but are framed as in a controversy between the complainant and defendant chiefly or only, such general language will be held down to these two principal parties alone."

To the same effect is the decision of the Supreme Court of the United States in *Barnes v. Railway Co.*, 122 U. S. 1, 7 Sup. Ct. 1043, 30 L. Ed. 1128, and this has become an established principle, so well settled that it is unnecessary to cite a large number of authorities. It may be sufficient to refer to 23 Cyc. p. 1279, and *Gatch v. Simkins*, 25 Ohio St. 89, and *Koelsch v. Mixer*, 52 Ohio St. 207, 39 N. E. 417, in which latter case the court said:

"Whilst the exact limits of the doctrine of *res judicata* in its application to some cases are not definitely settled, it is accepted as generally true that the judgment relied on for that effect in subsequent litigation must have been pronounced upon the same issues, between the same parties, or their privies, standing in an adversary character to one another. By this is not meant that they should have stood upon the record as plaintiff and defendant, but that this should have been their real attitude upon the issues tried and determined."

Two cases are cited to us in which this doctrine is applied to situations precisely similar to that before us. The first is *Lincoln National Bank v. Virgin*, 36 Neb. 735, 55 N. W. 218, 38 Am. St. Rep. 747, wherein the facts as found by the court were that in a suit by A. against B., the mortgagor, and C., a subsequent mortgagee, to foreclose his mortgage, he alleged that C. had or claimed some lien or interest in the premises but that it was subordinate and junior, and the decree, by default, was "that C. has no right, title or interest in the land in controversy herein." The court held:

"The general rule is that a default is an admission of such facts only as are properly alleged in the petition or complaint. * * * A recognized exception, however, is in a foreclosure or other kindred proceeding in which a defendant, who is called upon to disclose his supposed but unknown interest in the subject of the action by a default, admits his interest to be subordinate to that of the plaintiff. * * * The Merchants' Bank, by its default, must be held to have confessed the cause of action of the plaintiff therein, and to that extent the decree is conclusive. But the question of the validity of the mortgage now under consideration, as a second lien, was not presented by the petition, and the bank, as a defendant in that action, was justified in assuming that * * * the plaintiff was merely seeking to assert his own lien."

It was held that the second mortgage still subsisted as to all persons save the first and foreclosing mortgagee and those in privity with him.

The second case is that of *De Roberts v. Stiles*, 24 Wash. 611, 64 Pac. 795, by the Supreme Court of Washington. Stiles was the owner of real estate incumbered by two mortgages; one, the junior mortgage, held by the assignee of De Roberts. The senior mortgage was foreclosed; the junior mortgagee being made a party with Stiles. The property was actually sold to the senior mortgagee for the amount of his decree, but under the local law a proceeding to redeem was brought by one Fry, who had purchased the property from Stiles and who obtained title by paying the full amount due on the certificate of sale. The court held that Fry had no greater right as the purchaser from Stiles than Stiles himself, and that Stiles was not in position on the face of the record to contend that the mortgage lien assigned to De Roberts had been extinguished as to any other parties than the complainant in foreclosure and its privies. The same principle controlled the decision in the case of *Owensboro v. Westinghouse, etc., Co.*, 165 Fed. 385, 91 C. C. A. 335, by the Circuit Court of Appeals of this circuit.

These authorities are not in conflict with the cases cited to us by counsel for defendant and decided by the Supreme Court of Ohio. Granting, as contended, that this court would be bound by the decisions of the Supreme Court of Ohio touching the effect of judgments of the courts of the state as affecting title to real property within the state, the cases cited are clearly distinguished from those relied upon by the complainant and followed by us, in that in each case there had been a sale upon foreclosure with confirmation of sale and deed vesting title in another party. *Winemiller v. Laughlin*, 51 Ohio St. 421, 38 N. E. 111; *Pinney v. Bank*, 71 Ohio St. 173, 72 N. E. 884. There can be no question but that, if in this case John E. Barnes had bought the property at sheriff's sale and obtained his deed from the court, he would have succeeded to the rights of the Fremont Savings Bank Company and entitled to insist upon the exact terms of the decree, and that the interest of Cady in the property would have been barred. But John E. Barnes in this respect stands in the shoes rather of Charles W. Barnes, who, as we have stated, had no such finding in his favor.

[4] The last question is one of exceeding interest. The rule applicable is thus stated by Mr. Pomeroy (*Pomeroy's Equity Jurisprudence*, § 797):

"An owner of the fee subject to a charge, who is himself the principal and primary debtor, and is liable personally and primarily for the debt secured, cannot pay off the charge, and in any manner or by any form of transfer keep it alive. Payment by such a person and under such circumstances necessarily amounts to a discharge. The incumbrance cannot be prevented from merging by an assignment taken directly to the owner himself, or to a third person as trustee. This rule applies especially to a mortgagor who continues to be the primary and principal debtor. The rule also applies to a grantee of the mortgagor who takes a conveyance of the land subject to the mortgage, and expressly assumes and promises to pay it as a part of the consideration. He is thereby made the principal debtor, and the land is the primary fund for payment. If he pays off the mortgage it is extinguished."

The principle is reiterated by Pomeroy in sections 1206 and 1213. In section 1206 the author says:

"When the deed executed by the grantor contains a clause sufficiently showing such an intent, the acceptance thereof by the grantee consummates the assumption, and creates a personal liability on his part, which inures to the benefit of the mortgagee as though he had himself executed the deed. When a grantee thus assumes payment of the mortgage debt as a part of the purchase price, the land in his hands is not only made the primary fund for payment of the debt, but he himself becomes personally liable therefor to the mortgagee or other holder of the mortgage. The assumption produces its most important effect, by the operation of equitable principles, upon the relations subsisting between the mortgagor, the grantee, and the mortgagee. As between the mortgagor and the grantee, the grantee becomes the principal debtor primarily liable for the debt, and the mortgagor becomes a surety, with all the consequences flowing from the relation of suretyship. As between these two and the mortgagee, although he may treat them both as debtors and may enforce the liability against either, still, after receiving notice of the assumption, he is bound to recognize the condition of suretyship, and to respect the rights of the surety in all of his subsequent dealings with them."

And in a note to the above written by the author himself it is said:

"Since such grantee thus becomes the principal debtor, primarily and absolutely liable for the debt, when he pays the mortgage it is extinguished completely; when he takes an assignment of it, it is completely merged. He cannot by any form of assignment, legal or equitable, or by subrogation, keep the mortgage alive as against other liens on the land"—citing cases.

And in section 1213:

"On the other hand, if payment of the mortgage debt is made to the mortgagee or other holder of the mortgage, by a party who is himself personally and primarily liable for the debt, who is in any manner or by any means the actual primary debtor, whose duty it is to pay the debt absolutely, and before all others, such payment operates ipso facto as an end of the mortgage, and the lien is completely destroyed. The party so paying is not subrogated to the rights of the mortgagee; there is no equitable assignment to him of the mortgage security; even if he should receive a formal assignment, the mortgage could not be thus kept alive, but would be wholly merged and ended."

Annotating this doctrine, the author says:

"In this description are included the mortgagor himself, so long as he remains the principal debtor, and has not changed his relations by a conveyance, and also the grantee from the mortgagor who has assumed payment of the mortgage debt, and thus rendered himself the principal and primary debtor therefor."

This principle was recognized by the Supreme Court of Ohio in *Joyce v. Dauntz*, 55 Ohio St. 538, 45 N. E. 900, wherein relief was granted to one having paid the mortgage debt on the ground that the circumstances showed him not to have been primarily liable but to have paid it to protect his own estate.

To the same effect is *Birke v. Abbott*, 103 Ind. 1, 1 N. E. 485, 53 Am. Rep. 474, where the doctrine is announced as follows:

"Subrogation takes place only where one has performed the obligations of another, or has paid his own debt, the burden of which has, for a valuable consideration, been assumed by another, or when he has paid incumbrances for the protection of his own title or interests, the payment of which he has not assumed by contract."

To the same effect are *Shirk v. Whitten*, 131 Ind. 455, 31 N. E. 87; *Stastny v. Pease*, 124 Iowa, 587, 100 N. W. 482; *Lincoln Nat. Bank v. Virgin*, *supra*; *Willson v. Burton*, 52 Vt. 394; and cases cited in 37 Cyc. 452, 473.

The facts before us seem to bring this case clearly within the authorities cited. The agreement between Charles W. Barnes and John E. Barnes, respecting the consideration for the conveyance of the property, made John E. Barnes primarily liable for the debt to the Fremont Savings Bank Company, and the transaction was one controlled by the settled course of Ohio law. In *Thompson v. Thompson*, 4 Ohio St. 333, it was held to be a well-settled principle that the purchaser of an incumbered estate, if he agreed to take it subject to the incumbrance and an abatement is made in the price on account, is bound to indemnify his grantor against the incumbrance whether he expressly promised to do so or not; a promise to that effect being implied from the nature of the transaction.

In *Brewer v. Maurer*, 38 Ohio St. 543, 43 Am. Rep. 436, it is held that the acceptance by a grantee of a deed "containing the clause that the said grantee assumed as part of the purchase money the mortgage debt was an agreement between herself and her grantor to pay the mortgage debt as part payment of the consideration agreed by her to be given for the land. The transaction was not a purchase of the equity of redemption, subject to the mortgage, but of the land in fee with a stipulation as to the manner in which the purchase money agreed upon by the parties should be paid."

In *Emmitt v. Brophy*, 42 Ohio St. 83, the principle of *Thompson v. Thompson*, *supra*, is restated in these words:

"An agreement made on a valid consideration by one person with another, to pay money to a third, can be enforced by the latter in his own name."

Under the agreement between them, as very freely testified to by both of the Barnes brothers on the stand, the payment of the bank's lien by John E. Barnes was an act which he had bound himself to perform for his brother; it was of no other consequence respecting its effect upon the status of the lien when the act was performed than would have followed if Charles W. Barnes, the original obligor, had taken his grantee's consideration and out of it paid off the lien and costs. John E. Barnes simply took the position his brother then occupied with respect to the lien; no one will say that any payment of this lien by Charles W. Barnes would have resulted in a subrogation to him against Cady's claim, and it is obvious from the authorities cited, which are by no means exhaustive, that the only way in which a right in John E. Barnes to either enjoy a subrogation of the bank's lien or to have the advantage of the decree against Cady would be through becoming privy to the bank's interest by way of purchase at a sale upon the decree in favor of the bank. He chose to become privy to the mortgagor rather than the mortgagee, a distinction of controlling significance in this case.

The decree in this case should be for a foreclosure of the lien set up in the complaint.

UNITED STATES v. BRESSI.

(District Court, W. D. Washington, N. D. September, 1913.)

No. 2,546.

1. PERJURY (§ 11*)—FALSE SWEARING IN NATURALIZATION CASES—NECESSITY THAT TESTIMONY BE MATERIAL.

To constitute a crime under Cr. Code, § 80 (Act March 4, 1909, c. 321, 35 Stat. 1103 [U. S. Comp. St. Supp. 1911, p. 1612]), which provides that "whoever, in any proceeding under or by virtue of any law relating to the naturalization of aliens shall knowingly swear falsely in any case where an oath is made or affidavit taken shall be fined," etc., the testimony given must be material.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 38-54; Dec. Dig. § 11.*]

2. PERJURY (§ 11*)—FALSE SWEARING IN NATURALIZATION CASES—MATERIALITY OF TESTIMONY.

Testimony given by an applicant for naturalization on the hearing of his petition that he was never arrested nor imprisoned in his native country, and never committed a crime there, is material and, if knowingly false, constitutes perjury under Cr. Code, § 80 (Act March 4, 1909, c. 321, 35 Stat. 1103 [U. S. Comp. St. Supp. 1911, p. 1612]).

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 38-54; Dec. Dig. § 11.*]

Criminal prosecution by the United States against Joseph Bressi. On demurrer to indictment. Overruled as to the first count and sustained as to the second.

C. F. Riddell and John J. Sullivan, both of Seattle, Wash., for plaintiff.

Vanderveer & Cummings and Robert Welch, all of Seattle, Wash., for the United States.

NETERER, District Judge. The grand jury returned an indictment against the defendant in two counts. Count 1 recites in substance that the defendant, being a citizen of Italy, filed in the superior court of the state of Washington a petition in writing, signed by himself, applying to be naturalized as and become a citizen of the United States of America under the provisions of the naturalization laws; and thereafter such proceedings were had that the matter came on regularly for hearing, and upon the hearing:

"The said Joseph Bressi being then and there so sworn on his oath as aforesaid, did then and there willfully, unlawfully, knowingly, feloniously, and corruptly depose and say in substance and effect that he had never been convicted of any crime in the old country and had never been arrested in the old country, meaning by the words 'old country' Italy, the country from whence he came, which statements of the said Joseph Bressi were given by question and answer in words and figures as follows, to wit:

"Q. Did you ever have any trouble in the old country? A. No, sir.

"Q. Were you ever arrested in the old country? A. No, sir.

"Q. You never had any trouble with any of the authorities in the old country before you came here? A. No, sir; I never did. * * *

"Q. I ask you again, were you ever arrested charged with any crime or violation of the law in Italy, in your native land? A. No, sir; I never was.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 208 F.—24

"Q. Is it not a fact that in the old country you were arrested and convicted for homicide in the old country, killing a man? A. No, sir.

"Q. Did you ever serve any time in prison in the old country? A. No, sir.

"Q. Were you ever arrested in the old country for carrying a stiletto? A. No, sir."

"That in truth and in fact, as he, the said Joseph Bressi, well knew at the time of making said statements as aforesaid, the said Joseph Bressi had had trouble with the authorities and had been arrested in the old country charged with a violation of the law of Italy and had been convicted in Italy for killing a man and had served time in prison in Italy."

In count 2 the defendant is charged with perjury upon the hearing of his said petition for citizenship, as follows:

"The said Joseph Bressi, being then and there so sworn, on his oath as aforesaid did * * * corruptly depose and say in substance * * * that the said Frank Bressi had never had any trouble in the old country and had never been arrested or had any trouble with the authorities in the old country, meaning by the words 'old country' Italy, * * * which statements * * * were given * * * as follows, to wit:

"Q. Did your brother, Frank, ever have any trouble in the old country? A. No, sir.

"Q. He never was arrested or never had any trouble with the authorities in the old country? A. No, sir."

It is then alleged that the said statements were false and known to be false by the said defendant. The defendant "demurs to the indictment therein and to each count of said indictment on the ground that the same does not state facts sufficient to constitute an offense."

It is contended on the part of the defendant that the testimony which was sought from this witness and concerning which he was interrogated was not material to the issue then before the court, and, not being material, perjury cannot be predicated upon the answers.

[1] This indictment is prosecuted under section 80 of the Penal Code, approved March 4, 1909, which seems to be a re-enactment of section 5393, U. S. R. S. (U. S. Comp. St. 1901, p. 3654), and reads:

"Whoever, in any proceeding under or by virtue of any law relating to the naturalization of aliens, shall knowingly swear falsely in any case where an oath is made or affidavit taken, shall be fined. * * *"

Other enactments with relation to the giving of false testimony are section 23 of the Act of June 29, 1906 (34 Stat. 603, c. 3592 [U. S. Comp. St. Supp. 1911, p. 539]), which provides that any person "who in any naturalization proceeding knowingly procures or gives false testimony *as to any material fact*, * * * required to be proved in such proceedings, shall be fined," etc.

Section 341 of the Penal Code provides:

"All other sections and parts of sections * * * so far as they are embraced within and superseded by this act are hereby repealed."

It is suggested that the act of 1906, using the phrase "as to any material fact," manifests a desire on the part of Congress to amend section 5395 of the U. S. R. S. (U. S. Comp. St. 1901, p. 3654), and requires that all testimony to be the subject of perjury must be material. It is in reply suggested on the part of the government that, if such intent was manifest in 1906, the requirement of section 5395 being re-

enacted in 1909 manifests an intent to omit the phrase "as to any material fact," and make false swearing in a court proceeding perjury whether material or not. I think the use of this phrase in the section above quoted is immaterial, in view of the fact that the courts have uniformly held, in considering section 5395 and section 23 of the 1906 act, that the testimony must be material. Section 80 of the Penal Code must be considered in the light of this conclusion, and it remains to determine whether the examination of the defendant upon the hearing in question was material. Section 4, subd. 4, of chapter 3592, U. S. St. at L. vol. 34, among other things, provides:

"In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence and occupation of each witness shall be set forth in the record."

Section 6 of the same chapter provides:

"That petitions for naturalization may be made and filed during term time or vacation of the court and shall be docketed the same day as filed, but final action thereon shall be had only on stated days, to be fixed by rule of the court."

Section 4 of the same chapter, subd. 4, provides:

"It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the state or territory where such court is at the time held one year at least, *and that during said time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same.*"

[2] The defendant contends that the phrase "during said time he has behaved as a man of good moral character" limits the inquiry, and that any examination of the applicant prior to that time is immaterial, and cites *U. S. v. Grottkau* (D. C.) 30 Fed. 672; *U. S. v. Severino* (C. C.) 125 Fed. 949; *In re Ross* (C. C.) 188 Fed. 685; *In re Hopp* (D. C.) 179 Fed. 561; *U. S. v. Dupont* (D. C.) 176 Fed. 823; *In re Di Clerico* (D. C.) 158 Fed. 905; *U. S. v. Bedgood* (D. C.) 49 Fed. 54; *U. S. v. Singleton* (D. C.) 54 Fed. 488; *U. S. v. Maid* (D. C.) 116 Fed. 650.

These cases are all readily distinguishable from the facts in this case. *U. S. v. Grottkau* (D. C.) 30 Fed. 672, was a proceeding under R. S. U. S. § 2165 (U. S. Comp. St. 1901, p. 1329) "that the oath of the applicant shall be in no case allowed to prove his residence"; and *U. S. v. Dupont* (D. C.) 176 Fed. 823, was a prosecution under the same provision. District Judges Bean and Dyer both held that the oath administered in each case was extrajudicial and perjury could not be predicated thereon. *U. S. v. Severino* (C. C.) 125 Fed. 949, was predicated upon false statement required by New York law in addition to the testimony of the applicant under act of Congress, and it was held that the oath was extrajudicial. In *Re Ross* (C. C.) 188 Fed. 685, an alien had been convicted of murder in the second degree, but his conduct for more than five years had been good. He was not admitted to citizenship. In *Re Di Clerico* (D. C.) 158 Fed. 905, an applicant had made

use of a certificate of naturalization previously issued to him after knowledge that he was not entitled thereto, and, until it was canceled, the court held he was not entitled to apply for naturalization again until the expiration of five years. Each and every case cited by defendant are in like manner distinguishable from the case at bar.

The naturalization act makes the applicant for citizenship a witness in his own behalf. His testimony as to being attached to the principles of the Constitution of the United States and his disposition with relation to our theory of government, and his position in and relation to society and beliefs pertaining to organized government, and disposition as to public officers, is the very essence of the inquiry. These are matters of growth and development, and a conclusion as to some of these requirements can only be arrived at by a discovery of the mental relation and bearing as to these functions and institutions; and any condition or practices of the applicant during his previous life would be material as bearing upon the truthfulness of the statements made. The examination, since the applicant is a witness in his own behalf, should not be limited to the time within which he may have resided in the United States, but should cover a broader period of his life, as that would be a very material criterion by which the court could judge his present and probable future conduct. It would be material to know the sacredness with which human life is regarded, his relation to organized society pertaining to governmental functions, and, if such examination should develop a standard of life and living at some time which would be considered outside the limits which religion and society and the law have long established for the best welfare of government, it would be of the most material character to guide the court in its conclusions in determining whether a person who had ruthlessly violated that standard upon which good qualities are dependent should be the recipient of the highest privilege this government can confer—citizenship. The inquiry made in count 1 of the indictment would have a material bearing upon the credibility of the statement and testimony of the petitioner. *State v. Coella*, 3 Wash. 99, 28 Pac. 28; *State v. Champoux*, 33 Wash. 339, 74 Pac. 557; *State v. Miller*, 26 R. I. 282, 58 Atl. 882, 3 Ann. Cas. 943; *State v. Park*, 57 Kan. 431, 46 Pac. 713; *U. S. v. Landsberg (C. C.)* 23 Fed. 585; *State v. Moran*, 216 Mo. 550, 115 S. W. 1126; *People v. Courtney*, 94 N. Y. 490; *Lang v. U. S.*, 133 Fed. 201, 66 C. C. A. 255.

The demurrer is overruled as to count 1 of the indictment and is sustained as to count 2.

In re YOUNG.

(District Court, N. D. Ohio, E. D. October 2, 1912.)

No. 4,135.

1. BANKRUPTCY (§ 143*)—ASSETS—INSURANCE.

A policy on a bankrupt's life for the benefit of his children or their executors, etc., contained no right to change the beneficiary, and as to surrender values provided that at the end of ten years or at the end of each period of five years thereafter the company would pay to the persons designated a cash value only on surrender and release thereof by such person or persons within 30 days after the end of such period. The policy was issued April 3, 1895, and at the time bankruptcy intervened there would be no right to surrender until April 3, 1915. *Held*, that such policy was not controlled by Gen. Code Ohio, § 9398, providing that policies of life insurance made payable to a married woman or any person in trust for her or for her benefit, etc., shall inure to her benefit, but was nevertheless not such a policy as would pass insured's contingent interest therein to his trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.*]

2. BANKRUPTCY (§ 143*)—ASSETS—LIFE INSURANCE POLICY—INSTALLMENT ENDOWMENT.

A policy on the bankrupt's life, providing that at the expiration of 20 years there should be paid to the insured or his assigns \$250 annually until 20 installments had been paid, or at his election such deferred installments would be commuted and paid in one stipulated sum, but that if he should die within the 20-year period the installments should be paid to his widow or their stipulated commuted sum might be paid on the written request of insured and his beneficiary, the right to change the beneficiary being reserved to him, was a speculative endowment policy solely for the bankrupt's benefit and passed to his trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.*]

3. BANKRUPTCY (§ 143*)—ASSETS—LIFE INSURANCE POLICIES—EXEMPTIONS.

Gen. Code Ohio, § 9398, exempts policies of insurance payable to a married woman or to any person in trust for her or for her benefit. Bankr. Act July 1, 1898, c. 541, § 6, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), declares that the act shall not affect the allowance of exemptions to bankrupts prescribed by state laws in force at the time of the filing of the petition, and section 70 (30 Stat. 565 [U. S. Comp. St. 1901, p. 3541]) provides that when any bankrupt shall have any insurance policy which has a cash surrender value it shall be surrendered to the trustee, or unless he shall pay or secure such surrender value for the benefit of his creditors. *Held*, that the policies, having a cash surrender value payable to the bankrupt's wife whether he had the right to change the beneficiary or not, were exempt and not assets passing to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. § 143.*]

In the matter of bankruptcy proceedings of A. S. Young. Petition for William H. Vodrey, as trustee, to sell at private sale the right of the bankrupt in certain policies of insurance. Granted in part.

J. H. Sampliner, of Cleveland, Ohio, for petitioning creditors.

Brookes & Thompson, of E. Liverpool, Ohio, for bankrupt.

W. B. Hill, of E. Liverpool, Ohio, for trustee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

KILLITS, District Judge. The matter before us is the petition of William H. Vodrey, trustee of the bankrupt, to be allowed to sell at private sale the right of the bankrupt in ten policies of insurance upon his life, against the claim of the bankrupt and his wife, Ella S. Young, that neither of said policies are in any way a part of the bankrupt's estate. The petition has been referred to us for decision by the referee, who advises that it be allowed as to all of the policies with the exception of one in the amount of \$5,000, in force for 16 years, which has apparently no cash surrender value and in which the insured does not retain the right to change the beneficiary, who is his wife.

With the exception of a policy for \$3,000, payable to the children of the bankrupt, which must be separately treated, a consideration of the remaining policies demands a construction of section 9398 of the General Code of Ohio, which reads:

"A policy of insurance on the life of any person, duly assigned, transferred, or made payable to a married woman, or to any person in trust for her or for her benefit, whether such transfer is made by her husband or other person, shall inure to her benefit, and that of her children, independently of her husband or his creditors, or of the person effecting or transferring the policy or his creditors."

This statute, as far as we are able to ascertain, has received no construction by the courts of Ohio.

The situation, of course, also demands that this state statute be weighed in connection with sections 6 and 70a of the Bankruptcy Law, which two sections in their pertinent parts read as follows:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile." Section 6.

"Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets." Section 70a.

Since the decision of *Holden v. Stratton*, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018, there is no longer a question that the paragraph quoted from section 70a qualifies or limits the terms of section 6 of the Bankruptcy Act. It is the holding of the court, in substance, that section 70a deals only with policies of insurance which are not exempt under the state law, and the question simplifies itself to be whether, under a proper construction of the state statute quoted, the policies now to be considered are exempt.

The nine policies under consideration fall into four classes:

(1) Those which are made payable to Ella S. Young, insured's wife, wherein the bankrupt expressly retains the right to change the beneficiary at any time without her consent, and is granted the right to receive at his sole option at any time the stipulated surrender value. Of these there are three.

(2) The second class embraces four policies, each having a cash surrender value at certain periods which may be taken by the insured

without the consent of the beneficiary. No right to the insured is reserved to change the beneficiary.

(3) In the third class is a policy in the Northwestern Mutual Life Insurance Company, termed by the company an "installment endowment," which provides that, in consideration of the annual premium to be paid for a period of 20 years, at the expiration of such term there will be paid to the insured or his assigns the sum of \$250 yearly until 20 installments have been paid, or at his election such deferred installments will be commuted and paid to him in one stipulated sum, but that if he should die within the 20-year period these 20 annual installments shall be paid to the bankrupt's wife, Ella S. Young, or their stipulated commuted sum may be paid upon the written request of the insured and his beneficiary. The right is also expressly reserved to the insured to change the beneficiary at any time during the continuance of the policy. This policy has been in force for about 15 years.

(4) The fourth class embraces a policy in the sum of \$3,000 of the nature known as a 20-payment life, which has continued for about 17 years, in which the beneficiaries are "the children of said insured equally, or their executors, administrators or assigns." No right to change beneficiary has been reserved to the insured, and as to surrender values the provision is as follows:

"At the end of ten years from the date above written or at the end of each period of five years thereafter, * * * this company will pay to the person or persons thereunto designated in the aforesaid application a cash value therefor * * * only upon surrender and release hereof by such person or persons within thirty days after the end of such period."

In the application the insured designated himself as the person to whom the surrender value should be paid in his lifetime.

[1] It is plain that the policy last referred to is not controlled by the state statute above quoted, nor by any other statute of the state, except that by law (section 9393, Code Ohio) the insurable interest of bankrupt's children is recognized. The only ground for requiring this policy to be considered as part of the bankrupt's estate, to be administered upon in behalf of his creditors, is the limited right given him in the terms quoted above to surrender the policy and receive the stipulated value, and the question before us is whether that option is one which he may be compelled to exercise or which he might assign to be exercised by some one else.

The precise question arose in the case of *Townsend's Assignee v. Townsend*, 127 Ky. 230, 105 S. W. 937, 16 L. R. A. (N. S.) 316, except that in that case was involved a particular statute of Kentucky (Ky. St. § 655) which we do not consider essential to the determination. Speaking of a somewhat similar option enjoyed by the insured, the court says that it is such an estate as "under a general deed of assignment will not pass by law to the assignee for creditors. The interest is remotely contingent and incapable of being valued. It is so woven in with other considerations, such as his conception of duty to his children and the exercise of judgment in their behalf and in his own, that there can be no certain way of estimating the value of that interest or the disposing of it without destroying or injuring other interests under

the policy which are primary to those of the insured. The option is baldly to let his children have this provision for their future support or to take it himself. Whether he should take it himself involves the exercise of judgment, discretion, and his own conception of duty. No one else has the right to exercise it for him nor against the children. No one else could be actuated by the same impulse."

The policy in question was issued April 3, 1895. By the terms quoted above, only within 30 days after April 3, 1910, the insured could have surrendered the policy and taken its surrender value. By its terms it has at this time no surrender value, nor did it have any at the time of the application of the trustee, February 9, 1912, for an order of sale. Only during the 30 days succeeding April 3, 1915, may this option be exercised next again by the insured. Without the provisions just quoted, the policy would be an ordinary life policy, in which case nothing would pass to the trustee. *Remington on Bankruptcy*, § 1004.

It would seem that good policy is opposed to the sacrifice of the interests of insured's children and to the control of the insured's option, which depends upon the pull of natural affections for its exercise and which can be exercised only at a period quite remote from the orderly administration of this estate to put this policy to sale for whatever sum the contingent interest of the estate, if any there is, might bring. Under a strict reading of section 70a, which we have quoted, it is open to grave doubt whether this policy is within the statute.

Without the consent of the children at this time the company issuing the policy can pay no surrender value, nor is there any method whereby under the contract the value at this time may be ascertained. By no process can the insured be compelled to exercise at this time an option that is not open to him for three years, nor can the company be compelled to pay any amount upon the policy. One who would attempt to buy the assumed rights of the insured or of the estate under this policy must take into consideration the contingency that all his interest may be lost by the death of the insured prior to April 3, 1915, and he must burden himself with the necessity of moving immediately after that date to the exercise of the option, which then only otherwise is conferred upon the insured. These considerations suggest to the court that the estate has no salable interest in this policy and that the petition of the trustee to that end should be denied.

[2] The policy put by the court in the third class, in our judgment, passes to the trustee. It is such a policy as that considered by the court in *Re Herr* (D. C.) 182 Fed. 716, 25 Am. Bankr. Rep. 142, and in *re Loveland* (D. C.) 192 Fed. 1005.

In the *Herr Case* the court say:

"While the wife, as it stands, is the contingent beneficiary, the policy is under the complete control of the bankrupt, and he may change the situation at any moment, and realize upon it, without regard to her, either giving it up and getting the surrender value, or continuing it with a newly designated beneficiary, just as he may choose."

In fact, this is only contingently a life insurance policy at all. It is purely a speculative endowment, an investment for the sole benefit of the bankrupt, provided he survives the limited period of the

policy, which is well within his expectancy of life. To permit this sort of contract to be exempt from application upon bankrupt's debts under the assumed application of the section of the Ohio statute which we have quoted above would be, it seems to us, to open a wide avenue for, if not a concealed fraud upon, his creditors, at least an improvident disposition of his income to their injury and his benefit. We are content to sustain the referee's recommendation and to direct the sale of this policy on the application of the trustee on the authorities just cited.

[3] The trustee justifies his recommendation that the remaining seven policies in classes 1 and 2 be ordered sold, upon the authority of *In re Loveland*, supra, where the exact point, so far as policies of class 1 are concerned, has been decided. This case was decided with reference to the Massachusetts law, which provides that:

"Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband or by any other person, and whether the assignment or transfer is made by her husband or by any other person, shall inure to her separate use and benefit, and to that of her children."

This statute is not vitally different in the particulars under consideration from that of Ohio the application of which we are considering; but the District Court of the United States for Massachusetts, in so deciding this case upon its facts, is at variance with the great current of authority and is supported by no other decision to which we have been cited, the case of *In re Herr*, as we have observed, being upon facts comparable to the policy which we have put in class 3 rather than those in class 1.

The exact question involved as to these seven remaining policies, as to whether or not they are exempt under provisions similar to those of Ohio, has been frequently passed upon. The cases on this subject are: *In re Orear*, 189 Fed. 888, 111 C. C. A. 150, 26 Am. Bankr. Rep. 521, a decision by the Circuit Court of Appeals of the Eighth Circuit, construing a statute of Missouri; *In re Booss* (D. C.) 154 Fed. 494, 18 Am. Bankr. Rep. 658, construing a statute of Pennsylvania; *In re Pfaffinger* (D. C.) 164 Fed. 526, 21 Am. Bankr. Rep. 255, construing a statute of Kentucky; *In re Whelpley* (D. C.) 169 Fed. 1019, 22 Am. Bankr. Rep. 433, construing a statute of New Hampshire—the provisions of which several statutes are substantially identical with those of Ohio and in each of which cases the policies under consideration were similar to those in class 1 in the case at bar; and *In re Johnson* (D. C.) 176 Fed. 591, construing a similar statute of Minnesota with reference to a policy similar to those in class 2. These authorities are all adverse to the decision of the District Court of Massachusetts (192 Fed. supra) upon which the referee relies, and control us in a construction of the Ohio statute, which reserves the interest of the beneficiary in these seven policies and holds them as exempt thereunder from administration in behalf of the bankrupt's estate.

It is to be observed that the conditions of the policies embraced in class 1 make a stronger case for the trustee's application than those attached to the policies embraced in class 2, and that the authorities

exempting the policies in the first class are a fortiori applicable to those in the second class. In *Re Orear*, supra, the court says:

"The primary purposes of such policies is still to insure against death and usually for the benefit of those dependent upon the insured, and when a modern policy is made, as in this case, payable upon the death of the insured to his wife by name as beneficiary, the fact that the insured may have the right to change the beneficiary or enjoy certain collateral rights in his lifetime does not make it any the less a policy of insurance made by an insurance company expressly for the benefit of the wife of the insured within the meaning of the statute in question. * * * The property is not only exempt, but never passed to him (the trustee) and is not his. The statute, while in the nature of an exemption law, is more than that; it declares that this property shall inure to the separate benefit of the wife. Ordinary exemption laws leave the full right and title to the property in the debtor. This law declares that this policy shall inure to the separate benefit of the wife of Jacob W. Derr."

This language is equally applicable to the conditions in this case, having reference to the terms of the Ohio statute, which provides that a policy of insurance made payable to a married woman "shall inure to her benefit and that of her children independently of her husband or his creditors or of the person effecting or transferring the policy or his creditors." To grant the request of the trustee is to absolutely extinguish all interest of the beneficiary in these contracts; it is to wipe out all provision that the bankrupt has made for his wife and family. If that may be done, then section 9398, General Code of Ohio, and section 6 of the Bankruptcy Law are to no purpose.

An order may be entered in this case granting the right of sale to the trustee of the estate's interest in the policy issued January 14, 1897, by the Northwestern Mutual Life Insurance Company, No. 361,713, and denying the application as to each of the others.

GAUMONT CO. et al. v. HATCH.

(District Court, W. D. Pennsylvania. August 28, 1913.)

No. 1, May Term, 1913.

1. COPYRIGHTS (§ 81*)—SUIT FOR INFRINGEMENT—PARTIES—CONSTRUCTION OF RULES.

Under new equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii), which provides that "all persons having an interest in the subject of the action and obtaining the relief demanded may join as plaintiffs," the owner of a copyrighted moving picture film and his lessees within a certain territory, who have contracted to return it on termination of the lease, may join in a suit to enjoin a third person from infringement by making or exhibiting copies of such film.

[Ed. Note.—For other cases, see Copyrights, Dec. Dig. § 81.*]

2. COPYRIGHTS (§ 82*)—SUIT FOR INFRINGEMENT—PLEADING.

A motion to dismiss a bill for an injunction to restrain infringement of a copyright for a motion picture film, on various grounds, considered and overruled.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 72, 73; Dec. Dig. § 82.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the Gaumont Company, John A. Schwalm, and Carl S. Rothleder against Frank Hatch. On motion to dismiss bill. Overruled.

Isaac B. Owens, of New York City (F. W. H. Clay, of Pittsburgh, Pa., of counsel), for plaintiffs.

Edward A. Lawrence and J. A. Wakefield, both of Pittsburgh, Pa., for defendant.

YOUNG, District Judge. [1] The grounds of dismissal in this case are fivefold. The first ground is that there is a misjoinder of the parties plaintiff in that the Gaumont Company is joined with Schwalm and Rothleder, the lessees. The thirty-seventh rule in equity (198 Fed. xxviii, 115 C. C. A. xxviii) provides:

"All persons having an interest in the subject of the action and obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff."

It appears from the allegations of the bill as amended that the Gaumont Company is the owner of the film and the lessor and is entitled to have the film returned at the termination of the lease. It is therefore interested in preventing by injunction the removal of the film, or any copy thereof, beyond the jurisdiction of this court, as such removal into another jurisdiction would result in the necessity of more and probably of a multiplicity of suits. The lessees, Schwalm and Rothleder, are interested in preventing the exhibition of the film at any other place within the territory secured to them by the lease. They have a vital interest in the relief sought. Both the lessor, the Gaumont Company, and the lessees, Schwalm and Rothleder, are parties in interest, and, under the nineteenth rule in equity (198 Fed. xxviii, 115 C. C. A. xxviii), are proper parties plaintiff. This ground of dismissal must therefore be overruled.

[2] The second ground of dismissal is that the Gaumont Company has no right or title to the film; it having assigned it to Schwalm and Rothleder. This ground may have been good at the time the motion to dismiss was filed, as the complainants pleaded an assignment of the film by the Gaumont Company to Schwalm and Rothleder. But the question of title in the Gaumont Company has been eliminated by the amendment to paragraph 5 of the bill, which now sets up a lease for two years to Schwalm and Rothleder and a covenant on their part to return the film to the Gaumont Company. It is therefore unnecessary to decide the question of whether or not the assignment of the exclusive right to Schwalm and Rothleder by the Gaumont Company would have made the joinder of all the parties such a misjoinder as would require the dismissal of the bill. The Gaumont Company by the leasing of the film did not part with the title; but, as we have said in discussing the first ground of dismissal, it was a necessary and proper party to the bill. This ground of dismissal will therefore be overruled.

The third ground of dismissal is that the bill does not set up a compliance with the provision of the act of Congress fixing the conditions and steps necessary to procure a copyright. The alleged defects in the procuring and registering of this copyright are set forth by coun-

sel for respondent as being that by paragraph 3 of the bill it is alleged that the Gaumont Company was the sole and exclusive owner, author, and proprietor of a certain original moving photograph or photographs, and by paragraph 4 of the bill that the work is designated as a moving picture photograph, and that it is not alleged that the work constituted a photo play, and that therefore, under the eleventh section of the Copyright Law of March 4, 1909, c. 320, 35 Stat. 1078 (U. S. Comp. St. Supp. 1911, p. 1475), as amended by Act August 24, 1912, c. 356, 37 Stat. 488, there should have been deposited a title and description with not less than two prints taken from the different scenes other than a photo play. These alleged defects in the original bill were cured by the amendments allowed by the court. In the amendments the work is described as a moving picture photograph or photo play, and the allegation is made that the Gaumont Company deposited with the register of copyrights a title and description of each scene or act of said drama "The International Conspiracy"; a certified copy of the certificate of registration being attached to the amendment. The allegation is sufficient, and it puts on the complainants the burden of showing the character of the work, whether a "motion picture photo play," or a "motion picture other than a photo play," and also the burden of showing compliance with the act as to the deposit with the register of copyrights of title, description, and proper prints. It is sufficiently alleged, and the question of whether or not complainants can prove it is not now before us. As the motion to dismiss has taken the place of a demurrer, the rule that a demurrer admits the facts as alleged obtains.

The fourth ground of dismissal is that it does not appear from the bill that the acts and duties fixed by the act were performed. This general statement, we gather from the brief of counsel for respondent, is that under the twelfth section of the act the action cannot be maintained until the provisions of the act with respect to the deposit of copies and illustration of such work shall have been complied with, and that section 11 provides:

"But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies under sections 12 and 13 of this act where the work is later produced in copies for sale."

And that the Gaumont Company by the allegations of the bill is engaged in the business of exhibiting the aforesaid copyright picture and of leasing it to others for exhibition, and that this is a reproduction for sale, and that the twelfth section of the act has not been complied with by the deposit of two complete copies of the film as required by that section. The amendment allowed by the court to the bill of complaint alleges in the fourth paragraph "that, said moving picture photograph or photo play not having been reproduced in copies for sale," the complainant deposited with the register of copyrights "the claims for copyright, the title and description and prints from each scene or act of the drama, 'The International Conspiracy,' and received the certificate of registration." This allegation sufficiently pleads the facts upon which the complainant relies and which he must prove. We cannot now pass upon the truth or falsity of the allegation. Under the

rules of pleading those allegations upon a motion to dismiss must be taken as true. The fourth ground of dismissal must therefore be overruled.

The fifth and last ground of dismissal is stated to be that it does not appear that the Gaumont Company was entitled to register and copy-right the picture referred to, and this, we gather from the argument, is based upon the assertion that the complainant, the Gaumont Company, being a corporation, could not be capable of intellectual effort, which is involved in the word "author," and that it does not appear how the Gaumont Company became possessed of the picture. This reason and argument may be disposed of, first, by the consideration that the bill alleges in the third paragraph that the Gaumont Company was the sole and exclusive owner, author, and proprietor of certain original moving pictures and that is a question of proof at the trial; and, second, that by the provisions of the act, section 62, the word "author" should include an employer in the case of works made for hire. This, too, is a matter of proof which must await trial. The fifth ground of dismissal must therefore be overruled.

All the grounds of dismissal having been overruled, the respondent will be required to answer the bill within 20 days, exclusive of the day of service of an order overruling the motion to dismiss, to be served upon counsel for respondent.

Let an order be drawn accordingly.

BUTTERWORTH v. DEGNON CONSTRUCTION CO.

(District Court, S. D. New York. October 27, 1913.)

1. RECEIVERS (§ 90*)—CONTRACTS—PERFORMANCE.

A receiver appointed for an insolvent is not bound to assume and perform contracts of his insolvent, but may do so, if favorable to the estate, and elect not to do so, if unfavorable, and is entitled to a reasonable time to determine such question.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 164-166; Dec. Dig. § 90.*]

2. RECEIVERS (§ 171*)—CONTRACTS—PERFORMANCE IN PART—DAMAGES.

Where a receiver, on being appointed to take charge of the assets of a transportation company, found a contract between the company and defendant for the carriage and delivery of a large quantity of stone, and proceeded to transport and deliver a portion of the stone in accordance with the terms of the contract, in order to ascertain whether he would assume and fulfill the same as beneficial to the estate, and, becoming convinced that the contract was unprofitable, elected to reject it, defendant was entitled to set off damages growing out of the nonperformance of the contract against the receiver's claim for services rendered by him.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 325; Dec. Dig. § 171.*]

At Law. Action by Frank S. Butterworth, as receiver of the Gilbert Transportation Company, against the Degnon Construction Company. On motion by both parties at the close of the evidence for a directed verdict. Verdict for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Walter G. Merritt, of New York City, for plaintiff.
Herman Aaron, of New York City, for defendant.

HOUGH, District Judge. Gilbert Transportation Company had a contract with defendant for the carriage and delivery of a large quantity of stone. The performance of this contract would have extended over a long time. Before any considerable fraction of the work had been done, the transportation company became insolvent, and Mr. Butterworth was duly appointed receiver.

He was cautious, if not warned, regarding this contract, and never assumed it, but did proceed to transport and deliver a certain quantity of stone, in accordance with its terms, in order to ascertain whether he would assume and fulfill the same. He shortly became convinced that the contract was unprofitable, could never be of any benefit to the estate in his charge, and rejected it. Of such rejection he notified defendant, which has proven damages growing out of nonperformance of contract far exceeding the worth at contract prices of the services rendered by the receiver. It is for the value of such services that this suit is brought.

[1] No one doubts that a receiver is not saddled with the contract of his insolvent or bankrupt, except by choice, nor that he can take a reasonable time for investigation before choosing, nor that (choice once made) the selected contract becomes the receiver's, or the court's, in the sense that a receiver is an officer of the court. But from these postulates plaintiff draws the inference that his right of recovery for work done while considering whether to assume or reject the contract is not governed by the contract and bears no relation to it. Indeed, such labors constitute an independent cause of action, accruing to the receiver alone, and one not to be defeated by any damages growing out of rejection and nonperformance.

[2] This ingenious position suggests as a first inquiry: By what right did the receiver do any work at all for this defendant? Evidently by right of the contract, for admittedly no new agreement was ever made. But if one does the work of a contractor only by virtue of a written contractual agreement, why is he not bound by that writing, at least as long as he works? To this plaintiff replies that, since he had the right to reject, such right includes the privilege of avoiding damages for breach, which are, indeed, no more than an obligation to perform, measured in money. If there is no obligation to perform, how can there be damages for nonperformance? The question is no harder to answer than that insisted on by defendant: How can there be a recovery under a contract without performance, and without any breach by defendant?

The matter is probably a deadlock until recourse is had to equitable principles, by which the rights and duties of receivers are governed; and here, I apprehend, equity means especially justice and common sense. A receiver is permitted to experiment with a contract before assuming it, only because experience shows investigation and reflection to be usually for the benefit of the estate in charge. But if the receiver's acts are for the benefit of the estate, who shall pay for them?

Evidently the estate, and not the party losing the benefit of the rejected agreement.

It is the whole contract, and not merely a selected portion thereof, which can be assumed. The receiver can take or leave, but he must act in regard to the whole. If it were otherwise, a contractor in default under many forms of contract has but to suffer a receivership and thereby enable his general creditors to collect the price for (possibly) nearly all the work to be done, if the receiver rejects before completion. This is singularly unjust, and it is not to be presumed that any court of equity would permit such conduct.

It is (I think) because the basis of this plaintiff's claim is so easily capable of abuse that little applicable case law can be found. It is not doubted that, where a debt is due "for a sale made by a receiver, the receiver is a party to the contract of sale, and his action is not subject to equities against the insolvent by way of set-off. But this is not inconsistent with the existence of such right of set-off when the receiver sues not on his own sale alone, but for the value of goods delivered in part performance of his insolvent's contract." *Kuebler v. Haines*, 229 Pa. 274, 78 Atl. 141. Still more obvious is the result where the contract (as here) is for services, and *Parsons v. Sovereign Bank*, 107 L. T. Rep. 572, is decisive.

Verdict directed for defendant.

KELLOGG TOASTED CORN FLAKE CO. v. BUCK.

(District Court, S. D. California, S. D. September 2, 1913.)

No. 205, Civil.

CONTRACTS (§ 116*)—MONOPOLIES (§ 17*)—PATENTED ARTICLES—SALE—PRICE RESTRICTIONS.

Where a patented article has passed into the channels of trade and reached a retail dealer, the manufacturing patentee is not entitled to enforce a price restriction agreement for the purpose of preventing competition as against such retailer; such restriction being void both at common law and under Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), prohibiting monopolies, etc.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116;* Monopolies, Cent. Dig. § 13; Dec. Dig. § 17.*]

In Equity. Suit by the Kellogg Toasted Corn Flake Company, a corporation, against W. A. Buck. On motion to dismiss. Granted.

Henry J. Brodsky, of San Francisco, Cal., and Loeb & Loeb, of Los Angeles, Cal., for plaintiff.

Hiatt & Selby, of Los Angeles, Cal., for defendant.

WELLBORN, District Judge. I am of opinion that the restrictions here sought to be enforced are invalid, both at common law and under Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200). The case made by the bill falls within *Dr. Miles Medical*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Co. v. Park & Sons Co., 220 U. S. 373, 408, 31 Sup. Ct. 376, 385 (55 L. Ed. 502), wherein the court declares broadly, underscoring mine:

"The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. * * * And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. *The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.*"

The recent case of Bauer & Cie v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, decided May 26, 1913, which is the latest one called to my attention, construes the former case thus:

"The question, therefore, now before this court for judicial determination, is: May a patentee by notice limit the price at which future retail sales of the patented article may be made, such article being in the hands of a retailer by purchase from a jobber, who has paid to the agent of the patentee the full price asked for the article sold? The object of the notice is said to be to effectually maintain prices and to prevent ruinous competition by the cutting of prices in sales of the patented article. That such purpose could not be accomplished by agreements concerning articles not protected by the patent monopoly was settled by this court in the case of Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373 [31 Sup. Ct. 376, 55 L. Ed. 502], in which it was held that an attempt to thus fix the price of an article of general use would be against public policy and void."

Since both of these decisions are by the Supreme Court of the United States, and, of course, authoritative here, it is unnecessary to review the large number of other cases, both state and federal, bearing upon the question.

Said motion will be allowed.

SOUTHERN PAC. CO. v. WARD.

(Circuit Court of Appeals, Ninth Circuit. October 6, 1913. Rehearing Denied November 17, 1913.)

No. 2,249.

1. CARRIERS (§ 286*)—INJURIES TO PERSONS AT STATIONS—CARE REQUIRED.

A railroad company is bound to the highest degree of care to maintain order and guard persons waiting at its stations with tickets for its trains against such dangers as may reasonably be anticipated, and what constitutes such care varies with the circumstances and conditions.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1142-1148, 1150-1152; Dec. Dig. § 286.*]

2. CARRIERS (§ 320*)—ACTION FOR INJURY TO PASSENGER AT STATION—QUESTIONS FOR JURY.

Defendant railroad company extensively advertised excursion trains to run for 15 days between a camp where military maneuvers were being conducted and a town, and sold round trip tickets. After 10 o'clock one night, several hundred excursionists, who had spent the evening in the town, were gathered at the station waiting the last return train, which came in late at high speed. It had but three cars, and the people waiting could see that they were already quite well filled. There was a rush, and plaintiff, who was standing some 10 feet from the track and behind others, was pushed toward the train and fell under the wheels and was injured before the train stopped. Defendant had no guards or other employés in attendance to look after and protect the waiting passengers. *Held*, that it was its duty, under the circumstances, to exercise more than the usual care to safeguard the crowd; that it was bound to know that the number of passengers was unusual, to provide sufficient cars for their carriage and see that they were reasonably protected in reaching the same; and that whether it performed that duty was a question for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

3. TRIAL (§ 295*)—ACTION FOR INJURY TO PASSENGER AT STATION—INSTRUCTIONS.

Instructions given, in an action against a railroad company for an injury to a person at a station, considered, and, under the rule that they must be read as a whole, *held* not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

4. CARRIERS (§ 317*)—ACTION FOR INJURY TO PASSENGER AT STATION—EVIDENCE.

On the trial of such an action, it was not error to admit testimony which tended to show the crowded condition of the cars to assist the jury in better understanding the action of the crowd in rushing for the train when it came in.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1295, 1297-1305; Dec. Dig. § 317.*]

5. DAMAGES (§ 172*)—EVIDENCE—PERSONAL INJURIES.

In an action for a personal injury to an officer of the regular army by which he was incapacitated for service, it was not error to permit him to testify to the number of actions in which he had been engaged, as bearing on the question of mental suffering, nor to compute the amount

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 208 F.—25

of money he would probably have earned provided he had received no promotion; the pay under the acts of Congress being fixed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490-492, 501; Dec. Dig. § 172.*]

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Frank H. Rudkin, Judge.

Action at law by John Wilbur Ward against the Southern Pacific Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. W. McKinley and R. C. Gortner, both of Los Angeles, Cal., for plaintiff in error.

Edward E. Cothran, of San Francisco, Cal. (M. H. Hyland, of San Francisco, Cal., of counsel), for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. This is an action for damages growing out of the alleged negligent crushing of the leg of the defendant in error under a passenger train of the Southern Pacific Company. Verdict in favor of defendant in error, and the Southern Pacific Company brings error.

The injury occurred at the railroad station of the Southern Pacific Company at Paso Robles, Cal., on October 8, 1910, at about 11 p. m. Soldiers of the United States regular army and the state militia were engaged in joint maneuvers near Atascadero, a few miles south of Paso Robles; between 5,000 and 10,000 men participating. A considerable number of these soldiers, together with defendant in error, who was at that time a first lieutenant in the regular army, and other officers, had made the trip from Atascadero to Paso Robles on that day over the Southern Pacific Company's road on round trip excursion tickets good for their return within two days. The railroad company advertised the maneuvers at Camp Atascadero by means of posters done in colors, and published special schedules for its trains between Paso Robles and Atascadero for the time from October 1st to October 15th. The schedule showed eight trains daily between the two points for the period mentioned, and this special schedule had been made generally public among the soldiers. Under this announced service several hundred regulars and militiamen went up to Paso Robles during the day of the 8th on various north-bound trains. At Paso Robles there were, among other amusements, band concerts and swimming contests.

At about 10 o'clock on the evening of October 8th, apparently after the amusements had ceased, a crowd began to gather at the Southern Pacific Company's station in Paso Robles. This crowd is variously estimated by the different witnesses as from 450 to 1,000, composed largely of soldiers and containing in their midst several officers in uniform. Defendant in error, Captain (then Lieutenant) Ward, was one of these officers. The station grounds about the depot were open and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

unfenced, adjoining public roads and open grounds. A train was due at 10:46 p. m., en route through Paso Robles to Atascadero and beyond, being train No. 10, the New Orleans Limited. Train No. 20 was scheduled to go through in the same direction at 11:16, but it is in evidence that this train did not run. Why No. 20 did not run, or whether the crowd knew it would not run, does not appear.

The crowd was orderly and gave no indication or sign of disorder until the train was pulling in. There was no one representing the Southern Pacific Company who attempted in any way to guide or direct the crowd about boarding the train, and no warning or direction as to the manner in which the crowd should take the train was given. As the train came in, some 10 or 15 minutes late, there was a swaying of the crowd and movement toward the train, by reason of which Captain Ward was jostled and thrown, or fell, so that he went under the moving train; the wheels of one of the cars passing over and crushing his right leg, thereby necessitating its amputation at the knee. Captain Ward was near the tracks, but there were a few persons between him and the train when the movement of the crowd began. One witness testified that he was directly next to Captain Ward when the train came in, that they were six or eight feet away from the tracks, and that when the engine went by there were a few persons ahead of him and both were surrounded on all sides by a crowd of people. Captain Light, an officer of the National Guard of California who was present, said:

"I saw the accident happen to Captain Ward. I was standing about between 10 and 12 feet to the rear of Captain Ward and the officer that he was talking to at the time the accident occurred. From the time that we saw the headlight, the train came on, as I say, at about 25 miles an hour; didn't seem any more than the snap of your finger until the time it was past us, and of course the crowd started to move along, and I saw some one fall ahead of me. By that time I had closed in a little closer to the crowd. And there were some people in between Captain Ward and the train, surging forward themselves to meet the train. * * * The train hadn't stopped, but had kept moving until after Captain Ward was hurt. It hadn't made a stop and then started again; the train was in motion when he got hurt. He did not try to board it. I know, because there was people between him and the train."

There was evidence tending to show that the train approached the station at a rate of speed variously estimated at from 18 to 25 miles an hour and that from this rate of speed members of the crowd gained the impression that it was not going to stop; that the train came in at the usual rate of speed and came to a stop in the usual and customary manner, and at the customary place; that the cars available for passengers, three in number, were well filled, and that before the train stopped it was apparent to the waiting passengers that the accommodations on the train were limited and insufficient for all that desired to return to Atascadero on that train. As the train left Paso Robles, the cars were crowded with people. A witness said:

"There were men sitting on the sides of the seats, standing in between the people that had occupied the train before it arrived at Paso Robles, standing in back of them and in front of them."

There was evidence tending to show that one or more freight cars were standing on the house track between the main track and the depot, that as the train came in the larger portion of the crowd was standing in front of the waiting room of the depot; that when the day coaches passed the crowd moved up in toward the box cars; and that the train stopped with the head of the rear day coach just past the first box car, the rear of the day coach being just past the waiting room of the depot.

Further details will be brought out as the various assignments of error are considered.

In his complaint Captain Ward charges the Southern Pacific Company with liability because of its negligent failure to prepare to accommodate the crowd, its neglect to anticipate a general movement and surging of the crowd to obtain and secure accommodations on the train, its failure to employ means to maintain order in the crowd, and its negligence in approaching the station at an excessive rate of speed and failure to have said train under instant control.

The Southern Pacific Company set up that the accident was not the proximate result of any negligence of the railroad company, and that whatever injuries were suffered by Captain Ward were proximately caused by his own negligence, and that his negligence contributed to cause the accident.

[1] The railroad company contends that the trial court should have directed a verdict in its favor. We are satisfied, however, that in this respect there was no error. Counsel for plaintiff in error are correct in their contention that the duty of the company depends upon the reasonable necessities of the situation and varies according to the circumstances, the kind of crowd, the kind of place, and all other conditions; but we cannot support the argument that under the proofs the issue was purely one of law, for there was ample evidence to require submission to the jury. *Taylor v. Penn. Co.* (C. C.) 50 Fed. 755; *Penn. Co. v. Stockton*, 184 Fed. 422, 106 C. C. A. 433. It is well settled that a railroad is bound to take good care to guard against dangers reasonably to be anticipated. This general rule extends to one who is at the depot with a ticket entitling him to ride upon a train. The degree of care required of the carrier is the highest, in maintaining order and guarding those whom it transports against such dangers as might be reasonably anticipated or naturally expected to occur. The record before us shows that the company had advertised an excursion and had transported large numbers of persons from Atascadero to Paso Robles on two-day excursion tickets. While these tickets were good until the next day, it was but reasonable to expect that a great many of the excursionists would return on the same day. So far as the record shows, train No. 10 was the last one that ran from Paso Robles to Atascadero on that day. It was a few minutes late, and there was evidence tending to show that the accommodations for passengers thereon were limited, which was apparent to the waiting crowd before the train stopped. The accommodations were in fact insufficient, although if they had been ample we do not see that it would change the case. The apparent tendency of a crowd under such

circumstances is, when the cars which they desire to board approach, for the people to endeavor to secure places from which they can board the train. There is also an obligation upon a railroad carrier to employ sufficient servants for the protection of its passengers.

[2] It would never do to say that, under the facts of this case, the railroad company could be relieved from responsibility upon the ground that no higher degree of care was called for at its station than was ordinarily exercised when the usual travel was being cared for. The company advertised the excursion extensively and was charged with a knowledge of the number of tickets that it sold to excursionists. It therefore knew in advance that there would be a large number of people traveling to and from Paso Robles. As was said in *Harmon v. Flintham*, 196 Fed. 638, 116 C. C. A. 312:

"It is obviously a reasonable rule, deducible from the principles of law governing common carriers, that a carrier's proposal through advertisement to conduct an excursion calculated to induce people to travel in unusual numbers implies that it will furnish greater facilities to accommodate and care for those who avail themselves of the proffer than its usual service requires. This applies to the stations and crowds assembling there, as well as to transportation."

No person representing the company made any effort to police the crowd or to manage it when those on the ground in front of the depot made a movement or surging towards the train. In *Penn. Co. v. Stockton*, 184 Fed. 422, 106 C. C. A. 433, the Circuit Court of Appeals of the Third Circuit discussed the duty of a railroad to a passenger about to board a train at a station. That case, like the one under consideration, presented the question of duty in an action for damages for negligence in causing the death of a passenger on the platform at the height of the summer excursion travel. There the crowd pushed the decedent under the train while he was attempting to get upon it. The court held that the situation was not one which the railroad company had no reason to anticipate. Said the court:

"The crowd was not extraordinary. It was one from which, uncontrolled, an accident might result, and the railroad, although equipped to control it and proving it was its duty to handle the crowd properly, simply left it to take care of itself. Under this situation, a jury might fairly infer that absence of any care was a lack of due care, and negligence is the lack of due care under the circumstances."

Nor can it be held that this case is one of contributory negligence. Captain Ward did not know in advance that the train would be late. He did not know that it would be apparent to the crowd that the accommodations would be inadequate. He did not know, and had no reason to believe, that he was in a position of unusual danger. He had a right to assume that the company would perform its duty and that it would take every necessary and reasonable precaution to protect its passengers rightfully upon the station grounds. The suggestion that, as an officer of the army, he could have commanded the soldiers, is not sound. The men were not there as soldiers under military orders, but went in their private capacities and are to be regarded as persons and passengers rightfully about a depot awaiting an expected train. The speed at which the train came into the depot was a circumstance

proper to be considered. It helped to explain the whole situation. Surely we cannot say as a matter of law that a train advertised to stop at a station, and which came into the depot at a fast rate, would repel a crowd of passengers waiting to board it, rather than draw them closer in a general endeavor to secure position where they could get aboard and obtain seats. It was for the jury to apply its common sense to such a state of facts. It would seem very reasonable to say that if there had been one or two persons in authority representing the railroad, and he or they had told the crowd of the movement of the expected train and of its probable accommodations, the sudden great crowding and resulting danger would not have happened. We must remember that the railroad company induced people to go upon the excursion. Its agents knew whether the sale of tickets indicated that the gathering about the station would probably be larger than usual, and as a consequence it ought to have known whether the danger to passengers would be more than such as would ordinarily surround people awaiting a train. They ought reasonably to have anticipated the probable movement of such a crowd when the train with its crowded coaches rolled into the depot. *Mulhause v. Monongahela St. Ry. Co.*, 201 Pa. 243, 50 Atl. 937. Clearly the jury were the ones to say whether or not the company used proper care in endeavoring to control the crowd and to guard against the dangers arising from the probable conduct of the persons about the station when the train arrived. *Barrett v. Southern Pacific Co.*, 91 Cal. 302, 27 Pac. 666, 25 Am. St. Rep. 186; *Riley v. Vallejo Ferry Co.* (D. C.) 173 Fed. 331; *Harmon v. Flintham*, 196 Fed. 638, 116 C. C. A. 309; *Richmond & Danville R. Co. v. Powers*, 149 U. S. 45, 13 Sup. Ct. 748, 37 L. Ed. 642.

[3] It is argued that the court erred in giving the following instruction to the jury:

"I also instruct you that it is the duty of every public carrier of passengers to employ sufficient servants for the protection of such passengers, and it is under obligations to take due care to secure the safety of a passenger who is upon its premises peaceably for the purpose of boarding its trains."

Counsel for the company contend that the language employed means that it is obligatory upon a railroad to furnish complete security by the employment of servants adequate to secure such security, and hence that the rule as expressed by the court goes beyond the requirement that the highest degree of care shall be employed. But when we examine all of the instructions which were given pertaining to the degree of care which the railroad owed to one about to board its train, surely the jury could not have misunderstood the application of the whole instruction. The court of its own motion charged that the degree of care which one person owes to another depends in a measure upon the relationship which exists between the parties, and that a common carrier—

"owes to its passengers the duty to exercise the highest degree of care for their protection and safety which is consistent with the practical operation of its road; and if you find from the testimony in this case that the plaintiff was on the platform to take a train with a ticket in his pocket, he was within

the meaning of the rule * * * a passenger. That is, the railroad company owed him the same degree of care and protection that it owes to a passenger in actual transit."

The court made its meaning clearer by giving the following instruction:

"Where a railroad company, by reason of an advertisement of reduced rates, induces an unusual crowd to collect at its stations, it is bound to use such means as are reasonably necessary to prevent injury to individuals from the conduct or pressure of the crowd in passing to and from its trains."

Furthermore, at the request of the railroad company, the court charged that while the company was obliged to exercise the highest degree of care and caution to avoid injuries to its passengers, it was not required to guarantee or insure protection from the disorder or violence of mobs or immense and unruly crowds. The court continued:

"The impossible is not required of such companies. If you believe from the evidence that at the time of plaintiff's said accident he was pushed under the said car by an unruly crowd which the defendant was unable to control or restrain, and was thereby and without fault of the defendant injured, then I instruct you that * * * defendant is not liable therefor."

And again, at the company's request, the court told the jury if they believed from the evidence that plaintiff was injured by reason of being pushed under the train by a sudden onrush, if any, of persons towards the train, which the defendant did not know or could not anticipate in advance of the happening of such event, but that such sudden onrush did occur and was the sole cause of the accident, then plaintiff could not recover damages. At defendant's request, the court also stated that, as there was nothing to indicate disorder in the crowd at the station prior to the time the train pulled in, the defendant was under no obligation to police or restrain or attempt to control the crowd *prior* to the arrival of the train; and, continuing, said:

"If, at that time, the injury to plaintiff resulted from a sudden movement or rushing of a portion of said crowd, which the said defendant could not reasonably have anticipated or could not have guarded against by the exercise of any degree of care reasonable under the circumstances, then * * * defendant is not to be held liable in this action."

Under the general doctrine that the instructions must be regarded as a whole, we believe the law was made clear enough, and that absolute security was not made the criterion for guidance. This court, in the case of *Belsea v. Tindall*, 190 Fed. 440, 111 C. C. A. 244, quoting from *Magniac v. Thompson*, 7 Pet. 348, 389 (8 L. Ed. 709) used this language:

"In examining the charge for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them, without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge. In short, we are to construe the whole, as it must have been understood, both by the court and the jury, at the time when it was delivered."

[4] Captain Light, who had witnessed the accident, was asked how he got on the train as it was leaving. Counsel for the company objected to the question as "irrelevant and immaterial." The court ruled that the witness could state what the conditions on the train were. Exception was preserved. The witness answered to the effect that after the train had started he ran some distance before he managed to get on the step after getting hold of the handles of one of the cars, and that he stayed upon the step four or five minutes before he could wedge himself onto the platform; that the men pushed him through; and that it took him 10 or 15 minutes to get inside of the packed car. This testimony may not have been competent from some standpoints, but, as against the general objection made, it was relevant in that it helped to explain to the jury the extent of the crowd that had theretofore surged toward the cars and bore out the accuracy of the judgment of the people to the effect that accommodations were very limited, and thus the jury were better able to draw conclusions as to the conduct of the crowd when the train came in.

[5] In the course of the trial evidence was admitted to show the provisions of the acts of Congress concerning retirement and promotion of officers of the army, and Captain Ward was allowed to testify as to the number of actual engagements of war in which he had participated; he was also allowed to compute the amount of money which he would have earned as a captain by the rule of promotion in the army. The company says this was error. The salary and emoluments of an officer of the army are, however, fixed and certain under the acts of Congress. The age of retirement, 64, is prescribed by statute, and, while the court might as a matter of law have stated to the jury what these statutes were, it was not prejudicial error to permit Captain Ward to answer the questions covering the point. Neither was it error to permit Captain Ward to say how many battles or military engagements he had participated in. He was entitled to recover for mental anguish as well as pain, and, as bearing upon the question of suffering of mind, it would seem wholly just to consider those incidents directly connected with his chosen profession and which served to disclose his general proficiency and achievement in it and attachment to it. Captain Ward based his computation as to the probable amount of money which he would have earned upon his actual rank of captain. We think this in no way prejudicial to the railroad company, for it eliminated every element of probable promotion to any rank higher than captain. Upon this hypothesis the earning capacity of a captain of the army at the age of 35 may be arrived at by computation of the salary paid to him at the time of his testimony and up to the age of retirement and adding to it such sums as he may lawfully be entitled to in addition to such salary, such as longevity pay and commutation for quarters.

The court, among other things, charged that, if it were shown that two parties had contributed to the injury of a third person, then, notwithstanding the act of one of said two parties might have been reckless and that of the other merely manifesting the want of ordinary care, neither of said parties is relieved of liability for the injury to

such third person who has not himself been guilty of contributory negligence. The objection urged to this instruction is that it was not limited to negligence directly or proximately producing the accident or contributing thereto. But an examination of the instructions as a whole discloses that the jury was given to understand that there could be no recovery except where the injury had resulted from negligence which was the proximate cause of the accident. This general rule was repeated several times, so that they must have understood that any breach of duty to authorize recovery must have been the direct and proximate cause of the injury. The instruction was not inappropriate for the reason that there was testimony introduced by the railroad company tending to show that a teamster recklessly grasped the handles of the in-coming train and that in this way Captain Ward was thrown down and injured. It therefore became fitting that in considering the facts of the case the responsibility of the railroad company should be viewed from any situation brought about by such recklessness.

These views cover the principal points of the case. We have also carefully examined the several other assignments of error upon which plaintiff in error bases its arguments, but do not find that any of them demonstrates prejudicial error.

The judgment is therefore affirmed.

T. E. WELLS & CO. v. SHARP.

In re PLYMOUTH ELEVATOR CO.

(Circuit Court of Appeals, Eighth Circuit. October 1, 1913.)

No. 3,717.

1. BANKRUPTCY (§ 210*)—BANKRUPTCY COURT—JURISDICTION—CONSENT.

In bankruptcy proceedings, the trustee obtained an order requiring a chattel mortgagee of certain property of the bankrupt to surrender the same, and enjoining the mortgagee from proceeding to foreclose its mortgage. Thereafter the bankruptcy court ordered the property sold and the lien of the mortgagee, if any, transferred from the property to the proceeds of sale. The mortgagee, without appeal, delivered the possession of the property to the trustee, who sold the same and delivered the property to the purchaser, after which the trustee filed a petition attacking the validity of the mortgage, and prayed for an order to show cause why the lien should not be adjudged void. *Held* that, though the validity of the mortgage was originally a question which could be determined only in a plenary action between the trustee and the mortgagee, the latter, having consented by failure to object to the proceedings taken, waived its right to object to the determination of the validity of its lien by the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321-323; Dec. Dig. § 210.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. **BANKRUPTCY (§ 260*)—ADMINISTRATION OF ESTATE—LOCATION OF PROPERTY—EXTRATERRITORIAL JURISDICTION.**

That a bankrupt's estate was being administered in a bankruptcy court of South Dakota did not deprive it of jurisdiction to sell property belonging to the estate located in Iowa.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 360; Dec. Dig. § 260.*]

Jurisdiction of federal courts in suits relating to bankruptcy, see note to *Bailey v. Mosher*, 11 C. C. A. 313.]

3. **CORPORATIONS (§ 415*)—CHIEF EXECUTIVE OFFICER—POWERS—CHATTEL MORTGAGE.**

The chief executive officer of a business corporation, though empowered to transact its usual and current business in the ordinary course, has no implied power to execute a chattel mortgage on a portion of the corporation's assets.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1664-1669; Dec. Dig. § 415.*]

4. **CORPORATIONS (§ 477*)—CHATTEL MORTGAGES—EXECUTION—WHAT LAW GOVERNS.**

The validity of a corporation's mortgage of personal property executed in South Dakota, which is the corporation's domicile, is governed by the laws of that state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1857-1863, 1865-1869; Dec. Dig. § 477.*]

5. **CORPORATIONS (§ 415*)—CHATTEL MORTGAGE—EXECUTION—VALIDITY.**

Civ. Code S. D. § 434, provides that the business of corporations shall be conducted by a board of not less than 3 nor more than 11 directors. A corporation's articles provided that the number of its directors should be four, and the by-laws declared that the board should have the management of its affairs and business, and that a majority of them should constitute a quorum for the transaction of business. Held that, where the president of the corporation, without authority from the board, attempted to execute a chattel mortgage on certain of its assets, and acknowledged the same as "his voluntary act and deed" as distinguished from the act and deed of the corporation, it was void.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1664-1669; Dec. Dig. § 415.*]

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

In the matter of bankruptcy proceedings of the Plymouth Elevator Company. From an order (191 Fed. 633), affirming the decision of a referee holding invalid a chattel mortgage executed by the bankrupt in favor of T. E. Wells & Co., it appeals. Affirmed.

See, also, 208 Fed. 399.

Edwin R. Winans, of Sioux Falls, S. D. (Edward Sonnenschein, of Chicago, Ill., on the brief), for appellant.

J. W. Boyce, of Sioux Falls, S. D. (R. H. Warren and A. B. Fairbank, of Sioux Falls, S. D., on the brief), for appellee.

Before ADAMS and SMITH, Circuit Judges, and WILLARD, District Judge.

ADAMS, Circuit Judge. This is an appeal from a judgment of the District Court for the District of South Dakota, affirming an order of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the referee in bankruptcy awarding the proceeds of sale of two certain movable elevators located along a railroad in the state of Iowa to the trustee in bankruptcy of the Plymouth Elevator Company, for distribution among the general creditors, and not to T. E. Wells & Co., the appellant.

The facts as disclosed by the proof are these: Some time before the elevator company was adjudicated a bankrupt its president executed a chattel mortgage purporting to convey the elevators in question to Wells & Co., to secure the payment of a past-due indebtedness. Later Wells & Co., pursuant to a provision of the mortgage in that regard, took possession of the property mortgaged, for the purpose of foreclosing its lien. Afterwards, on petition of the trustee, disclosing among other things that the property was worth more than the debt secured, the referee made an order upon Wells & Co. to show cause on a day fixed why it should not be enjoined from proceeding with the foreclosure. Wells & Co. appeared in opposition to the order to show cause, and after a hearing the referee made the order prayed for.

Later the trustee made a report to the referee that the mortgaged property, by reason of its peculiar location and brief annual usefulness, ought to be speedily disposed of, advised the referee that he had received an offer of \$5,500 for a clear and unincumbered title to the property, and recommended its acceptance. An order was made upon Wells & Co. to show cause why the property should not be sold, as recommended by the trustee. After a full hearing, the referee ordered the trustee to accept the offer as made, and that the lien of Wells & Co., if any, be transferred from the elevators themselves to the proceeds of the sale. Wells & Co. was thereupon ordered to forthwith deliver possession of the elevators to the trustee for delivery by him to the purchaser upon the payment of the purchase price. Wells & Co. took no appeal from this order, but obeyed it and delivered the elevators to the trustee as directed.

Afterwards the trustee filed a petition before the referee, setting forth the facts hereinbefore stated, and that Wells & Co. claimed to have had a valid mortgage or lien upon the elevators, and, by virtue of the orders already referred to, now claim such a lien upon the proceeds of their sale. The trustee further set forth that the alleged chattel mortgage was void, among other reasons, because the president, who alone executed it, had no authority to do so, and prayed for an order against Wells & Co. to show cause why the lien claimed by it should not be adjudged void, and why the proceeds of the sale of the elevators should not be distributed like other assets among the general creditors. This order having been made and duly served, Wells & Co. specially appeared, and made a return to the effect that the court was without jurisdiction to determine its rights to the fund in question, and, in the language of the return, "that the said subject-matter can only be considered and the relief sought granted, if at all, in a plenary action instituted in a court of competent jurisdiction." The referee overruled this plea and proceeded to hear and determine the question whether the mortgage was void or not, and finally adjudged it

to be void, and that the proceeds of the sale of the elevators belonged to the trustee for distribution to general creditors.

This order of the referee was afterwards in all things affirmed by the District Court, and the present appeal presents the two questions: Whether the referee and the court below had jurisdiction to hear the controversy between Wells & Co. and the trustee summarily; and, second, whether they rightly adjudged the mortgage void, and for that reason awarded the proceeds of the sale of the elevators to the trustee instead of to Wells & Co.

The question whether the mortgage was void or not if seasonably raised would, without doubt, have presented a controversy at law or in equity, and for that reason could not, in the absence of other facts disclosed by the record, have been determined in a summary proceeding in the bankruptcy case. It necessarily would have been the subject-matter of some plenary action between the trustee and plaintiff.

[1] But do not the facts alter the situation? We think they do. Three times at least Wells & Co. submitted without appeal to the exercise of jurisdiction by the court of bankruptcy; once when the court enjoined it from proceeding with its foreclosure; again when the court ordered the elevators to be sold and the lien of Wells & Co., if any, transferred from the property itself to the proceeds of sale, and again when in obedience to the order of court it delivered possession of the elevators to the trustee to be by him delivered to the purchaser.

From none of these orders did Wells & Co. appeal or seek review by any superior tribunal. It acquiesced in them all, and never questioned the jurisdiction of the court in bankruptcy to make any of them. (Counsel for appellants in their brief state that they objected to the procedure to enjoin appellant from foreclosing its mortgage, on the ground that the court was without jurisdiction to proceed in a summary way; but the record does not sustain their contention. It shows merely that they appeared *specialty*, not to protest against the exercise of jurisdiction, but "for the purpose of setting aside the service of the order to show cause and in opposition thereto.") In other words, they allowed the court of bankruptcy to take possession of the mortgaged property and convert the same into money, provided only it would preserve Wells & Co.'s rights, whatever they were, against the money in place of the property itself. Not until this money was in *custodia legis* and in the process of administration did Wells & Co. question the jurisdiction of the court of bankruptcy in the premises.

We think the failure to appeal from the several orders of the bankruptcy court already referred to, and the surrender of the possession of the mortgaged property to the trustee for sale by him under the terms and conditions specified, amounted to a voluntary submission by Wells & Co. of its present contention to the court of bankruptcy for adjudication as a proceeding in bankruptcy. It voluntarily permitted that court to take custody of the property on which it claimed a lien, and to reduce it to money for the benefit of the true owner, whoever it might be. It results that the money was in the lawful custody of the bankruptcy court for disposition. After that it was clearly competent for the court to proceed in the usual course of administration as a pro-

ceeding in bankruptcy, even in a summary way, to determine the rights of the claimants to that fund. In re Bacon, 159 Fed. 424, 86 C. C. A. 404; In re Rochford and Joe Kirby, 124 Fed. 182, 59 C. C. A. 388; Chauncey v. Dyke Bros. et al., 119 Fed. 1, 55 C. C. A. 579.

[2] The suggestion is made that because the elevators in question were located in the state of Iowa and outside the territorial jurisdiction of the District Court of South Dakota, that court could exercise no jurisdiction over them; but this is without any merit. United States Fidelity & Guaranty Co. v. Bray, 225 U. S. 217, 32 Sup. Ct. 620, 56 L. Ed. 1055; Robertson et al. v. Howard et al., 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174, decided by the Supreme Court June 10, 1913.

The next question is whether the mortgage created a valid lien in favor of Wells & Co. The statutes of South Dakota provide that the business of its corporations should be conducted by a board of not less than 3 nor more than 11 directors. Section 434, Revised Civil Code, S. D. The articles of association of the Plymouth Elevator Company provided that the number of its directors should be four, and its by-laws provided that the board of directors should have the management of its affairs and business, and that a majority of them should constitute a quorum for the transaction of business. On June 21, 1909, the board consisted of four members, namely, J. G. Walter, F. P. Walter, Ed. L. Wendt, and J. W. Cook. J. G. Walter was the president and Mr. Wendt was the secretary of the corporation. On that day the president executed a chattel mortgage purporting to convey the two movable elevators in question to Wells & Co. to secure a past-due indebtedness. He signed the mortgage thus: "The Plymouth Elevator Company, by J. G. Walter, President." The seal of the corporation was affixed to the mortgage by the president. Neither the board of directors nor the individual members of the board, or any of them, authorized or knew anything about the execution of the mortgage by the president. The mortgage was acknowledged by Mr. Walter as "*his voluntary act and deed*" and not as the act and deed of the corporation.

[3] Was the mortgage, so executed, a lawful and valid conveyance of the property sought to be conveyed to Wells & Co.? According to the obvious meaning of the statute of the state, the articles of association, and the by-laws of the corporation, the mortgage should have been authorized by the board of directors or by at least a majority of its members. But the argument is made that because Walter was the president and active manager of the business of the corporation he was ipso facto empowered to execute the mortgage in question. Without doubt his general authority as chief executive officer and active manager of the business of the corporation empowered him to transact the usual and ordinary current business in the usual and ordinary course, such as contracting for the purchase or sale of grain or coal in which the corporation was authorized to deal, and to perform other like acts necessary and incidental to the conduct of the business, but we are of opinion that this implied authority did not comprehend the power to dispose of the building or machinery or appliances which the corporation had acquired and was then using for the transaction of its

business. The mortgaging of property to secure a past-due indebtedness is certainly not an act done in the usual course of current business. It is a first step to what generally terminates in bankruptcy and destruction of the business. We cannot give our assent to the exercise of such potentially destructive power by a chief executive officer of a business corporation without authority of the board of directors or stockholders themselves. The leading case on this subject in South Dakota, *Des Moines M. & S. Co. v. Tilford M. Co. et al.*, 9 S. D. 542, 70 N. W. 839, puts a construction upon the statutes of that state above referred to quite inconsistent with the contentions of counsel for appellant, and in entire harmony with the conclusions we have reached.

Appellant's counsel call attention to section 2 of article 2 of the Session Laws of South Dakota for the year 1907 in force at the time the mortgage was given, which reads:

"The corporate seal of any corporation attached to a deed, mortgage * * * executed and acknowledged by any officer of such corporation, shall be prima facie evidence that such officer was duly authorized to execute such instrument on behalf of such corporation"

—and earnestly argue that the presumption of authority arising from the presence of the seal on the mortgage was not overcome by the proof. We cannot agree to this. We think the proof taken as a whole establishes, without any reasonable doubt, that none of his associate directors either authorized or had any knowledge whatever of the execution of the mortgage by the president.

[4] Section 1 of this same article 2 enacts:

"That any officer of a corporation, authorized by the charter or articles of incorporation, the by-laws, or the consent of the stockholders or of the board of directors of such corporation, may execute deeds, mortgages, * * * and acknowledge the same on behalf of such corporation."

[5] In view of the fact that this is a mortgage of *personal property* (so conceded by counsel on both sides), and that it was executed in South Dakota, the home or domicile of the corporation, it is conceived that the law of South Dakota with relation to the execution of the instrument should prevail. Mr. Walter in acknowledging the execution of the chattel mortgage before the notary public did not pretend to have acted for and on behalf of the corporation. He acknowledged the execution of the mortgage "*as his voluntary act and deed.*" Whether this fact would in itself have vitiated the mortgage as a corporate act need not now be determined, but the fact that he did not represent himself to have acted for and on behalf of the corporation affords an interesting confirmation of the conclusion already reached by us that he (certainly in his own opinion) had never been authorized to act for it in the making of the mortgage.

Attention is called by appellant's counsel to the case of *American Nat. Bank v. Wheeler-Adams Auto Co.* (S. D.) 141 N. W. 396, and they claim it is a parallel case to the one under discussion, and, being a construction of a local law by the highest judicial tribunal of South Dakota, must govern us in the determination of the present case. But is the case parallel? That was a suit to foreclose a chattel mortgage given by a corporation, and the vital question was, as in this case,

whether the mortgage was lawfully executed by the corporation. The board of directors was composed of three members, consisting of the president and secretary and the wife of the president. Two of them, the president and secretary, who had the general control of the business of the corporation, joined in the execution of the mortgage, but the wife knew nothing about it. It appeared in that case that the directors had no regular meetings, but had permitted two of its members, the president and secretary (a majority of the board) to assume and exercise entire control and management of the business of the corporation. This is referred to in the opinion as an abandonment by the directors "of their functions and duties as directors," and for that reason, among others, it was held that the corporation, its directors and stockholders were estopped from questioning the validity of the mortgage. Without assenting to these propositions we content ourselves with a statement of the differences between that case and this. In this case, instead of there being a joint participation in the execution of the mortgage by a majority of the board of directors, as in that case, the president alone acted for the corporation; the secretary neither signed the mortgage, nor attached the seal, and no other one of the four directors knew anything about its execution. In this case also, while there were no regular meetings of the board of directors, the other directors were frequently in consultation with the president in relation to the affairs of the corporation, and hence there was no abandonment of their functions as in that case. In view of these differences the case cited is not only not controlling of this, but in our opinion is of very little, if any, persuasive force.

We discover no error in the conclusion reached by the referee and District Court in the case, and the decree must be affirmed.

T. E. WELLS & CO. v. SHARP.

In re PLYMOUTH ELEVATOR CO.

(Circuit Court of Appeals, Eighth Circuit. October 1, 1913.)

No. 120, Original.

BANKRUPTCY (§ 440*)—PROCEEDINGS—MODE OF REVIEW.

Where an order setting aside a chattel mortgage on assets of the bankrupt resulted from a consideration of disputed facts and depended on findings made thereon, the order was reviewable by appeal as provided by Bankruptcy Act July 1, 1898, c. 541, § 24 (a), 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431), and not by petition to revise as authorized by section 24 (b).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.*]

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Petition for Revision of Proceedings of the District Court of the United States for the District of South Dakota, in Bankruptcy; James D. Elliott, Judge.

Proceeding by W. Z. Sharp, trustee of the estate of the Plymouth Elevator Company, against T. E. Wells & Co., on an order directed to the latter to show cause why a chattel mortgage on certain of bankrupt's assets should not be declared void. A referee's order setting aside the mortgage was affirmed by the District Court, and the mortgagee files a petition to revise. Denied.

Edwin R. Winans, of Sioux Falls, S. D. (Edward Sonnenschein, of Chicago, Ill., on the brief), for petitioner.

J. W. Boyce, of Sioux Falls, S. D. (R. H. Warren and A. B. Fairbank, both of Sioux Falls, S. D., on the brief), for respondent.

Before ADAMS and SMITH, Circuit Judges, and WILLARD, District Judge.

ADAMS, Circuit Judge. This was an original petition to revise an order or judgment made by the District Court of South Dakota in bankruptcy, in the matter of the Plymouth Elevator Company, bankrupt. On examination of the record we find that the order and judgment complained of resulted from a consideration of disputed facts, and depended upon the findings made thereon. In such circumstances the proper remedy is an appeal under the provisions of section 24 (a) of Act July 1, 1898, c. 541, 30 Stat. 553 (U. S. Comp. St. 1901, p. 3431), and not a petition to revise under section 24 (b). Pursuing a common practice, the petitioner out of abundant precaution prosecuted concurrently with this petition an appeal which properly presented all the questions attempted to be presented by this petition, and that appeal has been disposed of at this term of court. 208 Fed. 393. This petition therefore must be denied.

ANDERSON v. J. O. & N. B. CHENAULT.

(Circuit Court of Appeals, Fifth Circuit. October 29, 1913.)

No. 2,516.

1. CHATTEL MORTGAGES (§ 48*)—VALIDITY—DESCRIPTION—GROWING CROPS.

A mortgage on all of the grantor's "crop of cotton of 100 acres now up and growing on the land of W., also 30 acres of corn on the same place, and 20 acres of cotton on the H. place, up and growing," was substantially a mortgage on growing crops, and sufficiently identified the same as between the parties.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 93-95; Dec. Dig. § 48.*]

2. BANKRUPTCY (§ 178*)—SECURED CLAIMS—CHATTEL MORTGAGE.

On June 14, 1911, a bankrupt, being indebted to C. in the sum of \$700, secured the same by an unrecorded mortgage on certain personal property, and at the same time borrowed an additional sum from C., bringing the total indebtedness up to \$1,690, of which \$250 was not advanced

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at the time, because not then needed. In November following the bankrupt gave C. notice of garnishment proceedings against him by another, in which the property covered by the mortgage was sought to be reached, whereupon C. filed the mortgage for record November 22, 1911. On January 30, 1912, the mortgagor was adjudged a bankrupt. *Held*, that the mortgage was given for a valid consideration, and not to hinder, delay, or defraud creditors, and not having been withheld from record with a fraudulent intent, and having been recorded before the lien of the bankrupt's trustee attached, was valid as against him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264-274, 283, 284; Dec. Dig. § 178.*]

Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Proof of claim of J. O. & N. B. Chenault, secured by a chattel mortgage, against Roy S. Anderson, as trustee in bankruptcy of J. H. Beard. A referee's order allowing the claim as preferred was affirmed by the District Judge, and the trustee appeals. Affirmed.

This case is brought to this court on an agreed statement of the record which shows:

I. The proof of debt or intervention filed by the mortgagees, which was substantially and in brief as follows:

(a) That they were creditors of Beard, the bankrupt, in the sum of \$1,690 for merchandise and advances.

(b) That the only security held by them was a mortgage or bill of sale, which transferred to them "all of the crop of cotton of 100 acres now up and growing on the land of B. M. Walton, also 30 acres of corn on the same place up and growing, 20 acres of cotton on Mrs. D. J. Hill's place up and growing," and certain live stock and other personal property described in detail.

(c) That the bill of sale or mortgage was made more than four months prior to the adjudication of the bankrupt.

(d) That it was duly recorded before bankruptcy.

(e) That the cotton crops mentioned in the bill of sale had been gathered and shipped to Phinizy & Co. at Augusta, garnished there by Anderson, a creditor of Beard, and a bond given to dissolve the garnishment by the mortgagees, the Chenaults.

(f) That \$714.40 were realized from the sale of the cotton, which the mortgagees had been ordered by the District Court to turn over to the trustee in bankruptcy, and that the said mortgagees had the highest and best claim on said money and personal property by reason of said bill of sale.

(g) That the said sum of \$714.40 was not enough to pay the claim of the mortgagees.

(h) That the mortgagees took the bill of sale in good faith, at a time when they believed Beard to be solvent—and praying that their claim be allowed as a secured claim against said property and said money, and that the said property and said money be turned over to them to be applied on their debt without any cost or expense to them, and that the trustee show cause why the title to said personal property should not be decreed to be in the mortgagees, and the said money at once delivered to them.

II. The objection filed by the trustee to the allowance of this claim on the ground:

(a) That the bill of sale contains an inaccurate and incomplete description of the cotton to be mortgaged, and is therefore void against third parties.

(b) That the bill of sale or mortgage was void as a preference, because,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 208 F.—26

while dated June 16, 1911, it was not recorded in the clerk's office of Wilks county, Ga., until November 24, 1911, within four months preceding bankruptcy, and after other creditors had commenced suit against Beard, and that it was recorded by the mortgagees for the purpose of obtaining a preference, and with reasonable cause to believe that it would operate as a preference.

(c) That the mortgagees knew Beard was insolvent at the date the bill of sale was made, and certainly at the time it was recorded.

(d) That the mortgage was void, because given as a preference to hinder, delay, and defraud creditors.

III. The evidence taken before the referee.

IV. The mortgage or bill of sale given by J. H. Beard to J. O. & N. B. Chenault substantially and in brief is as follows:

Georgia, Wilks County:

Know all men by these presents, that I, J. H. Beard, in consideration of \$1,695.32, hereby grant, bargain, sell, and convey to J. O. & N. B. Chenault, their heirs and assigns, all my crop of cotton of 100 acres now up and growing on lands of B. M. Walton, also 30 acres of corn on same place up and growing, 20 acres of cotton on Mrs. D. J. Hill's place up and growing, and other personal property described in detail (the description of which is not material), all of which property is unincumbered, except 3,500 pounds lint cotton and \$300—followed by the usual habendum and tenendum clause and the usual warranty, dated June 14, 1911, witnessed by two witnesses, probated by one of these on the 22d day of November, 1911, and recorded in the clerk's office of Wilks superior court November 24, 1911.

VI. The findings and order of the referee, finding that on June 14, 1911, Beard was indebted to Chenault in the approximate sum of \$700, secured by an unrecorded mortgage on certain property; that on this day, June 14th, the bankrupt borrowed an additional sum, bringing his total indebtedness up to \$1,690, of which \$250 was not given to Beard until 30 or 40 days later, being withheld because Beard did not need it at that time. November, 1911, Beard received notice that Anderson had filed suit against him and served summons of garnishment on Phinizy & Co., cotton factors at Augusta, which constituted a part of the crop mortgaged to Chenault. Beard notified Chenault of the suit. Chenault thereupon filed his mortgage for record November 22, 1911. Beard was adjudged a bankrupt on his own petition on January 30, 1912. It does not appear from the testimony that the Chenault mortgage was given by Beard to hinder, delay, or defraud creditors, or that it was withheld from record by Chenault for this purpose. Chenault testified that it was his custom not to record any mortgages unless and until he became apprehensive of loss. Under the ruling in *Bean v. Orr*, 182 Fed. 599, 105 C. C. A. 137, 25 Am. Bankr. Rep. 400, this mortgage was good.

The trustee contended that under the amendment to section 47 (2) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. Supp. 1911, p. 1501]), adopted 1910 (Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [U. S. Comp. St. Supp. 1911, p. 1501]), that the law in this case no longer controls. This amendment provided that trustees shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien on all property coming into the custody of the bankruptcy court. The date at which the trustee's right as of a judgment or lien creditor accrues is not specifically mentioned, and construing the amendment in connection with section 70 (a) we are forced to the conclusion that the right accrued on the date of the trustee's qualification, February 21, 1911, and was, therefore, subject to the then recorded Chenault mortgage. The objections to the mortgage of Chenault are therefore overruled.

The decree appealed from is as follows:

In the District Court of the United States for the Northeastern Division of the Southern District of Georgia.

In the Matter of J. H. Beard, in Bankruptcy.

The matter coming on to be heard upon a petition for review of the findings of Joseph Ganahl, Esq., one of the referees in bankruptcy, and after ar-

gument had, it is considered, ordered, and adjudged by the court that the findings of the referee be, and they are, hereby sustained in all respects. Ordered, further, that the trustee pay the costs of this proceeding.

This March 31, 1913.

Emory Speer, Judge.

Clement E. Sutton, of Washington, Ga., and R. S. Wimberly, of Macon, Ga., for appellant.

Orville A. Park and Geo. S. Jones, both of Macon, Ga., and J. M. Pitner, of Washington, Ga., for appellees.

Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). Assuming that the decree appealed from is final, and therefore that this appeal will lie, we find that the amount involved in the mortgage given by the Chenaults was \$1,695.32, plus interest from June 14, 1911, to January 13, 1912, and that the actual amount in controversy in the case was the sum of \$714.40, realized from the sale of the proceeds of cotton turned over to the trustee and claimed by the appellees under the mortgage.

[1] The contract between Beard and the Chenaults is substantially a mortgage on growing crops and personal property, and, as between the parties, sufficiently identifies the property involved in this controversy.

[2] We have examined the evidence in the case, and agree with the referee and the judge of the lower court that under the testimony the Chenault mortgage was given for a valid consideration, and not to hinder, delay, or defraud creditors, and that it was not withheld from record with any fraudulent intent, nor to bolster the credit of the mortgagor, and that it was recorded before any lien or claim of the trustee in bankruptcy did or could attach.

The decree in question is affirmed.

HALLIGAN, Warden, v. MARCIL.

(Circuit Court of Appeals, Ninth Circuit. October 29, 1913.)

No. 2322.

PARDON (§ 14*) — FORFEITURE — BREACH OF PAROLE — EFFECT — FORFEITURE OF GOOD TIME.

Act Cong. June 25, 1910, c. 387, § 6, 36 Stat. 820 (U. S. Comp. St. Supp. 1911, p. 1703), provides that, at the next meeting of the board of parole held at a prison where a paroled prisoner has been incarcerated after the issuing of a warrant for the retaking of such prisoner for breach of his parole, the prisoner shall be given an opportunity to appear before the board, which may revoke the order and terminate the parole or modify its terms and conditions, and, if the order shall be revoked and the parole terminated, the prisoner shall serve the remainder of the sentence originally imposed, and the time he was out on parole shall not be taken into account to diminish the time for which he was sentenced. *Held* that, since the section declares that a paroled prisoner, on being rearrested for

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

breach of his parole, shall serve the remainder of the sentence originally imposed, such prisoner, on being reincarcerated, loses the good time he had earned by good conduct in the prison prior to his parole.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 28-31; Dec. Dig. § 14.*]

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington.

Petition by James A. Marcil for writ of habeas corpus to obtain his discharge from the custody of O. P. Halligan, Warden of the United States Penitentiary at Bee, McNeil Island, Washington, for the United States Government. From an order sustaining the writ and discharging petitioner, the Warden appeals. Reversed.

For opinion below, see 207 Fed. 809.

C. F. Riddell, U. S. Atty., of Seattle, Wash., and E. B. Brockway, of Tacoma, Wash., and J. J. Sullivan, of Seattle, Wash., Asst. U. S. Attys., for appellant.

James A. Marcil, of Bee, Wash., in pro. per.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. The appellee was petitioner in the court below for a writ of habeas corpus, and, that court having by its judgment discharged him from custody, the government brings the case here by appeal.

The record shows that the appellee was on May 3, 1909, upon conviction of a violation of the National Banking Act, sentenced by the United States District Court for the Eastern District of Washington to serve five years in the United States Penitentiary at McNeil Island, and that his sentence commenced May 13th of that year; that while confined pursuant to the sentence he earned 216 days for good conduct, under and pursuant to the provisions of the Act of Congress of June 21, 1902, entitled "An act to regulate commutation for good conduct for United States prisoners" (32 Stat. L. 397, c. 1140 [U. S. Comp. St. Supp. 1911, p. 1701]); and that subsequently he was paroled under and pursuant to the Act of June 25, 1910, entitled "An act to parole United States prisoners, and for other purposes" (36 Stat. L. 819, c. 387 [U. S. Comp. St. Supp. 1911, p. 1702]), the first section of which provides:

"That every prisoner who has been or may hereafter be convicted of any offense against the United States, and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, whose record of conduct shows he has observed the rules of such institution, and who has served one-third of the total of the term or terms for which he was sentenced, may be released on parole as hereinafter provided."

The act creates a board of parole, and its third section provides:

"That if it shall appear to said board of parole from a report by the proper officers of such prison or upon application by a prisoner for release on parole, that there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society, then said board

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of parole may in its discretion authorize the release of such applicant on parole, and he shall be allowed to go on parole outside of said prison, and, in the discretion of the board, to return to his home, upon such terms and conditions, including personal reports from such paroled person, as said board of parole shall prescribe, and to remain, while on parole, in the legal custody and under the control of the warden of such prison from which paroled, and until the expiration of the term or terms specified in his sentence, less such good time allowance as is or may hereafter be provided for by act of Congress; and the said board shall, in every parole, fix the limits of the residence of the person paroled, which limits may thereafter be changed in the discretion of the board: Provided, that no release on parole shall become operative until the findings of the board of parole under the terms hereof shall have been approved by the Attorney General of the United States."

By section 4 it is provided that if the warden of the prison or penitentiary from which the prisoner is paroled, or the board of parole, or any member thereof, shall receive reliable information that the prisoner has violated his parole, the warden may, at any time within the term of the prisoner's sentence, retake him and return him to the prison. It is then provided by section 6 of the act as follows:

"That at the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner, said board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before said board of parole, and the said board may then or at any time in its discretion revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced."

The record in the case shows that the appellee was out on parole 230 days; that he was then, by reason of his violation of the parole, retaken and returned to the prison. The record further shows that if he continued entitled to 216 days earned by him for good conduct before his parole, as the court below held, his sentence had at the time of the issuance of the writ been completed, and he was legally entitled to a discharge. But if the time so earned by him by his previous good conduct was forfeited by his subsequent misconduct, the judgment of the court below discharging him from custody must be reversed. That is the sole question in the case, and we are of the opinion that it is answered by the provisions of the statutes referred to. Both are acts of clemency intended to invite good behavior, but the consequence of a violation of that clemency is distinctly declared by the statute itself; section 6 of the Act of June 25, 1910, declaring that in the event of a violation of the parole and its revocation therefor, not only shall the time for which the prisoner was sentenced not be diminished by the time he was out on parole, but expressly declares that, in such event, he shall serve the remainder of the sentence *originally imposed*, which was, in the instant case, five years. The formerly acquired credit by reason of the previous good conduct of the prisoner, which could not become effective until the end of his term, was thus forfeited by the statute itself upon the revocation of the parole, because of the prisoner's subsequent misconduct.

The judgment of the District Court is reversed.

POPE MFG. CO. v. ARNOLD, SCHWINN & CO.

(Circuit Court of Appeals, Seventh Circuit. April 21, 1913.)

PROHIBITION (§ 11*)—NATURE AND SCOPE OF REMEDY—CORRECTION OF ERRORS.

An alleged error in the taxation of costs in a suit in which the court had jurisdiction of the subject-matter and the parties cannot be reviewed by a petition for a writ of prohibition, which is a collateral attack and can prevail only where the court was without jurisdiction to render the judgment or make the order complained of.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 36; Dec. Dig. § 11.*]

On motion for leave to file an original petition for a writ of prohibition and annul an order entered in the suit of the Pope Manufacturing Company against Arnold, Schwinn & Co. Denied.

See, also, 193 Fed. 649, 113 C. C. A. 517.

Charles K. Offield, of Chicago, Ill., for the motion.

Russell Wiles, of Chicago, Ill., opposed.

Before BAKER and SEAMAN, Circuit Judges.

BAKER, Circuit Judge. The tendered petition shows that in the District Court of the United States for the Northern District of Illinois the petitioner was the complainant and the respondent was the defendant in certain patent litigation; that by stipulation of the parties the defendant put into the record a printed copy of testimony and paper exhibits in another case, "to be used on final hearing with the same force and effect as if they were originally part of the record of this suit"; and that, a final decree on the merits having been rendered against the petitioner, the clerk of the court taxed as costs the reasonable amount paid by the respondent in obtaining said evidence from the other case.

Thereafter the petitioner made a motion for the retaxation of costs and attacked that particular item; and the court, having compared the fee bill with the statute, overruled the petitioner's motion. Section 983 R. S. (U. S. Comp. St. 1901, p. 706), which was considered by the court in passing upon the correctness of the fee bill, provides:

"The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by the judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause."

In its argument the petitioner is contending that the trial court wrongly construed and applied the statute in refusing to strike out the item in question. But this is not an appeal. An attack upon a judgment, through an application for writ of prohibition, is a collateral attack. For such an attack to prevail, it must appear that the judgment assailed is void for want of jurisdiction. In High's Extraordi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

nary Legal Remedies, par. 762, the nature of this writ is accurately stated:

"It is an original remedial writ, and is the remedy afforded by the common law to correct encroachments of jurisdiction by inferior courts, and is used to keep such courts within the limits and bounds prescribed for them by law. The object of the writ being to restrain subordinate judicial tribunals of every kind from exceeding their jurisdiction, its use in all proper cases should be upheld and encouraged, since it is of vital importance to the due administration of justice that every tribunal vested with judicial functions should be confined strictly to the exercise of those powers with which it has been by law intrusted."

The court had jurisdiction of the persons of the parties. They were the parties to the pending patent litigation and both were in court. On the motion to retax costs, this petitioner was the moving party; and the respondent appeared and contested the motion. The subject-matter of patent litigation is unquestionably within the jurisdiction of the court. That is, among the organic powers of the District Court is the power to hear patent cases. Costs in all cases are necessarily incidental matters, of which the court, having jurisdiction of the cases, likewise has jurisdiction. If, on the motion of petitioner to retax costs, the court had stricken out the item, it is hardly conceivable that the petitioner or any one else would contend that the court was without organic power to act in that matter and in that way. So it is evident that the petitioner's real complaint here is that the court erroneously decided the question submitted by the petitioner for decision. But, if a court has jurisdiction to decide a question correctly, its jurisdiction is just as impervious to collateral attack if it decides the question erroneously. A misconstruction or a misapplication of a statute or of the common law or of a rule of court does not make the judgment void. Van Fleet's Collateral Attack, §§ 65, 66, 67.

The motion for leave to file the petition is denied.

In re MYERS.

(Circuit Court of Appeals, Seventh Circuit. April 21, 1913.)

No. 1,957.

BANKRUPTCY (§ 257*)—SALE OF PROPERTY BY TRUSTEE—MEDICAL PRACTICE.

The personal medical and surgical practice and good will of a bankrupt as a physician are not subject to sale by his trustee, although his property interest in a practice and good will purchased from another may be so sold.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 356, 357; Dec. Dig. § 257.*]

Petition to Review and Revise in Matters of Law an Order in Bankruptcy of the District Court of the United States for the Northern District of Illinois; Kenesaw M. Landis, Judge.

In the matter of Jacob Myers, bankrupt. On petition by the bankrupt to review and revise in matter of law an order of the District Court. Modified.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Morris G. Leonard and Emory J. Smith, both of Chicago, Ill., for petitioner.

Dwight D. Root, of Chicago, Ill., for respondent.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

PER CURIAM. The bankrupt petitions for review and revision of an order in bankruptcy directing sale by the trustee (among other matters) of "the medical and surgical practice and good will of said bankrupt, Jacob Myers, together with the leasehold interest of said bankrupt in and to the office formerly occupied by Dr. S. Lewin (one of the bankrupt's creditors), and now occupied by said bankrupt as a doctor's and surgeon's office." It appears that the bankrupt is a medical practitioner; that he purchased the location and good will of Dr. Lewin and was engaged in practice thereunder; and that his indebtedness to Dr. Lewin arose out of such purchase. The right of the trustee to take and sell whatever property interest may remain out of this purchase from Dr. Lewin is neither challenged nor questionable. But the terms of the order do not support the contention of counsel for the trustee that such property interest was intended by the above-mentioned provision thereof as the subject-matter of the sale. Whatever may have been the purpose, the "medical and surgical practice and good will of said bankrupt" are plainly specified as its subject-matter, and no doubt is entertainable that provision to that end is unauthorized. It comprises practice and good will attributable to the personality, reputation, or skill of the bankrupt, which is entirely of a personal nature and not subject to involuntary sale, for the benefit of creditors or otherwise. It goes without saying that patients of the bankrupt, either present or prospective, cannot be required to transfer their treatment or allegiance to another practitioner. So, the only force of the sale thus proposed would be to deprive the bankrupt of the exercise of his profession in any locality; and such deprivation is plainly unauthorized in the present proceedings.

The petitioner, therefore, is entitled to modification of the order of the District Court, to exclude the above-mentioned provision for sale of the "practice and good will of the bankrupt," and it is ordered that modification be made accordingly. The order may be amended, however, by the District Court, if so advised, to authorize the sale of any subsisting rights acquired by the bankrupt under his purchase from Dr. Lewin, and any outstanding accounts or credits which may be subject to sale, together with the leasehold interest described in the order.

COXE v. PECK-WILLIAMSON HEATING & VENTILATING CO.

In re SELMAN HEATING & PLUMBING CO.

(Circuit Court of Appeals, Fifth Circuit. October 29, 1913.)

No. 2,519.

COSTS (§ 256*)—TRANSCRIPT—CONTENTS—ASSESSMENT AGAINST SOLICITORS.

Where appellant's solicitors fail to prepare the transcript of the record in the manner prescribed by equity rules 75-77 (226 U. S., Appendix, pp. 23, 24, 33 Sup. Ct. xl, xli), and include therein much immaterial matter, the appellate court may impose costs on them.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 968-971; Dec. Dig. § 256.*]

Appeal from the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge.

Controversy between the Peck-Williamson Heating & Ventilating Company and John S. Coxé, trustee in bankruptcy for the Selman Heating & Plumbing Company. Judgment (204 Fed. 839) for the former, and the latter appeals. Affirmed.

Max J. Winkler, of Birmingham, Ala., and Victor H. Smith, of Pell City, Ala., for appellant.

Henry Bentley, of Cincinnati, Ohio, for appellee.

Before PARDEE and SHELBY, Circuit Judges.

PER CURIAM. This case was correctly ruled and decided, and we fully concur in the opinion of Judge Grubb found in the record.

Our attention was called in the oral argument to the fact that the transcript of record was not made up, as it might well have been, in accordance with the seventy-fifth, seventy-sixth, and seventy-seventh equity rules of the Supreme Court (226 U. S., Appendix, pp. 23, 24, 33 Sup. Ct. xl, xli), and that it is diffuse, containing much unnecessary matter, including duplicates of many papers and immaterial parts of exhibits, documents, etc.; and we were urged to impose costs for the infraction of the rules.

In this particular case, as we affirm the judgment, the costs will be taxed to the appellant, a trustee in bankruptcy, and it appears that the only real relief we could give in the matter would be to tax the unnecessary costs to the solicitors who admittedly directed the preparation of the transcript. As no motion was put of record in the case, we are indisposed to apply this extreme remedy; but we take occasion to admonish the bar generally that the above-mentioned rules of the Supreme Court are to be enforced, and that it is incumbent upon the solicitors taking out an appeal to see that they are complied with.

The decree of the District Court is affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

GRANGER & LEWIS et al. v. STEWART & CO. et al.

(Circuit Court of Appeals, Fifth Circuit. October 29, 1913.)

No. 2,456.

SHIPPING (§ 172*)—DEMURRAGE—DISCHARGE OF CARGO—CUSTOM OF PORT.

Demurrage allowed under a contract of affreightment on discharge of cargo in New York *held* correct under the customs and usages of the port.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 569; Dec. Dig. § 172.*

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Suit in admiralty by Stewart & Co. and others against Granger & Lewis and others. Decree for libelants, and respondents appeal. Affirmed.

Samuel B. Adams and A. Pratt Adams, both of Savannah, Ga., for appellants.

Edw. S. Elliott, of Savannah, Ga., for appellees.

Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. Under the contract of affreightment in this case, the discharge of cargo was necessarily controlled by the customs and usages of the port of New York, and under the evidence in the case we find the amounts allowed in the District Court for demurrage are in accordance with such custom and usages; and as we think the decree does substantial justice between the parties, the same is affirmed.

TOLEDO COMPUTING SCALE CO. v. COMPUTING SCALE CO.

(Circuit Court of Appeals, Seventh Circuit. April 15, 1913.)

No. 1,934.

1. PATENTS (§ 21*)—INVENTION—SUBSTITUTION OF MATERIALS.

Lessening the weight of a part of a machine, while a change in degree, is not necessarily merely a matter of degree; and, where it converts a machine which is a failure into one which is a success and is the first practically efficient and reliable machine of the kind, something more is involved, and the change is one of kind resulting in a new mechanism, which constitutes "invention."

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 23; Dec. Dig. § 21.*

For other definitions, see Words and Phrases, vol. 4, pp. 3749-3754.]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—COMPUTING SCALE.

The Smith reissue patent, No. 11,536 (original No. 545,616), for a computing scale, *held* valid and infringed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PATENTS (§ 328*)—INVENTION—COMPUTING SCALE.

The Smith patent, No. 597,300, for a computing scale, claim 2, *held void* for lack of invention.

4. ACKNOWLEDGMENT (§ 38*)—CERTIFICATE—ASSIGNMENT BY CORPORATION.

The assignment of a patent by a corporation should show in the acknowledgment that the persons signing as officers were personally known to the notary, that they stated on oath that they were such officers, and were authorized by the board of directors to execute the instrument, that the corporation had no seal, or that the genuine seal was attached, and that they acknowledged the instrument to be the free act and deed of the corporation.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 217-220; Dec. Dig. § 38.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Suit in equity by the Computing Scale Company against the Toledo Computing Scale Company. Decree for complainant, and defendant appeals. Reversed.

Appellant (defendant) was adjudged to be an infringer of claims 5 and 6 of reissued patent No. 11,536, April 28, 1896, and of claim 2 of patent No. 597,300, January 11, 1898. Each was issued on application of Albert U. Smith, for improvements in automatic computing scales.

As the scales of complainant and defendant are identical so far as the claims in suit are concerned, the questions to be considered are the patentable novelty of the claimed improvements, the validity of the reissue, and the sufficiency of complainant's proof of title.

Prior art facts of record, which are deemed controlling, are stated in the opinion.

Claims 5 and 6 of the reissued patent are as follows:

"5. An indicator-drum for weighing mechanism, consisting of a spindle provided with a plurality of skeleton frames of light material and secured to said spindle, and having secured to their peripheries a sheet of paper forming a cylinder.

"6. An indicator-drum for weighing mechanism consisting of a spindle provided with a plurality of skeleton disks or frames of thin aluminium having a sheet of paper extending around and secured to their peripheries to form a cylinder."

In applying for the reissue, Smith made no changes in the drawings, the descriptions, or the four claims of the original patent, No. 545,616, September 3, 1895. Application for the reissue was made on January 27, 1896, and the desired change consisted in adding claims 5, 6, and 7 to the original claims. Claim 2 of the original (reproduced in the reissue) was the only one that related to the subject-matter of reissue claims 5 and 6, and it reads as follows:

"2. The combination of the indicator-drum constructed of thin skeleton frames of a very light material, the periphery of said drum being formed of a sheet of paper having the divisions of the weight-scale and other numerals printed thereon, the pinions carried by the shaft of said drum, adjustable conical bearings wherein said shaft is journaled, the cross-bar *c* having a suspending-clip secured thereon, the headed draft-pins supported loosely within the notched ends of the cross-bar *c* after the manner of a stirrup connection, the bow-shaped clips in the ends of the draft-pins, the springs between the coils of which said clips are inserted, whereby the tension on said springs may be altered as described, the draft-rods *k*, the yoke *n* whereby said rods are connected, the cross-rod *a'* to which the rack-bars are pivoted and whose ends are notched and embrace said draft-rods so as to be capable of sliding

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

thereon, a ring from which the scale-pan is suspended, and suitable adjusting connections between the yoke *n* and said cross-rod *a'*, substantially as described."

Part of the description of Smith's invention as set forth in his original application is in these words:

"The object of my invention is to provide scales of this description which shall be extraordinarily sensitive to weights of small amount and to accurately register the same. A further object of my invention is to provide an adjusting mechanism by the use of which the springs employed may at all times be held at uniform tension, or, in other words, when said springs have become weakened or distorted by long usage the adjusting mechanism may be employed to restore a proper tension to said springs; also, said adjusting mechanism may be used to set the scales at a 'balance' after the weighing-pan is suspended therefrom, and the difference in weight of various kinds of weighing-pans may be compensated for by the use of this mechanism."

And in order to accomplish the first of the stated objects of his invention, Smith prescribed:

"It is a very essential feature that the indicator-drum in scales of this nature should be made of very light material, for the reason that if it be not so made the sensitiveness and accuracy of the scales will be more or less affected. For instance, heretofore in scales of this character if a given quantity is weighed successively a number of times it will be found that said scales scarcely ever indicate the weight of such quantity twice exactly the same; there always being some slight variation in the amount registered. This is in a great measure due to the fact that the more the actual weight of the indicator-drum itself the greater must be the force to operate it, and in order to overcome this disadvantage I have constructed the drum of thin skeleton frames of aluminium, while the periphery is formed of a thin sheet of paper pasted to the frames. In this way I have secured a structure that is so light that the force necessary to operate it is almost insignificant."

So far as it needs consideration, the reissue statute reads:

"Sec. 4916. Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the Commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee," etc. U. S. Comp. St. 1901, p. 3393.

Claim 2 of the second patent is this:

"2. In a scale of the character described, the combination with a casing having openings in opposite sides but not opposite each other, of a revoluble drum provided with a series of columns of figures representing dollars and cents and two independent columns of figures representing weights in pounds and ounces, one column of the latter being arranged to be read from the same side of the casing as the figures representing dollars and cents, and the other column of weight-figures being arranged to be read solely through the opening in the opposite side of the casing, the figures representing dollars and cents not being visible from said opposite side, the openings in the opposite sides of the casing being covered with transparent material having stationary pointers thereon adapted to correspond with each other in their indications of figures so that when the pointer on one side indicates one figure in one column, the other pointer on the other side will indicate exactly the same figure in the other column."

Respecting the title, the only difficulty arises in connection with an assignment from the E. C. Smith Company, a corporation, and another assignment of identical character. Signature was as follows:

"The E. C. Smith Company,
"Chas. R. Luce, Pres't,
"William G. Bell, Treas."

No corporate seal was affixed. No recital appears that Luce was president and Bell treasurer, or that they as such officers were authorized to execute

the assignment in the name and on behalf of the corporation. An acknowledgment, in the following words, was attached.

"State of Massachusetts, County of Suffolk, ss.:

"March 8th, 1899, personally appeared before me the persons known to be Charles R. Luce and William G. Bell, who executed the above instrument in my presence, and acknowledged the signing of the same to be their voluntary act and deed. [Seal.] C. F. Brown, Notary Public."

Edward Rector and Frank Parker Davis, both of Chicago, Ill., for appellant.

Walter A. Scott and Carl A. Richmond, both of Chicago, Ill. (Thomas F. Sheridan and George L. Wilkinson, both of Chicago, Ill., of counsel), for appellee.

Before BAKER and KOHLSAAT, Circuit Judges, and WRIGHT, District Judge.

BAKER, Circuit Judge. In this record the greatest thing is the fact that Smith put in the hands of the world's vendors of commodities the first usable automatic computing scale. Long before Smith's time, and the length of the interval is a fact of considerable weight, the paper art (Phinney's patent, No. 106,869, in 1870, and Babcock's, No. 421,805, in 1890) had professed to teach practical scale-makers how to build automatic computing scales. But when those disclosures were given material bodies, failure was the result. Just as Smith said in his specification, they would not work twice alike, they were not reliable. To-day in the light of what Smith accomplished it may be easy enough to see exactly where the difficulty lay; but this record proves that during the long interval between Phinney and Smith some of the brightest and most skillful men in the scale business, realizing what a tremendous commercial success was awaiting a reliable automatic computing scale, did not draw from Phinney's patent, nor from elsewhere in the prior art, nor from their own experience as practical mechanics, nor from their own ingenuity, any conception of the necessary means. In the prior art were combinations of indicator-drums and weighing mechanisms. But the cause of their failure might lie at any one of many points. It remained for Smith to discover that the most essential thing in reorganizing the old elements was to make the drum so light that its interference with the weighing operation would be eliminated. And he embodied that conception or "happy thought" in the new means described in the patent and covered by the claims of the first patent in suit. The evidence in this record (and we have considered, though we have not thought it necessary to discuss, the remoter references to the nonautomatic art), instead of overcoming, has strongly fortified the presumption of invention.

[1] Defendant insists, however, that making the drum lighter was merely a matter of degree. Of course the lessening of weight is a matter of degree; but it is not necessarily merely a matter of degree. If the change converts failure into success, something more than a matter of degree is involved. Unreliable automatic computing scales, in the practical art, are no scales at all. A reliable automatic scale was a new mechanism, a creation, just as in the aspirin case (Kuehm-

sted v. Farbenfabriken of Elberfeld Co., 179 Fed. 701, 103 C. C. A. 243) this court held that the reduction of the amount of impurities in a compound theretofore known to chemists, whereby a deleterious substance was converted into a valuable medicine, was not merely a change of degree, but was a change of kind, producing a new article of commerce.

[2] A further insistence is made that the patent is void for indefiniteness, in this, that the degree of thinness of the aluminum frame and of the paper cylinder are not specified. In the quoted part of the specification Smith substantially told those skilled in the art to make the skeleton frame to the last degree of thinness that would support the cylinder, and to make the cylinder of the very thinnest paper they could then or thereafter find in the market, which would be stiff enough to retain its shape when attached to the frame. This, it seems to us, was very clear and definite instruction.

It is also contended that the reissue patent was improperly granted. In McDowell v. Ideal Concrete Machinery Co., 187 Fed. 814, 109 C. C. A. 574, this court considered the requirements of the reissue statute, and found that the new claims in that case were invalid because they were not for "the same invention" that was disclosed as the applicant's in his original description. But here the quoted part of the applicant's original description shows that the idea of the light drum, the purpose to be accomplished by it, and the means by which it was to be produced, constituted the principal part of his invention. But it was not covered except in original claim 2, and there only in combination with particularly described weighing mechanism. So, under the original patent, if any one should alter the weighing mechanism, he could avoid claim 2 and thus appropriate the largest part of what Smith had stated to be his invention. Inasmuch as the value of the drum invention was not dependent upon its association with the specific weighing mechanism provided by Smith, he would have been clearly entitled, in our judgment, to have included reissue claims 5 and 6 in his original specification. These claims cover the combination of the Smith "indicator-drum" with any "weighing mechanism," which, with the drum, will produce a practicable automatic weighing scale. Though they are broader than original claim 2, they are not broader than the invention described as Smith's in his original statement of invention. In his application for reissue, made promptly and before any rights of defendant or the public had intervened, he swore that he had not intended to dedicate that principal part of his invention to the public, and that the omission of claims of the character of 5 and 6 had occurred through inadvertence. In our view the Commissioner was warranted in granting the reissue. Compare *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; *Houghton v. Whitin Machine Works*, 153 Fed. 740, 83 C. C. A. 84; *Gaskill v. Meyers*, 81 Fed. 854, 26 C. C. A. 642.

It follows that the finding of validity and infringement of the reissue claims was correct.

[3] Claim 2 of the second patent shows that all that Smith contributed to the art, beyond the disclosures of his reissue patent, was to

put upon the indicator-drum a column of figures, in inverse order to that of the column already there, so that the purchaser might read the weight through an opening in the back of the casing. If the concept involved had been Smith's, there might not be much difficulty in sustaining the claim, however obvious the application of the concept might seem. But the whole idea was old. "Back-indication," by reversing the figures, had long been commonly employed in indicating apparatuses, like cash-registers for example (Pottin's patent, No. 312,014 and others); and whatever claim might otherwise have been made for ingenuity in modifying and adapting the old means to an automatic computing scale is destroyed by referring to the way Smith had already put upon the drum the column of figures to be read by the seller. This claim, we think, is clearly void for lack of invention.

[4] In regard to the acknowledgment of a corporation's conveyance, the Massachusetts statutes (Rev. Laws Mass. 1902, c. 127, §§ 7 and 18) required (what is commonly called for in all jurisdictions with which we are familiar) that the notary's certificate should show that the persons who signed as officers were personally known to the notary, that on oath they stated they were such officers and were authorized by the board of directors to execute the instrument, and that the corporation either had no seal or that its genuine seal was affixed to the instrument, and that they thereupon acknowledged said instrument to be the free act and deed of the corporation. Execution of the instruments here in question was not proven by testimony. Certified copies of assignments of patents, not duly acknowledged, are not proof of execution. *Paine v. Trask* (C. C.) 56 Fed. 233; *New York v. Cable Ry. Co.*, 60 Fed. 1016, 9 C. C. A. 336; *National Co. v. Navy Co.* (C. C.) 99 Fed. 89. As the acknowledgments of these assignments are insufficient in every respect to constitute good corporate acknowledgments, the record is barren of proof of execution.¹

The decree is reversed with the direction to dismiss the bill on the second patent and to permit complainant to introduce proofs of title to the first patent.

¹ On the sufficiency of the acknowledgments defendant cited: *Lumbard v. Aldrich*, 6 N. H. 269; *Bennett v. Knowles*, 66 Minn. 4, 68 N. W. 111; *Lovett v. Sawmill Association*, 6 Paige, Ch. (N. Y.) 60; *People v. Deyoe*, 2 Thomp. & C. (N. Y.) 142; *Malloye v. Coubrough*, 96 Cal. 649, 31 Pac. 622; *Holt v. Trust Co.*, 11 S. D. 456, 78 N. W. 947; *Endowment Ass'n v. Fisher*, 71 Md. 430, 18 Atl. 808; *Klemme v. McLay*, 68 Iowa, 158, 26 N. W. 53; *Machesney v. Brown* (C. C.) 29 Fed. 145. And complainant cited: *Tenney v. East Warren Lumber Co.*, 43 N. H. 343; *Banner v. Rosser*, 96 Va. 252, 31 S. E. 67; *Catherine D. Fitch v. Lewiston Steam Mill Company et al.*, 80 Me. 34, 12 Atl. 732; *The Frostburg Mut. Bldg. Ass'n v. Wm. Brace et al.*, 51 Md. 508; *Ferguson et al. v. Ricketts et al.* (Tex. Civ. App.) 55 S. W. 975.

MOTION PICTURE PATENTS CO. v. ECLAIR FILM CO.

(District Court, D. New Jersey. September 4, 1913.)

1. MONOPOLIES (§ 21*)—SUIT FOR INFRINGEMENT—DEFENSES.

An allegation in the answer in an infringement suit that the United States had instituted a suit for the dissolution of complainant corporation as an illegal monopoly states no ground of defense, since the fact alleged, if proved, would be irrelevant.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 51; Dec. Dig. § 21.*]

2. MONOPOLIES (§ 28*)—INJURY TO COMPETITORS—RIGHT TO RECOVER DAMAGES.

That a corporation is a monopoly, in violation of the Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) and subject to dissolution at suit of the government, does not of itself give a right of action for unfair competition to any particular person, but, to sustain a claim for damages, specific injury must be proved.

[Ed. Note.—For other cases, see *Monopolies*, Cent. Dig. § 18; Dec. Dig. § 28.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 92*)—UNFAIR COMPETITION—ACTIONS—PLEADING.

Fraud is the basis of all actions of unfair competition, and, as that is never presumed, the facts relied on to show fraud must be pleaded and proved.

[Ed. Note.—For other cases, see *Trade-Marks and Trade-Names*, Cent. Dig. §§ 102, 103; Dec. Dig. § 92.*]

4. SET-OFF AND COUNTERCLAIM (§ 8*)—IN EQUITY.

A legal demand cannot be pleaded as a set-off or counterclaim in an equity suit, but under new equity rule 30 (201 Fed. v. 118 C. C. A. v) it must be a demand "which might be the subject of an independent suit in equity."

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. §§ 9-11; Dec. Dig. § 8.*]

In Equity. Suit by the Motion Picture Patents Company against the Société Française des Films et Cinématographes "Eclair," trading as the Eclair Film Company. On motion to strike out certain alleged defenses. Motion granted.

Melville Church, of Washington, D. C., and Louis Hicks, of New York City, for plaintiff.

Waldo G. Morse and John L. Lotsch, both of New York City, for defendant.

RELLSTAB, District Judge. [1] The bill of complaint charges infringement of certain patents. The answer sets up as defenses *inter alia* that the plaintiff was a monopoly denounced by the Federal Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and that it was guilty of unfair competition in the use of such patents. It also interposed a counterclaim for damages sustained by reason of such premises. Of the paragraphs challenged, No. 55 alleges the institution by the United States of a suit against the plaintiff charging that it is a monopoly and combination inhibited by the Anti-Trust Act. It alleges further that the plaintiff is such a monopoly and that it is using the patents in suit in furtherance there-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of. Neither allegation is a defense. The one averring that such a suit is pending does not charge the existence of such monopoly but merely that such a charge is made by a plaintiff in another proceeding. The proving of the issue here tendered, viz., that some one else made such a charge, would be no more a defense to the charge of infringement herein laid against the defendant than that such charge would preclude defendant from disproving it. The further allegation that such a monopoly exists, as well as the allegations in paragraphs 56, 57, 58, 59, and 60, charging unfair competition, founded upon the existence of such monopoly and the use of such patents (assuming that these conditions are defenses available in a suit of this character), are couched in too general and indefinite terms to require answer. A separate bill of complaint thus framed would be dismissed on motion, under equity rule 29.

[2] That the plaintiff is guilty of an infraction of the Anti-Trust Act and in appropriate proceedings will be dissolved is not enough to constitute a case of unfair competition against a particular person. *U. S. Fire Escape, etc., Co. v. Halsted Co.* (D. C.) 195 Fed. 295; *Fraser v. Duffey* (D. C.) 196 Fed. 900, and cases cited. Specific injury suffered by the defendant different from that sustained by it as a member of the community is essential to its recovery of damages or to restrain further infringement upon its rights. *Borden Ice Cream Co. v. Borden's Condensed Milk Co.*, 201 Fed. 510, 121 C. C. A. 200.

It is elementary that a plaintiff in equity must allege with particularity all material (ultimate) facts necessary to establish his right to the relief prayed, and an articulated array of generalities, no matter how well sounding, will not satisfy this requirement. *Story's Eq. Pl.* § 241; *Shipman's Eq. Pl.* p. 520; *Wilson v. American Ice Co.* (D. C.) 206 Fed. 736.

[3] Fraud is at the root of all actionable unfair competition; and, as no intentment is made in favor of fraud, the facts (but not the mere evidence thereof) upon which such a charge is predicated must be set forth distinctly and with as much particularity as the nature of the transactions involved and the circumstances in which they have their being or development are within complainant's knowledge or could have been ascertained by his employing such means as were at his command. That the pleader had no such idea of his duty in this case is manifest by a reading of the challenged paragraphs. The general charge of unfair competition against the defendant appears. However, this is but a mere conclusion of law. The allegations following pertain almost exclusively to a charge that the plaintiff is violating the Anti-Trust Act and, so far as they may be said to consist in facts, are framed for the purpose of supporting such a charge. The application of such allegations to the defendant is of the most general character. Paragraph 59 will suffice as illustrative of such lack of particularity:

"59. That complainant has under and pursuant to said agreements aforesaid (only one is specifically named and that with the plaintiff's assignor and other persons unnamed) employed the same wholly in, about, under, and in connection with said unlawful combination, agreement, and course of

business so in restraint of trade, and that by reason of said unfair competition and unlawful monopoly is wrongfully and unlawfully destroying the business of this defendant, and this defendant is being wrongfully deprived of a large amount of business, and by which the defendant has been and is being damaged in a great amount, the exact amount of such damage or damages so far inflicted is unknown to the defendant, but which, upon information and belief, it alleges is in excess of \$50,000, and that the defendant is, by the said action of the said complainant herein, being wrongfully and unlawfully prevented from fairly competing with the complainant, and the public thereby greatly deceived, prejudiced, and damaged."

Surely if the defendant has such a cause of action as entitles it to redress against an unfair competitor, some overt act of the plaintiff, specifically directed against the defendant or its customers, or which injuriously affects the defendant's business reputation and good will specifically, must be known by it and be capable of precise averment. No such acts, however, are pleaded, and the conclusion is irresistible that the purpose of the pleading was not so much to outline the specific injury being perpetrated upon the defendant as a separate identity, as that which it in common with others in the same trade was suffering because of the plaintiff's violation of the Anti-Trust Law. For such injury and violence, only the United States, in the exercise of its governmental power and duty to protect the general public, may bring suit. Anti-Trust Act, § 4; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870. For such lack of definiteness and particularity such paragraph must be struck out.

[4] Paragraphs 61 and 62, the remaining ones attacked by this motion, and which are inserted by way of counterclaim, seeking treble damages under such Anti-Trust Act, are also subject to a like infirmity. These, however, are objectionable for a greater (because incurable) reason in that the defendant thereby seeks to set up in an equity suit a claim that can only be maintained in a suit at law. Only counterclaims "which might be the subject of an independent suit in equity" may be set up in an answer to an equity bill. New Eq. Rule 30 (201 Fed. v, 118 C. C. A. v).

The subject-matters of all of these paragraphs fall within the condemnation of *Terry Steam Turbine Co. v. Sturtevant Co.* (D. C.) 204 Fed. 103, and *Williams Patent Crusher & Pulverizer Co. v. Kinsey Mfg. Co.* (D. C.) 205 Fed. 375, but the later case of *Vacuum Cleaner Co. v. American Rotary Valve Co.*, 208 Fed. 419, decided by the United States District Court for the Southern District of New York (memorandum filed May 2, 1913), holds that practices which amount to unfair competition may be interposed as a defense under such rule. In the present case a decision of this question for the reasons given is unnecessary.

All the recited paragraphs, as well as Nos. 28, 29, 30, 32, 34, 35, 36, 37, 45, 48, and 54, repeated by such answer in aid of these alleged defenses in so far as they are thus repeated and relied upon to support them, must be struck out. Prayers 5, 6, and 7, being based on such defenses, must also be struck out.

The motion is granted, with costs.

VACUUM CLEANER CO. v. AMERICAN ROTARY VALVE CO.

(District Court, S. D. New York. May 2, 1913.)

PATENTS (§ 310*)—PLEADING—COUNTERCLAIM.

Under new equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi), which permits the pleading of a counterclaim which might be made the subject of an independent suit in equity against the plaintiff, the defendant in an infringement suit may set up in his answer a counterclaim for damages to his business because of the circulation by plaintiff of false statements in respect thereto.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*]

In Equity. Suit by the Vacuum Cleaner Company against the American Rotary Valve Company. On motion to strike out counterclaim. Denied.

Ewing & Ewing, of New York City (Thomas Ewing, Jr., and Frank C. Cole, both of New York City, of counsel), for complainant.

Dyer, Dyer & Taylor, of New York City, and Poole & Cromer, of Chicago, Ill. (John Robert Taylor, of New York City, and C. Clarence Poole, of Chicago, Ill., of counsel), for defendant.

LACOMBE, Circuit Judge. The suit is the usual one for infringement of patent. The answer sets up various defenses. It also sets up a counterclaim which charges that complainant in combination with others has circulated false statements about defendant's cleaner and has threatened defendant's customers with suits which it has had no intention of bringing. It is prayed that further interference of this sort with defendant's business be enjoined and that it have damages for any loss already sustained by the circulation of these statements and threats. This may or may not be a good cause of action; it may or may not be susceptible of proof; it can hardly be said to arise out of the transaction which is the subject-matter of the suit. But it does fall within the second category of counterclaims allowable under new equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi), since it "might be made the subject of an independent suit in equity against the plaintiff."

The motion to strike out is denied.

UNITED STATES v. SPRAGUE et al.

(District Court, E. D. New York. July 31, 1913.)

1. FOOD (§ 12*)—FOOD AND DRUGS ACT—ADULTERATION—SHIPMENT OF ADULTERATED FOOD—"FILTHY."

Oysters, although shipped unopened as taken from the water, may come within the prohibition of Food and Drugs Act, June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1911, p. 1354), where by reason of the condition of the waters in which they are grown they contain harmful bacteria, which renders them "filthy, decomposed, or putrid," and therefore adulterated within section 7, subd. 6, of the act.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 12.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. FOOD (§ 12*)—SHIPMENT OF ADULTERATED FOOD—ELEMENTS OF OFFENSE—KNOWLEDGE AND INTENT.

Food and Drugs Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1911, p. 1354), which provides that the shipment or delivery for shipment in interstate commerce of any article of food or drugs which is adulterated or misbranded shall constitute a misdemeanor, does not make the knowledge or intent of the shipper an essential element of the offense.

[Ed. Note.—For other cases, see Food, Dec. Dig. § 12.*]

3. FOOD (§ 5*)—"ADULTERATION."

The ordinary use of the word "adulteration" implies an actual addition to the original substance, through human agency. But as used in Act June 30, 1906, c. 3915, § 7, subd. 6, 34 Stats. 769 (U. S. Comp. St. Supp. 1911, p. 1357), known as the Pure Food and Drugs Act, the meaning is not restricted to an addition by the hand of man, and if the adulteration of filthy, decomposed, or putrid substance has been added by nature, and is contained in the article to be shipped, it is adulterated in the eyes of the law.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

For other definitions, see Words and Phrases, vol. 1, pp. 210-212.]

Criminal prosecution by the United States against Smith Sprague and George W. Doughty, for violation of the Food and Drugs Act. On motion to quash and demurrer to information. Overruled.

William J. Youngs, U. S. Atty., of Brooklyn (Samuel J. Reid, Jr., Asst. U. S. Atty., of New York City, of counsel), for the United States.

Davison & Underhill, of Brooklyn, for defendants.

CHATFIELD, District Judge. The defendants have been brought into court upon an information filed under Act June 30, 1906, c. 3915, 34 Stats. 768 (U. S. Comp. St. Supp. 1911, p. 1354), known as the Pure Food and Drugs Act. The precise charge is that the defendants, as copartners, shipped from Far Rockaway, N. Y., to the state of Pennsylvania, 10 barrels of oysters, upon the 12th day of October, 1911; that the oysters were "adulterated" in that they "consisted in part of filthy, decomposed, and putrid animal and vegetable substance," and that the oysters were an article of food, as distinguished from drugs, etc. The information is sufficient in its general form. The defendants have appeared in court, and interposed a motion to quash the information upon three grounds: (1) That the information does not charge the defendants with knowingly and willfully doing any of the things mentioned; (2) that the law above referred to does not cover, and was not intended to cover the shipment of oysters, and that a shipment of unopened oysters, in their natural condition, after removal from the water, is not within the language or intent of the sections relating to adulteration; (3) that the papers upon which the information was issued, and which are filed with the information, do not show the oysters to have been, in whole or in part, of a filthy, decomposed, or putrid animal or vegetable substance. The defendants have also interposed a demurrer upon the same grounds above men-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tioned, alleging that the information does not state facts sufficient to constitute a crime.

It is apparent that some of these questions would be raised properly by demurrer rather than by motion to quash (for the alleged defects are claimed upon the allegations of the information, and argument thereon is based upon its language). The question with respect to the scope of the act, and the motion based upon the physical composition or analysis of the substance in question, can be raised by the motions. In support of the motion to quash, the defendants have relied upon facts which are matters of common knowledge and admitted by the United States Attorney, to the effect that the oysters in question were unopened when taken from the waters of a bay in this district by the shippers, and, without any treatment or manufacture, except that of gathering or packing for shipment, were transmitted in a living state. This presupposes that the muscular structure of the oyster has kept the shell closed, and that nothing has been added thereto, or could have been added thereto, except through the application of liquid. It is alleged and admitted that no liquid has been supplied beyond the ordinary water upon or in which the oysters live. In addition, the motion is based upon the allegations of the information that the adulteration complained of consists of bacteria, particularly the bacillus typhosus and other animal and vegetable bacilli, which were admittedly absorbed by the live oyster during its process of growth; that is to say, from the liquid which it consumed in its natural functions. The court will not attempt to differentiate between the points raised by demurrer and those raised upon the motion to quash, other than to state them as they are taken up in order.

[1] As to the objection that the oysters did not consist in whole or in part of filthy, decomposed, or putrefied animal or vegetable substance, no argument would be needed, if living bacilli had been knowingly introduced into an oyster by the defendants, and allowed to reproduce therein. It seems hardly open to argument that the words "filthy, decomposed, and putrefied" would be applicable to certain conditions resulting from the presence of living organisms; and in fact, from common knowledge of the present state of scientific research, the conditions of animal substance known as "filthy, decomposed, and putrefied" are caused by the presence of such living organisms. When we consider a specific bacillus such as that named, whether or not its presence might cause decomposition or putrefaction raises a question of fact that cannot be disposed of upon this motion, for the degree of decomposition of tissue might be so slight as to render the use of those words inapplicable, from the standpoint of a substance intended for food. But the language used in the statute is in the alternative, and in the information the words "filthy, decomposed, and putrid" are stated in conjunction. A substance containing bacilli liable to cause disease, to such an extent as to make it dangerous for food purposes, is certainly "filthy," under the meaning of that word as generally used, and especially since the result of investigation has shown that filth or dirtiness is dangerous through the germs which it contains, and not solely because of offense to the senses.

[3] The statute prohibits the *manufacture* of any article of food or drugs which is "adulterated or misbranded," and by section 7, subd. 6, the definition of the word "adulteration," for the purposes of the statute, is made to cover a substance consisting in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not. It may be assumed that oysters, while belonging to the animal kingdom, would not be classified as animals. But even if they be treated as fish or mollusk, and assuming that the words "whether manufactured or not" relate only to the clause as to the "portion of an animal unfit for food," the indication is that the certain intent of Congress was to give full meaning to the definition of "adulteration" defined as "consisting in whole or in part of a filthy substance." The ordinary use of "adulteration" implies an actual addition to the original substance, through human agency. But the word as used in the section does not restrict this to addition by the hand of man, and if the adulteration of filthy, decomposed, or putrid substance has been added by nature, and is contained in the article to be shipped, it is adulterated in the eyes of the law.

[2] This brings us to the principal question in the case. The statute makes it unlawful to manufacture any article of food or drug which is adulterated or misbranded within the meaning of this act. If a person, through his servants, makes an article which is in fact adulterated, he is liable for the manufacture, within the jurisdiction of the act of Congress, even though he does not know that the Pure Food and Drugs Law is on the statute book, and does not know that the resultant condition of his process of manufacture has produced a substance which on analysis appears to be adulterated through containing decomposed animal matter. In the same way, he would be liable for a misbranding if the methods employed in his business caused the sending out of goods in violation of the statute. The law further makes any article of food or drugs which is adulterated or misbranded, within the meaning of the act, contraband; that is, the introduction of them into another state or territory is prohibited. Such goods cannot be transmitted by interstate commerce without rendering the goods subject to seizure and destruction, and under section 10 this of itself shows that the knowledge or intent of the party shipping is not a material element of the situation which is prohibited by the act of Congress. The law further provides that if any person shall ship or deliver for shipment, in unbroken packages or otherwise, an adulterated or misbranded article, or shall offer such for sale, he shall be guilty of a misdemeanor.

The information in this proceeding charges the defendants with having offered for shipment an article which must be held to be adulterated and to be plainly contraband under the law. They are bound by the fact that the law was in existence. They are bound by the fact that they knew that they were manufacturing for shipment, or were actually shipping by interstate commerce, certain packages of oysters, which would be contraband or subject to seizure if found to contain filthy or decomposed matter (that is, "adulterated") within the mean-

ing of the law. Congress has seen fit to impose a penalty for such a violation, and it is no defense to claim that the person causing the violation neither knew at the time that the goods were offensive, nor intended to violate the law. Hence an allegation that the defendants knew that the article was adulterated, at the time that they intentionally and willfully shipped it or caused it to be shipped, would apply only to cases where the adulteration had been placed in the goods by or with the knowledge of the shipper, or where an examination of the article had disclosed its presence. But Congress has gone much further, and in the exercise of its police power has imposed a penalty upon the sending of the deleterious or harmful substance, where the shipper is responsible for the act of sending, even though he may have nothing to do with the condition of the article sent, except as possession or ownership make him responsible. The use of interstate commerce or of means of shipping an article from one point to the other, like the manufacture of an article, or its adulteration with a substance by the person preparing it, is an act which, when alleged in an indictment, need be charged as "knowingly" committed only if the person charged has to be alleged to be in possession of and exercising his mental faculties. Such an allegation is not necessary where, as here, the word "ship" means "cause to be shipped." Where a person intentionally uses or has used means of transportation, under such conditions that he may unwittingly be liable to a fine, then, subject to constitutional limitations, the imposition of the fine for the specific act must be determined solely from the conditions under which the penalty would be imposed, and not from the intent or purpose of the one liable to the fine.

The defendants have cited a number of cases to show that criminal intent requires knowledge or conscious action on the part of the criminal. They argue that a charge in the language of the statute is not sufficient if the act alleged could be innocently done, unless guilty knowledge is present, from which intent would have to be inferred. But this statute compels liability, if the harmful act has occurred through a shipment personally made by the defendant, or for which he is in a business sense responsible as shipper. The extent of the responsibility is left to the court, when considering the amount of punishment. The determination of when the defendant should be held as the shipper of the contraband article is a matter of law, but the fault of indefiniteness, or of failure to set forth what is charged to be criminal, cannot be urged against the present information. The statutory requirements render the matter more definite, so far as limiting or defining the circumstances under which Congress intended that criminal responsibility should be placed upon an individual, and less latitude is given to those enforcing the law (with respect to everything except the amount of punishment) than if a determination as to the knowledge or information of the defendant were to be entered into.

The conclusion must be that if the person accused is responsible under the statute for the consequences of a shipment by interstate commerce, and if that responsibility carries with it a punishment for

violation of some regulation necessary for the safety of health, then the information will lie.

The demurrer will be overruled, and the motion to quash denied.

THE LUCILLE.

(District Court, S. D. Alabama, S. D. September 24, 1913.)

No. 1,389.

MARITIME LIENS (§ 43*)—LIENS FOR REPAIRS AND SUPPLIES—WAIVER.

Act June 23, 1910, c. 373, § 1, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1192), giving a maritime lien on vessels for repairs, supplies, etc., furnished on order of the owner or of a person authorized by him, and providing that it shall not be necessary to allege or prove that credit was given to the vessel, does not bar proof that credit was in fact given to the owner and not to the vessel, and such proof may be of an express agreement or of circumstances from which such agreement may be inferred; and since section 4 provides that the act shall not be construed to prevent a waiver of the right to a lien or to change the rules of law with regard to laches, the charging of repairs or supplies to the owner instead of the vessel, and the taking of his notes therefor running several months, secured by mortgage on the vessel, will be held a waiver of the statutory lien as against the holders of liens subsequently acquired.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 82; Dec. Dig. § 43.*]

In Admiralty. Suit by Gust Nelson and others against the launch Lucille. On exceptions to report of special commissioner on claims of the S. M. Jones Company and the Texas Company. Report confirmed.

The launch Lucille was libeled on March 18, 1913, by one Nelson for wages, and a number of intervening libels were filed, among which were those of the S. M. Jones Company, for machinery, and of the Texas Company, for gasoline, oil, etc., furnished said launch; both claiming a lien for materials, supplies, etc. The launch having been sold and the purchase money paid into court, a reference was made to a commissioner to ascertain and report the liens in amount and priority to be paid out of this fund. On the hearing, the S. M. Jones Company, in support of their libel, introduced in evidence certain accounts made out against one John A. Welch, who was shown to have been the owner of said launch, for machinery furnished the Lucille on his order, and produced a mortgage given to them on March 28, 1911, by said Welch on the launch, which had been duly recorded, to secure 12 notes given by said Welch to cover the accounts in question, 11 of which having been paid by Welch, there remained the last note for \$1,111.18, due March 28, 1912, with 6 per cent. interest, unpaid and for which they sought to establish a materialman's lien on the fund derived from the sale of the launch. There was no question as to the receipt of the machinery by the Lucille. The commissioner denied them such lien on the ground that, by taking such notes and mortgage to secure balance due for materials and supplies, extending credit for a period of 12 months, and not filing their libel until April 23, 1913, they waived their maritime lien or postponed it as to subsequently accruing liens, and that they were entitled only to such lien as the mortgage gave them. To this finding they except.

The Texas Company, to support their libel, introduced an account against John A. Welch, the testimony showing that the gasoline and oil furnished to the Lucille, as well as to another launch, the Irma, owned by Welch, was all

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

charged on their books to the one account, that of John A. Welch; that Welch made payments on this account from time to time out of a common fund derived from the earnings of the two boats, commingling the moneys received and disbursed in such manner so that the amounts as to each vessel could not be accurately determined. Welch testified, however, that on a certain date, September 19, 1912, the balance at that time due by him to the Texas Company be considered as due and owing for account of supplies furnished to the Lucille, for the reason that the Irma had been showing a profit in her operations and the Lucille had not, and that he therefore considered or concluded that the one boat had discharged so much of the indebtedness charged against him on the Texas Company's books as was for her supplies, and that the balance was properly for the Lucille's supplies. There further developed that at this time, September 19, 1912, John A. Welch gave to the Texas Company five notes, signed by himself, in payment of this balance, due in May, June, July, August, and September, respectively, and bearing 8 per cent. interest; said notes being secured by second mortgage given by Welch on the Lucille, and duly recorded. The Texas Company also introduced certain receipts from the master of the Lucille and others authorized to receipt for supplies, showing the delivery of gasoline and oil to said vessel from December 1, 1911, to July 9, 1912, which (as found by the commissioner) cover the supplies (with some deductions where the proof failed), for which the notes and mortgage were given.

Upon objections by proctors for other interveners to the allowance of this claim as an admiralty lien for supplies, on the grounds that the Texas Company had waived such lien by taking the notes and mortgage, further, that the supplies were delivered on credit extended solely to the owner, John A. Welch, and on other objections, the commissioner found that said company had waived their lien, and had such lien only as the mortgage was entitled to. To this finding, the Texas Company except.

Leigh & Chamberlain and Hanaw & Pillans, all of Mobile, Ala., for S. M. Jones Co.

Hanaw & Pillans, of Mobile, Ala., for Texas Co.

Rickarby & Austill, of Mobile, Ala., for Gulf Dry Dock Co.

Wm. G. Caffey and Gregory L. & H. T. Smith, all of Mobile, Ala., opposed.

TOULMIN, District Judge. Prior to the enactment of the Act of June 23, 1910, c. 373, 36 Stat. 604, there was no lien given by the general maritime law on a domestic vessel for repairs, supplies, or other necessities furnished her in her home port. But that act created a new legal liability giving such lien. U. S. Comp. St. Supp. 1911, p. 1192.

No lien was given by the general maritime law to materialmen for supplies, etc., furnished a vessel in her home port, because in that case, according to the generally accepted theory, the presumption was that credit was given to the owner and not to the ship itself.

When necessary repairs, supplies, etc., were furnished to a vessel in a foreign port on the order of the master, nothing else appearing, there was a presumption that they were furnished on the credit of the vessel, and the maritime law gave a lien on the vessel. On the other hand, where necessary repairs, supplies, etc., were furnished to a vessel in a foreign port on the direct order of the owner who is present, there is a presumption that the repairs were furnished, not on the credit of the vessel, but solely on that of the owner. But this presumption

is not conclusive. It may be rebutted by circumstances. *The Ella* (D. C.) 84 Fed. 471, 478, 481.

The act of June 23, 1910, provides that any person furnishing repairs, supplies, or other necessities to a vessel, whether foreign or domestic, shall have a maritime lien on the vessel.

"All it requires is that whatever was furnished should have been furnished on the order of the owner, or some one duly authorized by him; and it provides that, in order that a lien therefor may be enforced in rem, it shall not be necessary to allege or prove that credit was given to the vessel." *Ely v. Murray & Tregurtha Co.*, 200 Fed. 371, 118 C. C. A. 523.

The First Circuit Court of Appeals, in considering this statute, in the case last cited, said:

"Of course, this does not bar proof that whatever was furnished was furnished on the mere credit of the owner, and in no sense on the credit of the vessel." 200 Fed. 371, 118 C. C. A. 523.

An agreement or understanding as to whom credit was given may be inferred from acts and circumstances as well as from express language, as is ordinarily true with reference to all alleged contracts where it must be shown that the minds of the parties met. *Cuddy v. Clement*, 115 Fed. 301, 303, 53 C. C. A. 94.

The existence of an agreement may be shown by either direct or circumstantial evidence; and an express agreement is none less express because circumstantial evidence is resorted to for its establishment.

The said act also provides:

"That nothing in this act shall be construed to prevent a furnisher of repairs, supplies, or other necessities from waiving his right to a lien at any time, by agreement or otherwise, and this act shall not be construed to affect the rules of law now existing, either * * * in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed in personam."

"It is settled law that a mortgage is to be treated, not as a debt, but as a mere incident of it; not as the principal thing, but as the mere accessory. * * * If a mortgage be thus but an accessory and incident of the note, and the note itself does not displace the maritime lien upon the vessel, then the mere fact of taking a mortgage does not operate as a waiver of the maritime lien. If, however, the taking of the mortgage be attended by acts inconsistent with the lien, or prejudicial to other maritime creditors, * * * or if the execution of the mortgage be in manner such as to make it conflict with the rights of maritime creditors whose claims are of equal dignity with that secured by the mortgage, then it would be inequitable to allow to the mortgagee the benefit of two remedies against the ship, and his taking the mortgage would be held as waiving the maritime lien." *The D. B. Steelman* (D. C.) 48 Fed. 580, 581.

In the *Lottawanna*, 21 Wall. 558, 22 L. Ed. 654, it was held that rule 12 adopted by the Supreme Court in 1872 that "In all suits by materialmen, for supplies, or repairs, or other necessities, * * * the libellant may proceed against the ship and freight in rem, or against the master and owner alone in personam," was to render rule 12 of 1844 general in its terms, giving to materialmen in all cases their option to proceed either in rem or in personam.

If the parties interested in this proceeding had the option to proceed either in rem or in personam, they unquestionably had the option to give credit to the owner or to the vessel, and if they gave credit

to the owner they thereby waived their right to a lien on the vessel. There is no law to prevent such waiver. Act June 23, 1910, § 4; The D. B. Steelman (D. C.) 48 Fed. 580, 581.

It is contended by the counsel opposing the exceptions that it clearly appears from the evidence in the case that the libelants gave credit to the owner for the supplies furnished, and that they thereby waived their right to a lien on the vessel. From a careful examination and consideration of the evidence, my conclusion is that the contention is well made.

The ruling of the commissioner is, in my opinion, correct, and his report is accordingly in all things confirmed. It is so ordered.

SALANDER v. CITY OF TACOMA.

(District Court, W. D. Washington, S. D. October 15, 1913.)

No. 1,390.

1. COURTS (§ 327*)—JURISDICTION OF FEDERAL COURTS—AMOUNT IN DISPUTE.

The proviso of Judicial Code (Act March 3, 1911) § 24, par. 1, 36 Stat. 1091, c. 231 (U. S. Comp. St. Supp. 1911, p. 135), "that the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section," does not enlarge the jurisdiction of the District Courts beyond that previously possessed by the Circuit Courts, but was added to the former statute merely to remove any uncertainty.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 889; Dec. Dig. § 327.*]

2. COURTS (§ 327*)—JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY.

An action to recover money exacted under a city ordinance imposing a license tax on users of trading stamps on the ground that it violates the constitutional rights of complainant is not one "authorized by law" to redress the deprivation of equal rights secured by the Constitution and laws of the United States, within the meaning of Judicial Code (Act March 3, 1911) § 24, par. 14, 36 Stat. 1092, c. 231 (U. S. Comp. St. Supp. 1911, p. 137), which has reference to civil rights provisions, but one arising under the Constitution and covered by paragraph 1 of said section, and the jurisdictional amount of \$3,000 must be involved to give a federal District Court jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 889; Dec. Dig. § 327.*]

At Law. Action by Gustaf Salander against the City of Tacoma. Dismissed for want of jurisdiction.

Tucker & Hyland, of Seattle, Wash., for plaintiff.

T. L. Stiles and Frank M. Carnahan, both of Tacoma, Wash., for defendant.

CUSHMAN, District Judge. This is an action to recover \$100 from the city of Tacoma, alleged to have been paid under compulsion and protest by plaintiff as a license imposed by what is asserted to be a void ordinance. The complaint resembles a bill in equity, containing 25

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

separate paragraphs. The defendant moves to strike a number of these paragraphs, and, upon the hearing, suggested a want of jurisdiction of the court to entertain the suit.

The complaint alleges that plaintiff is a citizen of the state of Washington, a resident taxpayer of the defendant city, engaged in the grocery business therein, and paying a regular mercantile tax; that he entered into a contract with a certain firm to furnish him "trading stamps" redeemable in merchandise at said firm's store in Tacoma, which stamps the plaintiff gives to his customers with their cash purchases, in order to advertise his business; that by an ordinance of the defendant city he is required to pay a \$100 license yearly, in order to avail himself of the use of such stamps; that such ordinance imposes a fine of not exceeding \$100 and not less than \$50 for its violation.

It is alleged that the ordinance is void as being in violation of article 1, § 10, of the federal Constitution, as its effect is to impair plaintiff's contract for "trading stamps" with said firm; that it violates the fourteenth amendment to the Constitution, in that it deprives him of the right of contract, and deprives him of liberty and property without due process of law, and denies the equal protection of the law.

No question is made but that the court would have been without jurisdiction prior to the adoption of the Judicial Code of 1911 (Act March 3, 1911, c. 231, 36 Stat. 1087 [U. S. Comp. St. Supp. 1911, p. 128]), the amount in controversy not being sufficient; the general character of the cause being such that, if the amount involved was sufficient, there would be concurrent jurisdiction in the federal and state courts.

[1] By the first paragraph of section 24 it is required that the amount in controversy must exceed \$3,000 and "arise under the Constitution or laws of the United States" to give the District Court jurisdiction. By the Code of 1911, the following words have been added to the first paragraph of this section:

"Provided, however, that the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section."

Following this provision is paragraph 14 of this section, which was paragraph 16 of section 629, R. S., as amended, which provides:

"Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States"

—under which, it is now contended, this suit may be entertained by this court.

In the special cases and particular subjects covered by paragraphs 2 to 25, the Circuit Court had jurisdiction prior to the adoption of the Judicial Code of 1911, without regard to the amount in controversy. *Spreckels v. McCain*, 192 U. S. 397, 24 Sup. Ct. 376, 48 L. Ed. 496;

Downes v. Bidwell, 182 U. S. 244, at 247, 21 Sup. Ct. 770, 45 L. Ed. 1088. This jurisdiction has been transferred to the District Court.

It must be held that the jurisdiction was not changed by the added provision. It was merely inserted to make more clear the jurisdiction, as it already existed, under paragraphs 2 to 25 of section 24.

"The clause to the effect that, as to the remaining clauses of the section, the court shall have jurisdiction without regard to the sum or value of the property in dispute, was added for the purpose of removing all doubt upon the point, and is to meet claims similar to those advanced in *Miller-Magee Co. v. Carpenter* [C. C.] 34 Fed. 433; and in *Ames v. Hager* [C. C.] 36 Fed. 129." Note to paragraph 1, section 24, Judicial Code, Document No. 1144.

[2] This suit is rather one which arises "under the Constitution and laws of the United States," as provided in the first paragraph of section 24, where there must be the jurisdictional amount involved to give jurisdiction, than one "authorized by law" to redress the deprivation of a right, privilege, or immunity secured by the Constitution of the United States.

The fourteenth paragraph of section 24 has reference to civil rights only. *Cruikshank v. Bidwell*, 176 U. S. 73, at 79, 20 Sup. Ct. 280, 44 L. Ed. 377.

The cause will be dismissed for want of jurisdiction.

UNITED STATES v. CERTAIN LANDS.

(District Court, D. New Hampshire. September 25, 1913.)

No. 71, Law.

EMINENT DOMAIN (§ 4*)—RIGHTS OF STATE—NATIONAL FOREST RESERVATION—ESTOPPEL BY GRANT.

Where the Legislature of a state by joint resolution approved by the Governor conferred on the United States the right to acquire land within the state for a forest reserve, reserving only the right to execute civil and criminal process therein, and the United States, acting in reliance thereon, purchased such lands, the state is estopped to assert the further right to exercise or grant the power of eminent domain over such lands.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 14-18; Dec. Dig. § 4.*]

Condemnation proceedings by the United States against certain lands. Judgment for plaintiff.

C. W. Hoitt, U. S. Atty., of Nashua, N. H.

James P. Tuttle, Atty. Gen., for State of New Hampshire.

ALDRICH, District Judge. In this case it is stipulated that issues of fact shall be determined by me, and right of trial by jury, if it exists, is waived.

This is a proceeding by the United States for the condemnation of certain lands in the state of New Hampshire, to the end that the United States, through notice of its proceeding, and such hearings as may become necessary, may be made secure in its title. It is understood that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

this proceeding is supplementary to certain conveyances and grants from individuals holding title; the object being to make the United States secure as against all parties who may claim to have an interest in the territory covered by the conveyances and grants.

The state of New Hampshire disclaims all right in fee, but asserts its "power to exercise and grant the right of eminent domain in the laying out of highways and in the taking of gravel banks and other necessary material for building and maintaining such public highways within said territory."

In acquiring the lands in question the United States was acting for the purpose of creating a national forest reserve for the protection of watersheds of navigable streams; conserving the navigability of navigable rivers; and for other incidental and reasonable public uses.

In 1903 the Legislature of New Hampshire passed a joint resolution (Laws 1903, c. 137) favoring the establishment of a national forest reserve in the White Mountain region, which was approved by the executive. Through this resolution the state undertook to confer upon Congress certain powers in respect to the interests of the state of New Hampshire, and its only reservation was that the state should retain jurisdiction concurrent with the United States with respect to civil and criminal process, to be exercised in the same manner as if the joint resolution had not been passed. In addition to this grant of power to the federal government, and for the purpose of promoting national legislation, the Senators and Representatives in Congress were requested to urge prompt and favorable action.

In 1905 (Laws 1905, c. 122), while a bill was pending before Congress, which sought to provide for the acquirement of land in the White Mountain region by the United States for a national forest reserve, the Legislature of New Hampshire approved and ratified the joint resolution of 1903, and again called upon Senators and Representatives in Congress to favor the proposed legislation, and this resolution also received state executive sanction.

The answer of the state of New Hampshire seeks to enlarge its reservation and now stand upon its right to exercise eminent domain in certain respects, viz., to reserve to itself the right to lay out highways and take gravel banks for building and maintaining highways.

It can be readily seen that the exercise of such a right by the state might interfere with the purpose for which the national reserve is sought to be established, and it is quite apparent from the pleadings, and especially from the allegations of the replication, which were not traversed, that the federal government proceeded in reliance upon the state joint resolutions, to which reference has been made.

There is no contention made that the Legislature and the executive in 1903 and 1905 exceeded their proper powers in the action taken for the purpose of promoting federal legislation upon the subject of a national reservation in the White Mountains.

So far as it is a question of fact, I find that the state of New Hampshire waived all its rights within the territory in question, except the right to serve civil process in all cases, and such criminal process as might issue under the authority of the state against any persons charg-

ed with the commission of crime, to be executed as though the joint resolution had not been passed.

I also find that such relinquishment or waiver having been made, the state of New Hampshire is estopped from setting up any of its reserved rights other than the one expressly reserved in the joint resolution of 1903.

So far as it is a question of law, I hold and rule that the state waived all dominion over the territory in question, except that in respect to civil and criminal matters, the only right of dominion which it sought to retain.

YOUNG v. CORRIGAN.

(District Court, N. D. Ohio, W. D. March 18, 1912.)

No. 7,902.

1. BREACH OF MARRIAGE PROMISE (§ 22*)—EVIDENCE—PLAINTIFF'S PRIOR CHARACTER—MITIGATION OF DAMAGES.

In an action for breach of marriage promise in which defendant claimed that plaintiff was immoral, evidence of her prior misconduct was admissible both as bearing on the issue of the making of the contract and in mitigation of damages.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. §§ 31-36; Dec. Dig. § 22.*]

2. BREACH OF MARRIAGE PROMISE (§ 35*)—DAMAGES—INSTRUCTIONS.

In an action for breach of marriage promise, an instruction that plaintiff's character was proper for the jury to consider in determining whether there was a contract and also on the issue of damages which in such case depended in some measure on the relation which plaintiff sustained in the community in which she lived and on her capacity to suffer from the affront which a breach would bring to her, and defining reputation, was proper.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. § 51; Dec. Dig. § 35.*]

3. BREACH OF MARRIAGE PROMISE (§ 22*)—EVIDENCE—PLAINTIFF'S MISCONDUCT.

Where, in an action for breach of marriage promise, plaintiff claimed aggravated damages for seduction, evidence of her previous immoral conduct and evidence of specific acts as well as reputation was admissible without reference to whether defendant had knowledge of her history at the time of the alleged promise or not.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. §§ 31-36; Dec. Dig. § 22.*]

4. TRIAL (§ 255*)—EVIDENCE—LIMITATION—NECESSITY OF REQUEST.

Where evidence is admitted for a particular purpose only, it is plaintiff's duty to request an instruction limiting its effect, if one is desired.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

5. BREACH OF MARRIAGE PROMISE (§ 35*)—TRIAL—INSTRUCTIONS.

In an action for breach of marriage promise, an instruction that if the jury found by a preponderance of the evidence that plaintiff was of previous immoral character, and such fact was known to defendant at the time of the alleged contract, they might consider such situation as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bearing on the probability of defendant's proposing to make a woman of that character his wife was proper.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. § 51; Dec. Dig. § 35.*]

6. TRIAL (§ 211*)—INSTRUCTIONS—FAILURE TO CALL WITNESS—INFERENCES.

Where, in an action for breach of marriage promise, the testimony showed that plaintiff's mother was active about the court during the trial, and her name was used as plaintiff's associate in many compromising situations, and her testimony was called for by every consideration of affection and interest, but she was not placed on the stand, the court properly charged that it was proper for the jury to consider plaintiff's failure to call her mother as a witness and draw such inferences as were reasonable from the circumstances because of such failure.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 505; Dec. Dig. § 211.*]

7. COURTS (§ 352*)—PRACTICE IN FEDERAL COURT—INSTRUCTIONS—REFERENCE TO EVIDENCE.

In courts of the United States, the trial judge in submitting the case to the jury may in his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment on the evidence, call their attention to parts thereof which he thinks important, and express his opinion on the facts, and an instruction in the exercise of such power informing the jury, however, that they are the judges of the facts and that their verdict should reflect their own uninfluenced judgment, uninfluenced by the court, except that they are bound to follow the law of the case as given by the court, is proper.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926-932; Dec. Dig. § 352.*]

8. COURTS (§ 352*)—FEDERAL JUDGE—FUNCTIONS.

A judge of the federal court is not a mere arbitrator to rule on objections to evidence and to instruct the jury on the law, but he is a real part of the machinery whereby just conclusions of fact are reached; it being his duty in the administration of justice to control the inquiry within due bounds and assist the jury to a just determination by such act or interposition as his position and superior knowledge suggest.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926-932; Dec. Dig. § 352.*]

9. SEDUCTION (§ 5*)—WHAT CONSTITUTES—INSTRUCTIONS.

Where, in an action for breach of marriage promise, plaintiff claimed seduction in aggravation of damages, an instruction defining seduction and charging that plaintiff was not seduced if she voluntarily went with defendant on a long trip with every reason to believe that sexual intercourse would result and was the end sought by defendant, etc., was proper.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 4-7; Dec. Dig. § 5.*]

10. BREACH OF MARRIAGE PROMISE (§ 22*)—EVIDENCE—CHARACTER OF DEFENDANT.

In an action for breach of marriage promise, evidence to show defendant's general bad character is inadmissible.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. §§ 31-36; Dec. Dig. § 22.*]

11. BREACH OF MARRIAGE PROMISE (§ 35*)—CHARACTER OF DEFENDANT—INSTRUCTIONS.

Where, in an action for breach of marriage promise, defendant's immoral character incidentally appeared, the court properly charged that such character was not directly in issue, and though it appeared in the evidence the jury should not impose any penalty or bring in any verdict against defendant on account of his character but might consider the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

same in connection with the question of the probability of his making the contract sued on.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. § 51; Dec. Dig. § 35.*]

12. BREACH OF MARRIAGE PROMISE (§ 22*)—CHARACTER OF PLAINTIFF—EVIDENCE—SPECIFIC ACTS.

In an action for breach of marriage promise, evidence that plaintiff had robbed witness in an assignation house of \$157 was admissible as bearing on her immoral character.

[Ed. Note.—For other cases, see Breach of Marriage Promise, Cent. Dig. §§ 31-36; Dec. Dig. § 22.*]

13. WITNESSES (§ 355*)—IMPEACHMENT—DETECTIVES.

Evidence of detectives employed to look up the reputation of a witness for truth and veracity is not admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1154-1156; Dec. Dig. § 355.*]

14. DEPOSITIONS (§ 83*)—APPLICATION TO SUPPRESS.

An application to suppress a witness' deposition because of his refusal to answer a question not made until the deposition was offered in evidence was properly denied.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 219-226; Dec. Dig. § 83.*]

15. WITNESSES (§ 270*)—CROSS-EXAMINATION—QUESTIONS—REFUSAL TO ANSWER—STRIKING OUT TESTIMONY—DISCRETION.

Where, in an action for breach of marriage promise, a witness for defendant was asked on cross-examination whether he had had intercourse with plaintiff on a certain occasion, it was within the discretion of the court not to compel the witness to answer, and hence his refusal to answer the question was not ground for striking his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 926, 955-957; Dec. Dig. § 270.*]

At Law. Action by Georgian Young against James W. Corrigan for breach of marriage promise. A verdict was rendered in favor of defendant, and plaintiff moves for a new trial. Overruled.

W. S. Anderson, of Youngstown, Ohio, and John Marron, of Pittsburgh, Pa., for plaintiff.

Samuel H. Holding, of Cleveland, Ohio, for defendant.

KILLITS, District Judge. The issue in this case is a politely made and courteously urged, but nevertheless a sharp, challenge of the fairness of the judge presiding, both in the conduct of the trial and in the instructions to the jury.

Plaintiff was defeated by an adverse verdict in her attempt to mulct defendant for an alleged breach of promise of marriage. The trial developed so much unsavoriness that, for the sake of public decency and that the putrid mass may be undisturbed, we do not largely discuss its features. The plaintiff rested her case, claiming a specific and formal contract to marry, on her own testimony, in which she confessed to a line of conduct before and leading up to and during the continuance of the alleged engagement which created a suspicion that the court's processes were invoked to aid an adventuress. The defense brought out fact after fact of depravity and immoral conduct

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 208 F.—28

imputed to plaintiff prior to the alleged contract, in much of which the mother of plaintiff was associated. Testimony was introduced tending to show that the girl had been used by the mother as a bait to induce well-to-do men of loose morals into compromising positions that they might be blackmailed.

[1] The testimony concerning the conduct of plaintiff prior to the alleged breach of contract was clearly competent. A sufferer from a broken contract of marriage may demand damages by way of compensation for injury to reputation and character and for humiliation endured. This is elementary, and, by way of mitigating damages, testimony that the plaintiff was at the time she sustained damages a prostitute, an adventuress, a woman of lewd and low report among her fellow citizens was admissible beyond the possibility of question. Such a woman cannot possibly sustain the same degree of injury to reputation and character as a noble woman, because she has less of either to be affected. A common prostitute cannot suffer humiliation to the same degree as a woman of pure character and deportment. Wigmore on Evidence, §§ 75, 206; Jones on Evidence, § 151; Wharton on Evidence, § 52. The latter author says:

"When the plaintiff claims that his character has been damaged and his feelings crushed by such a breach of promise, then in mitigation of damages it may be shown that he had no character to be hurt by the breach and no feelings that would be particularly shocked."

[2] This instruction, to which plaintiff objected, we think therefore was entirely proper:

"To some extent, as you have already seen, the character of the plaintiff is proper for you to know, in determining whether or not there was a contract. It is also essential in meting out justice between the parties to this case, if you get to the point where you think you should award damages to the plaintiff against the defendant, that you should know both the character and reputation of the plaintiff, the woman, at or about the time of the alleged breach of contract, because damages in a case of this kind depend in some measure upon the relation which the plaintiff sustained in the community in which she lived and depend in some measure upon her capacity to suffer from the affront which a breach would bring to her. You will observe that character is what a person actually is. Reputation is what the community in which that person lives thinks such a person is—the estimate that the community places upon such a person. In a breach of promise case the woman may be damaged in her character by the breach and she may be damaged in her reputation, and you cannot know the extent of damage to either character or reputation until you know what they were before the breach."

[3] This line of testimony was also competent as against plaintiff's claim that she was seduced. Her counsel demanded aggravated damages on this ground, although not pleaded. In this light it is not material whether defendant knew her history or not; evidence of previous loose, wanton, and lewd conduct, of specific acts, as well as of reputation, is admissible. 35 Cyc. 1314, note 84.

[4] But plaintiff urges that the court nowhere limited the application of this line of evidence to mitigation of damages. It is perhaps sufficient to answer this by the observation that plaintiff did not ask the court to so limit it, but her counsel confined themselves to general exceptions and failed wholly to except to the charge in this respect.

[5] But this evidence was also admissible touching plaintiff's claim that Corrigan seduced her. Testimony of a courtesan that she was seduced has manifest weakness of credibility. Again, to the extent that her character was known to defendant before the alleged proposal, the evidence thereof was competent for the reason given in this instruction, which also displeased plaintiff's counsel:

"Some testimony has been offered here by way of defense (whether it appeals to you or not is for you to say) suggesting that before the time of this alleged engagement the plaintiff was of unchaste character. If you find that fact to be established by a preponderance of the evidence, if that be the fact, and it is your judgment that her character in that respect was known to the defendant before the night on which this alleged contract was entered into, then you may consider that situation as bearing upon the probability of the defendant's proposing to make a woman of that character his wife."

The record shows that defendant, on the night when he is said to have proposed, had every reason to know, perhaps not all that was shown on the trial, but enough to awaken any mature mind to the belief that he was dealing with an unchaste woman. Pure young women are not understood to freely accompany strange men on a tour of the brothels of a large city, nor to proceed alone 300 miles to become the unchaperoned companions, at a public resort, of young men whom they have never theretofore met except through the medium of an inspection of the "red light" districts. Miss Young, on her own version of the facts, in accepting so readily Corrigan's invitation to become his associate at French Lick, established an accurate measurement of her character for chastity in the mind of every man possessing an average knowledge of human nature or with even ordinary human experience.

If we may accept the testimony of McKesson, Gerlach, Collingwood, and the defendant, the night spent in visiting the various houses of prostitution in Pittsburgh on the occasion when the plaintiff and defendant first met was enough to establish the lack of chaste character on the part of the plaintiff.

The defense, added to the admissions of plaintiff, but strengthened the suspicion that the court was wronged when it was entered to bring such a case, and the extent and character of the rebuttal was awaited with interest. To our surprise, except for attempts to impeach some of the defendant's witnesses, that took the form only of the plaintiff's unsupported denials of the serious matters urged against the plaintiff's character and her deportment. The mother, who had been active in and about the precincts of the court during the trial, and who acted within our observation as mistress of ceremonies for her daughter in receiving reporters and newspaper artists, and whose name had been used as the associate of plaintiff in many compromising situations, and who was shown not only to be her most important witness but one whose testimony was called for by every consideration of affection and interest, was not placed upon the stand.

[6] The omission gave rise to a suggestion in the charge which is urged as error and which appears in the transcript as follows:

"Now, gentlemen of the jury, I have this notion about a lawsuit, that it is the function of the lawsuit to get at the truth of a case and that it is the

duty of the parties to a lawsuit to exhaust reasonably within their power, as the jury reasonably sees the power is within their reach, the avenues of testimony leading to a determination of the truth, and, in determining where the facts of this case lie, it is proper for you to look to the manner in which this case is presented to you to determine whether or not the parties to this case, either or both of them, have reasonably exercised the opportunities open to them to enlighten you as to what the facts are, and if you find in the reason of things, as these circumstances illuminate your judgment, that there were reasonably at hand, within the command of either party to this case, witnesses who might give you valuable testimony upon any proposition, who were not put upon the stand, you are permitted to draw such inferences as reasonable men would draw under such circumstances from the failure to employ such opportunity. Only reasonable diligence in the elucidation of the truth is required of the parties, but there has appeared in this case a series of matters upon which one witness appears from this testimony to have been capable of speaking, who was not placed upon the stand—the mother of the plaintiff. She could have told us whether or not, in some degree at least, the witness Tom Mack told the truth. She could have told us in some degree or not whether in fact the plaintiff got home from Cleveland on the morning of July 1st or later. She could have told us whether or not the plaintiff had an engagement ring produced at or about the illuminating time. She could have thrown some light upon the credibility of Mrs. Jacobs and Mrs. Harrington. She could have told us something about Mt. Clemens and the conduct of the plaintiff there. She could have told us something about this charge against the plaintiff of drinking. And I regret, in the capacity of the court, affording full opportunity to throw onto these transactions all the light reasonably possible, that she was not put upon the stand, and it is for you to draw such inferences as are reasonable under the circumstances because of the failure to put this person upon the witness stand. And if in your consideration of this case, as you review the testimony and go down the procession of witnesses and the series of facts to which they attempt to testify, you find that the defense any place was derelict in the exercise of reasonable diligence in putting the testimony of witnesses before you, you will draw just exactly the same inferences against the defendant.”

The references here made were to the more pronounced instances shown in the testimony in which the mother largely figured with the plaintiff as to which her testimony seemed to be clearly demanded. We think it was not only proper but, in the interests of justice, the court's duty to give to the jury this instruction.

It is approved and universal to permit counsel to comment on the failure to offer or account for the absence of a witness shown in the testimony to be in position to know material facts. This is so because such failure raises a presumption that his testimony would be damaging to the party who seems from the state of the record to be called upon to produce him.

[7] The rule is now well settled that:

“In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error.” *Vicksburg Railroad Co. v. Putnam*, 118 U. S. 545, 553, 7 Sup. Ct. 1, 2 (30 L. Ed. 257).

The instruction quoted and excepted to is clearly not an expression of opinion upon the evidence but a reference only to a situation in the

state of the record out of which a presumption arises which the jury may indulge. It would seem very plain that a court which may at its discretion comment upon the evidence to assist the jury in arriving at a just conclusion may suggest a presumption useful to them to arrive at a just conclusion.

It is possible that the full record may disclose some acerbity of comment by the court. The frequent reiteration by plaintiff's Pittsburgh counsel, whose clientage in part, as shown in the testimony, was in the purlieu of the Smoky City, of an opinion that Pennsylvania practice was superior to that of Ohio, occupying, in advancing such immaterial views, an attitude, thinly veiled by courtesy, of contempt for the court's ignorance, which apparently he could excuse only because of the inferiority of the Ohio procedure in whose defective environment we were professionally and judicially reared, was at times a trifle irritating. However unfortunate and improvident these comments were, we are certain that they cannot be held to be prejudicial to the extent of overthrowing a verdict based upon evidence so strong as to justify the extension of a suspicion, at first engendered from the plaintiff's own testimony, into an opinion at the close of the testimony, and still entertained, that the court's processes and assistance were invoked by plaintiff and her mother to promote a blackmail. Indeed, this record is so conclusive against their client that we are able to explain the pressing of the case again to the court by counsel who remain in it, and who enjoy the fullest measure of the court's respect, only on the theory that they have allowed a chivalric feeling for the plaintiff on account of her sex to becloud their judgment of the testimony, whose overwhelming weight is against both her character and her case.

Nowhere, either in comment during the trial or in the charge to the jury, did the court go to the extent of discussion warranted under the authority quoted above, nor at any time did it "express an opinion on the facts." The jury was charged as follows:

"Now, gentlemen of the jury, you are the sole judges of the facts in this case. It is proper in proper cases for the court in the federal practice to suggest to you what the court's estimate of facts is. Whether the court in this charge has made that suggestion to you, directly or indirectly, the law is that you should not depend upon any impression that you have as to the court's view as to the facts of the case in the making up of your own judgment. Your judgment of the facts should be your own uninfluenced judgment, uninfluenced by the court, except as you are bound to follow the law of the case as the court gives it to you, and uninfluenced by any insistence of counsel."

Under the rule in the federal courts, this instruction is sufficient to meet any criticism offered against the court's conduct.

[8] The criticism of the court here made must proceed on what Prof. Wigmore (section 784) calls the "sporting theory" of a trial, with the judge as a mere umpire to see that the rules of the game are observed. We agree with the noted author just referred to that one of the vital "marks of regeneration" must be found in the more responsible relation of the bench to the issue. He says (section 21):

"First, the judge must cease to be merely an umpire at the game of litigation. Often he is little more. This, to be sure, is in part the continuance of a

tradition, inherited from the spirit of gentlemanly sportsmanship which dominated the administration of British justice. But it has been intensified, instead of lessened, by the spirit of strenuous struggle and unrestrained persistence which drives the bar of our country to wage their contests to the extreme of technicality. The judge weakly resigns himself to the position of 'a mere automaton, or at most the attitude of the presiding officer of a deliberative assembly, with no greater powers than those of announcing the utterances or conclusions of others.' To this many circumstances conspire. But it is an old and a marked tendency among us; and, until it is rooted out, that early warning of one of the Nestors of our judiciary will still be worth heeding."

Judge Sprague, in *United States v. 1,363 Bags of Merchandise*, 2 Spr. 85, Fed. Cas. No. 15,964, in language approved by the Supreme Court of the United States (*Capitol Traction Co. v. Hof*, 174 U. S. 15, 19 Sup. Ct. 586, 43 L. Ed. 873), says:

"The Constitution secures a trial by jury without defining what that trial is. We are left to the common law to learn what it is that is secured. Now the trial by jury was, when the Constitution was adopted, and for generations before that time had been, here and in England, a trial of an issue of fact by 12 men, under the direction and superintendence of the court. This direction and superintendence was an essential part of the trial."

A long line of federal decisions assert the function of the judge to be something more than a mere arbitrator to rule upon objections to evidence and to instruct the jury upon the law; that he is a real and essential part of the machinery whereby just conclusions of fact are reached; and that it is demanded of him, in the interest of the due administration of justice, that he control the inquiry before him within due bounds and assist the jury to a just determination by such active interposition as his position and superior knowledge suggest to be proper. Such consideration of the judicial office is at the basis of the decisions in *Vicksburg Rd. Co. v. Putnam*, supra, *United States v. Philadelphia & Reading Railroad Co.*, 123 U. S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138, and *Capitol Traction Company v. Hof*, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873. Having reference to the whole state of the record, the trial judge in this case did not exceed his plain duty in the conduct of the trial with respect to the matters criticised.

[9] An exception is taken to the court's charge on the subject of seduction, which was in this language:

"Now, gentlemen of the jury, I am not instructed as to what course the federal courts would pursue upon the question of whether or not seduction should be considered in aggravation of damages by any precedent that has come to my attention. In some states that question is not to be considered at all, but I think the current of authority is, and I shall adopt it for your instruction here, that in a case where a breach of promise of marriage is at issue, in which seduction has followed the making of the contract, that fact is proper to be considered by the jury by way of enhancing or enlarging damages. So, as there is something of that sort claimed in this case, I want this jury to go out of the box with a very clear understanding of what seduction is. It is not sexual intercourse merely between a woman theretofore chaste and a man. It is not merely the despoiling of a woman's virginity, not merely the dragging the woman down from a life of chastity to unchastity, but it is the despoiling of a woman's virtue against her will, yielding to seductive influences on the part of the man which she cannot fairly withstand. A girl theretofore pure in act, then unspoiled in act, but coming to the sexual act will-

ingly, consciously, and in that mind participating, is not seduced. So you may go to the circumstances which preceded the going of the plaintiff to French Lick; you may consider the degree of intimacy between the parties prior to her going there, the brief association they had together, and the places in which and the circumstances under which they associated in Pittsburgh before she went to French Lick, whatever those places and circumstances you find to have been; you may consider the manner in which she was procured to go to French Lick; you may consider her confessed deception of her mother, the distance she had to go, the knowledge of conditions when she got there, where she was and how she was surrounded by these men who were (one of them at least) a total stranger and the other of brief acquaintance, and then, gentlemen of the jury, you are permitted to draw from those circumstances and any other circumstances that in your judgment illuminate her mind and disposition such inferences as appeal to your judgment and determine whether the first act of sexual intercourse which she had with the defendant was an act of seduction or was an act which she could reasonably have anticipated would be one of the fruits of her trip to Indiana, and if you find it was the latter, if you find it was one which she could have and should have reasonably anticipated, with what knowledge of the defendant she had as you find it in this testimony, I say to you that that was not a seduction, no matter whether she had theretofore been pure or not."

This is but a proper phrasing of the accepted definition of seduction and as applied to this case states the law correctly. *Patterson v. Hayden*, 17 Or. 238, 21 Pac. 129, 3 L. R. A. 529, 11 Am. St. Rep. 822; *State v. Eckler*, 106 Mo. 585, 17 S. W. 814, 27 Am. St. Rep. 372; *State v. Hamann*, 109 Iowa, 646, 80 N. W. 1064; *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397; *Stowers v. Singer*, 113 Ky. 584, 68 S. W. 637; *Brown v. Kingsley*, 38 Iowa, 220.

The setting of this instruction regarding the reference to matters in evidence is well within the province to comment, as defined in the authorities cited elsewhere.

[10] We are criticised because we did not permit evidence intended to show the general bad character of defendant but are not referred to any authority supporting the admissibility of such a line of testimony in a breach of promise case; nor does extended research on our part disclose that it ever occurred to any one prior to this trial that the woman could support her case in this way. We regard our action as a mercy to plaintiff, for it seems logical to argue: First, that one as depraved as plaintiff tried to show defendant to have been would be least likely to make the lofty Laura Jean Libbey style of proposal which she put in his mouth, language, and phrasing, whose literary flavor was so dissonant from his epistolary efforts and his testimony; and, second, the more dissolute he is shown to be the stronger would grow the presumption that his invitation to French Lick was for lewdness rather than to propose holy matrimony.

[11] Incidentally his character cropped out, whence this instruction:

"The character of the defendant in this case is not directly at issue. The character of the defendant is known to this jury because it is in evidence. The jury is not here to impose any penalty or bring in any verdict against the defendant on account of his character, but you have a right to consider and should consider his character, as you know it from this evidence, in connection with the question of the probability of this contract and as having possibly some bearing in deciding whether or not he was likely to make such a contract as is charged against him."

This was excepted to. We are unable to see any error here. Defendant's disposition to be low in mind and action was an incident which the jury could consider. Obviously he could not offer it by way of defense. She ought not to ask to show it, for it would be against her; but, if it appeared as a setting for competent testimony, it was a proper subject for instruction.

[12] Many of the matters urged in argument were not saved on the record. We have indicated our view of the weight of the evidence elsewhere. Strenuous argument is offered that the court erred in permitting the testimony of one Thomas Machoviak, otherwise Tom Mack, who testified that he had been robbed in an assignation house by plaintiff of \$157. We have examined the record as to this testimony and find that nowhere was objection made or exception taken. However that may be, the testimony was clearly competent as bearing upon the character of the plaintiff.

We will notice but two other propositions urged in support of the motion for a new trial.

[13] A detective was employed by the plaintiff, as the result of an item of testimony offered in defense, to go to the town where the witness in question formerly resided and there make inquiry touching the reputation for truth and veracity of the witness, with a view of qualifying such detective to be a witness on rebuttal in impeachment. This the court refused to permit. As to this, the rule laid down in *Wigmore on Evidence*, § 692, undoubtedly states the law:

"The admissible reputation is that which is built up in the neighborhood of a man's domicile or in the circle where his livelihood is followed, and it is of slow formation. It is the sum of all that is said or not said for or against him. Consequently its tenor can be adequately learned only by a residence in the place, not by a mere visit of inquiry, or by a casual sojourn, or by a conversation with a resident who reports the reputation."

The court's refusal to permit this testimony was undoubtedly right. It is not difficult to see the opportunity for gross abuse, if it were permissible to attack reputation through the hiring of investigators.

[14] Much of the testimony was by deposition. A witness by the name of Kennelly was subjected to a very rigorous cross-examination by the plaintiff's attorney, who pressed him repeatedly to say whether or not on one occasion he had had sexual intercourse with plaintiff. The witness, after many evasions and equivocations, finally flatly refused to answer, and a motion was made to the court, but not until the deposition was offered in evidence, to suppress it because of this refusal of the witness to answer this question.

[15] This motion was overruled: First, because no application was addressed to the court to suppress it prior to the beginning of the trial, the deposition having been on file for more than a year (*Bird v. Halsy* [C. C.] 87 Fed. 671); and, secondly, because the question in cross-examination was one which it was clearly within the discretion of the court to permit, and his refusal to answer it, if he had been actually on the stand, if not procured by the party calling him, would not have been ground for striking out his testimony. No reason is apparent why plaintiff's counsel should have so pressed the witness

for an answer to the question, which, if answered in the affirmative, would have reflected upon his client and, if in the negative, would not have advanced plaintiff's interests. We see no error here,

The motion for a new trial will be overruled.

SAUNDERS v. PUBLISHERS' PAPER CO. et al.

(District Court, D. New Hampshire. September 17, 1913.)

No. 580.

1. EVIDENCE (§ 461*)—DEEDS—CONSTRUCTION—ADMISSIBILITY OF PAROL EVIDENCE—AMBIGUITY.

If the intention of the parties can be ascertained from the language of a deed when the court places itself as nearly as possible in the situation in which they were when the writing was made, parol or extraneous evidence of their intention is not admissible; but if, in attempting to apply the language to the subject-matter, two situations should be presented, either of which would answer the terms of the writing with equal certainty, parol evidence is admissible to prove which of the two situations the parties had in mind.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.*]

2. BOUNDARIES (§ 6*)—CONSTRUCTION—BOUNDARIES OF GRANT FROM STATE.

A deed from the state of New Hampshire for a grant of land made in 1830 construed as to the boundaries of the grant.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 47-57; Dec. Dig. § 6.*]

3. JUDGMENT (§ 685*)—PERSONS CONCLUDED—PRIVITY BETWEEN MORTGAGOR AND MORTGAGEE.

A mortgagee of land is not estopped by a decree affecting the mortgagor's title in a suit to which he was not a party and which was commenced after the mortgage was given in a state where the mortgagee is the owner of the legal title, subject only to the mortgagor's equity of redemption.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1208; Dec. Dig. § 685.*]

4. MORTGAGES (§ 144*) — COVENANT FOR TITLE — AFTER-ACQUIRED TITLE OF MORTGAGOR—PURCHASE-MONEY MORTGAGE.

Where, by a deed to certain described lands, the grantor did not undertake to convey a particular estate but only his "right, title, and interest" therein with a special warranty against the claims and demands of all persons claiming under him and "against none other," and he took back from the grantees a purchase-money mortgage by which the mortgagors undertook to convey title in fee simple, with a full covenant of warranty against the claims of all persons whatsoever, an outstanding interest in the land, not derived through the mortgagee, subsequently acquired by the mortgagors, inured to the benefit of the mortgagee under the covenant in his mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 285-289; Dec. Dig. § 144.*]

5. MORTGAGES (§ 144*)—RIGHTS AND LIABILITIES OF PARTIES.

An agreement by a mortgagee to waive the agreement of the mortgagors made by their covenant of warranty construed, and held to relieve them from any obligation to acquire any outstanding interest for the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

benefit of the mortgagee but not to entitle them to acquire such interest to be asserted against the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 285-289; Dec. Dig. § 144.*]

At Law. Action by Charles G. Saunders against the Publishers' Paper Company and the Conway Company. Judgment for plaintiff.

Niles & Upton, of Concord, N. H., for plaintiff.

Clarke C. Fitts, of Brattleboro, Vt., for defendants.

BINGHAM, Circuit Judge. This is an action of trespass *quare clausum fregit*. The writ is dated December 3, 1908. The question involved is the title to a strip of land situated in Grafton county, N. H., which sheds its waters into the Swift river, a tributary of the Saco. It is bounded on the south by the north line of Waterville, on the east by the west line of Albany, on the north by a line running due west from a tree known in the case as the "hemlock corner" and now recognized as the jurisdictional northwest corner of Albany, and on the west by the height of land that sheds its waters into the Swift river.

[1] One source of title on which the plaintiff relies is a grant made in 1830 by the state to Jasper Elkins and his five associates. The plaintiff's contention with reference to this grant is that it extends to the north line of Waterville for its southern boundary and therefore includes the territory here in question. The defendants deny this and say that the southern boundary of the grant is a line running due west from the hemlock tree. A solution of the problem necessitates a construction of the deed and the resolution authorizing the grant. Their construction, like that of any written instrument, is the ascertainment of the intention of the parties, as expressed in the writings, and in the process of construction it is the province and duty of the court to place itself as nearly as possible in the situation in which the parties were at the time the writings were made, so that it may see the application of the language employed to the subject-matter about which the parties were dealing. *Weed v. Woods*, 71 N. H. 581, 583, 53 Atl. 1024. If, when this is done, the intention of the parties can be ascertained, the court should proceed and declare it; and parol or extraneous evidence of intention would not be admissible; but if, in attempting to apply the language to the subject-matter, an ambiguity should arise (that is, if two situations should be presented, either one of which would answer the terms of the writings with equal certainty), then parol evidence would be admissible to prove which of the two situations the parties had in mind. *Clough v. Bowman*, 15 N. H. 504; *Drew v. Drew*, 28 N. H. 489, 494; *Heywood v. Lumber Co.*, 70 N. H. 24, 31, 47 S. W. 294; *Kendall v. Green*, 67 N. H. 557, 561, 42 Atl. 178; *Corwin v. Hood*, 58 N. H. 401.

[2] Let us see what the situation was that surrounded the parties at the time they entered into this transaction. It appears that in 1829 the state owned a tract of land lying north of the Gillis and Foss grant, now the town of Waterville, and that Jasper Elkins and his five as-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sociates petitioned the Legislature requesting that the land be granted to them, which they described as follows:

"Beginning at the southeast corner of land granted to Hatch and Cleaves, thence on the east and north lines of said land to the east line of Thornton Gore, thence to the northeast corner of Lincoln, thence east 10 miles, thence south to the north line of land granted to Gillis and Foss, thence on said line to the first-mentioned bound."

At the same session of the Legislature a resolution was adopted authorizing a grant to the petitioners of all the state's right and title to the land, describing it in the same terms as were employed in the petition. It does not appear that any deed was issued under this resolution, but in 1830 the Legislature passed a second resolution in favor of the same grantees, and it is found that this was probably done to rectify the 10-mile course in the resolution of 1829, which was found to extend into Hart's location.

In the resolution of 1830 the description starts at the northeast corner of Lincoln and runs east on the north line in which the defect was in the resolution of 1829 and defines the limits of the grant as follows:

"Beginning at the northeast corner of the town of Lincoln and running east 7 miles and 117 rods to Hart's location, thence southerly by the western boundary of said location to a point so far south that a line drawn thence due south shall strike the northwest corner of the town of Burton, thence south to said northwest corner of Burton, thence westerly along the northern line of Waterville to the eastern boundary of Hatch and Cleaves grant, thence northerly and westerly by said grant to the east line of Thornton, thence by said line of Thornton northerly to the line of Lincoln and along that line to the point first mentioned."

The deed to Elkins and his associates follows the language of the resolution of 1830 in its description of the property.

Waterville was incorporated as a town in 1829 and embraced the same territory that was granted by the state to Gillis and Foss in 1818. It is the north line of this town that is referred to as the south bound of the grant in the deed to Elkins and his associates. In the charter of Waterville this north line is described as beginning at a "spruce tree marked" and situated 418 chains north of the "S. & B." corner on Burton's west line, "thence west 790 chains 50 links to the northeast corner of a piece of land granted by the state of New Hampshire to John Raymond, which corner is on the southerly line of a piece of land granted by said state to Hatch and Cleaves."

In 1815 South Raymond was granted. Its north line is described as being "on said south line of the Hatch and Cleaves grant."

It will be recalled that in the petition of Elkins and his associates to the Legislature in 1829, which is apparently the basis of the grant of 1830, the north line of the Gillis and Foss grant, or Waterville, is described as striking the Hatch and Cleaves grant at its southeast corner. It is thus apparent, when the language of the deed of 1830 to Elkins and his associates is read in connection with these records, which were kept in the possession of the state, that the state intended to bound its grant on the south by the north line of Waterville, a line coincident with the south line of Hatch and Cleaves grant and striking

that grant at its southeast corner bound, and that the southeast corner of the Hatch and Cleaves grant should be the southwest corner of the grant to Elkins.

In 1830 the hemlock corner, above spoken of, was in existence and was marked as the northwest corner of Burton. It was situated about a mile north of the northeast corner of Waterville, as called for by its charter. A plan introduced in the case shows that this corner of Waterville is situated a short distance north of where the Swift river crosses the north and south division line between Burton and Waterville.

Burton was granted in 1766. It is matter of general history in New Hampshire that in 1803 the Legislature, with a view to making a map of the state, enacted a law making it the duty of the several towns within the state to cause an accurate survey of the same to be made and transmit a map thereof to the Secretary of State, containing the exact limits of said towns by careful admeasurement, together with a description of all public roads passing through the same, also the rivers, falls and principal streams, ponds, lakes, and mountains, and the names of adjoining towns, with the extent said towns adjoin on their own towns; the whole to be protracted by a scale of 200 rods to the inch and all disputed lines distinctly marked; and that in 1818 such a map was published by the state.

It is in evidence that in 1808 the town of Burton, now Albany, complied with the law of 1803, through its selectmen, who returned to the Secretary of State a map of that town. From this map it appears that the charter northwest corner of Burton, as located by this survey, is also situated a short distance north of where the Swift river crosses the division line between Burton and Waterville and, according to the measurements made and preserved, is 5 miles and 20 rods north of the "S. & B." corner. It is thus seen that the charter northwest corner of Burton, as located by that town in 1808, under legislative authority, is in substantially the same place as the charter northeast corner of Waterville and may have been in fact located at the same place, the variance in the distance from the "S. & B." corner in the two surveys being due to a difference of allowance in chaining; but, according to the measurements preserved, it is located a few rods south of the northeast corner of Waterville.

As to the hemlock corner, there was no evidence that would justify a finding that it had been established under legislative authority as the jurisdictional northwest corner of Burton prior to the grant to Elkins and his associates in 1830 and probably not before 1850. The record evidence preserved in the archives of the state discloses that in 1830, and only 15 days prior to the adoption of the resolution authorizing the grant to Elkins, an application was made to the Legislature by the selectmen of Burton to establish that corner as the northwest corner of the town, and that a remonstrance was also presented in which it was stated that the remonstrants had learned with regret that a petition was to be presented to the Legislature "praying that the northerly line of the town of Burton may be established farther north than it now is, and in such a place as greatly to discommode all those

who live northerly of said line," and praying "that the northerly line of Burton may be extended no farther north." In the House the petition and remonstrance were referred to the committee on towns and parishes, which, after considering the matter, reported a resolution giving the parties leave to withdraw. This resolution was adopted and was for all practical purposes a refusal on the part of the state to recognize the hemlock corner as the northwest jurisdictional bound of the town.

The language of the Elkins deed is plainly framed upon the idea that the southwest corner of the grant is where the north line of Waterville strikes the Hatch and Cleaves grant; that its south line is the north line of Waterville; and that the southeast corner of the grant is where the north line of Waterville terminates at its easterly end. This will be readily seen if we reverse the courses in the deed. Reversing the courses, the description will read:

"Beginning at the northeast corner of Lincoln, thence southerly by the east line of Lincoln, and the east line of Thornton to the Hatch and Cleaves grant, thence easterly and southerly by said grant to the north line of Waterville, thence easterly along the north line of Waterville to the northwest corner of Burton."

Now the hemlock corner does not answer the call of the deed for the southeast corner of the grant, as it is not located at the easterly end of the north line of Waterville but a mile above it. A line running on a due west course from it, or on any other course, would not be the north bound of Waterville, as the deed requires, and would not coincide with the south line of the Hatch and Cleaves grant, as the north line of Waterville does and the south line of Elkins grant should. The introduction of that corner, as the southeast corner of the grant, and of a line running due west therefrom as its south line, would necessitate a rejection of the Waterville north line from the description in the deed and a substitution of a new line and a new southwest corner about a mile north of the southwest corner called for in the deed. Therefore it seems to me that the reasonable inference to be deduced from the language of the deed is that the parties intended, when they inserted the northwest corner of Burton in the description, the charter northwest corner of Burton as called for by the survey of 1808, and that they understood that that corner was situated at the easterly terminus of the north line of Waterville. If the charter corner of Burton is situated at that point, the description in the deed is complete.

If, however, the charter corner of Burton is located some 30 rods south of the easterly terminus of the Waterville line, it does not follow that the parties had in mind the hemlock corner as the southeast corner of the grant, for such a conclusion would be inconsistent with the language of the deed taken as a whole and would involve a rejection of known bounds fully answering the description in the deed. Under such circumstances, effect will be given to the intention of the parties by rejecting the charter northwest corner of Burton, if it is located south of the northeast corner of Waterville, and terminating the grant at the northeast corner of that town (*Weed v. Woods*, 71

N. H. 581, 53 Atl. 1024; *Morse v. Rogers*, 118 Mass. 572, 578; *Parks v. Loomis*, 6 Gray [Mass.] 467), for the grantees, in their application to the Legislature, limited their request to land north of Waterville, and the state manifestly did not intend to grant land south of that line that it did not own but had previously conveyed.

Again I am of the opinion, if the hemlock corner was intended as a bound of the grant, that the language of the deed taken as a whole discloses that it could not have been intended as the southeast corner of the grant, and, on such an assumption, that there was a plain omission in the description of a line from that bound to the northeast corner of Waterville. The insertion of this line will carry out the intention of the parties and make the description complete.

It is of no importance in this case whether the line going north from the northeast corner of Waterville to Hart's location is a straight line or passes through the hemlock corner, for all the land here in dispute lies west of a line passing through that corner.

This conclusion renders the finding of the referee that the parties intended the hemlock corner as the southeast corner of the grant, and a line running west therefrom as its south line, immaterial, as the case does not present a situation calling for the introduction of parol evidence on the question of intention.

[3] The defendants make the further contention that, if the description in the deed of the state to Elkins and his associates embraced the territory in question, the plaintiff is precluded from setting it up as against them because of the decree in the suit of the Winnipiseogee Paper Company against James and the New Hampshire Land Company, and because of his having participated as counsel for the defendants in that suit.

That suit was a writ of entry to recover possession of the territory here in question and also of territory lying west of it and extending to the Hatch and Cleaves grant. The Winnipiseogee Paper Company claimed title under a grant from the state to Samuel Allen in 1839 and also under deeds from Jacob Sargent and Ebenezer P. Elkins, two of the grantees in the Elkins deed. It appeared that in 1836 Jacob Sargent and Ebenezer P. Elkins deeded to Stephen Thayer territory claimed to be located south of a line drawn west from the hemlock corner; and that Thayer conveyed his interest in the same to Allen in 1838, who in 1839 obtained the deed from the state. This deed contained the following description:

"Do remise, release, and forever quitclaim unto Samuel Allen of Grafton, county of Worcester, * * * and others claiming under Stephen Thayer, their heirs and assigns forever, all the right, title, and interest of the state of New Hampshire in and unto a certain strip of land lying between Elkins grant, so called, and the north line of Waterville, in the county of Grafton, in said state, 2,700 rods in length and 273 rods in width: Provided the said land has not been granted to other individuals before the date of deeds from Jasper Elkins and his associates to said Thayer."

The defendants in the Winnipiseogee suit claimed title under the grant from the state to Elkins and his associates. The action was brought in September, 1888. At that time Charles G. Saunders, as trustee for the Saunders family, held a warranty mortgage, given

October 15, 1887, by the New Hampshire Land Company and George B. James, covering the land then in question, and other valuable lands located in various towns in the state. The decision was in favor of the Winnipiseogee Paper Company, sustaining the Allen's grant title, and James and the Land Company appealed. Pending the appeal a settlement took place in which the Winnipiseogee Paper Company conveyed the east and west ends of the then disputed territory to James and the Land Company, retaining the central portion or that section drained by the Mad river.

It is found that the Winnipiseogee Paper Company did not change its position in reliance upon anything that Charles G. Saunders did while acting as associate counsel for James and the Land Company, and the conclusion of the referee that there was no estoppel in pais is undoubtedly correct. It is, however, a conclusion of law and not of fact.

Neither is the plaintiff estopped by the judgment in that suit from taking the position that Elkins' grant extends to the north line of Waterville. He was not a party of record in that proceeding, and, having obtained his mortgage prior to the bringing of the suit, he is not bound as a purchaser pendente lite or as privy in estate with the mortgagors. As between him and the mortgagors, he was the real owner of the property; the foreclosure operated simply as a bar to their right of redemption. *Parker v. Moore*, 59 N. H. 457; *Hunt v. Haven*, 52 N. H. 162, 170; *Orr v. Hadley*, 36 N. H. 575; *Keokuk & Western Railroad Co. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450.

[4] The defendants also take the position that even if the description in the Elkins deed of 1830 carried the grant to the north line of Waterville, and no territory is left on which the deed from the state to Allen can operate, still the plaintiff cannot maintain this action against them as they are tenants in common with him by virtue of the Stephen Thayer title which they claim to own.

In answer to this various propositions are advanced by the plaintiff, one of which is that, if Stephen Thayer ever had any title to or interest in the land in controversy, it was acquired by the New Hampshire Land Company and James in their settlement with the Winnipiseogee Paper Company in 1895 and inured to the plaintiff under the covenant of warranty contained in a mortgage given him in 1887 by the New Hampshire Land Company and James and which covered the territory in dispute.

In 1877 Daniel Saunders, who in 1864 acquired the title to Elkins grant, except so far as there may have been an outstanding interest in Stephen Thayer, sold and conveyed and forever remised and released unto Charles G. Saunders, as trustee for the Grafton County Lumber Company—

"the following described tract of land situated in the town of Livermore, county of Grafton, state of New Hampshire, and bounded and described as follows, to wit: 'Beginning at the northwest corner thereof at the southeast corner of the town of Franconia and the northeast corner of the town of Lincoln, thence running east to the west boundary of Hart's location, so called, thence southerly by the western boundary of Hart's location to a point nearest the northwest corner of the town of Albany, thence in a straight line to the northwest corner of said Albany, thence southerly by the west bound-

ary of said town of Albany to the northeast corner of the town of Waterville as said town was originally chartered by said state of New Hampshire, thence westerly by the northerly boundary of said town of Waterville as originally chartered to the easterly boundary of Hatch and Cleaves grant, so called, thence northerly by the eastern boundary and westerly by the northern boundary of said Hatch and Cleaves grant to the eastern boundary of the town of Thornton, thence northerly by the eastern boundary of said Thornton and also northerly by the eastern boundary of the town of Lincoln to the point of beginning."

This deed contained the following covenant:

"And I, the said Daniel Saunders, for myself and my executors and administrators, do covenant with the said Charles G. Saunders, his heirs and assigns, that the premises are free from all incumbrances made or suffered by me, with the exception of a certain mortgage made by me to one Nathaniel H. Weeks, and also with the exception of a lease of a part of the premises made to the firm of C. W. Saunders & Co., and that I will, and my heirs, executors and administrators shall warrant and defend the same to the said Charles G. Saunders, his heirs and assigns, against the lawful claims and demands of all persons claiming by, through or under me."

October 1, 1887, Charles G. Saunders, trustee for the Grafton County Lumber Company, conveyed the west portion of Elkins grant, by a description extending to the Waterville line, to John Tatterson, who conveyed the same to James and the New Hampshire Land Company, who in turn mortgaged it back to Tatterson.

October 15, 1887, Charles G. Saunders, trustee for the Grafton County Lumber Company, remised and released to George B. James and the New Hampshire Company all his—

"right, title, and interest in and to that part of Elkins grant, so called, * * * which is drained by the Saco river and its tributaries, and bounded as follows, to wit: 'Beginning at the northeast corner thereof at a point on the west line of Hart's location so called, thence running westerly by the south line of Sargent and Elkins grant, so called, to that part of Elkins grant which was conveyed by me to John Tatterson by deed dated October 1, A. D. 1887, thence running southerly by that part of said grant so conveyed to said Tatterson to the north line of the town of Waterville, thence on the north line of said town (as said line is indicated by the original charter of said town of Waterville) to the west line of the town of Albany, thence northerly by said west line to the northwest corner of said Albany, thence northeasterly by the shortest line from said corner to Hart's location, thence northerly to the point of beginning by the west line of said Hart's location according to the grant thereof made to Thomas Chadbourne A. D. 1772 as said west line is shown on a plan of said location made by Timothy Walker A. D. 1772.'"

This deed contained a covenant in which the grantor agreed to warrant and defend the premises "against the lawful claims and demands of all persons claiming under me * * * and against none other."

October 15, 1887, James and the New Hampshire Company mortgaged to Charles G. Saunders, trustee, the whole of Elkins grant and several other valuable tracts of land, in which mortgage the grant was described in substantially the same terms as in the above deed of Daniel Saunders in 1877 and as extending to the charter north line of Waterville. It contained the following covenants:

"And we, the said grantors, for ourselves and our heirs, executors, administrators and successors, do jointly and severally covenant with the said grantee, his heirs and assigns, that we are lawfully seized in fee simple of the

granted premises; and that they are free from all incumbrances except a mortgage of \$6,000 upon a portion of said premises given by Daniel Saunders to the Belknap Savings Bank, and also another mortgage on a portion of said premises given by the said grantors to John Tatterson by deed bearing date the 1st day of October, A. D. 1887, both of which mortgages said grantors assume and agree to pay; that we have good right to sell and convey the same to the said grantee, his heirs and assigns forever, as aforesaid; and that we will, and our heirs, executors, administrators and successors shall warrant and defend the same to the grantee and his heirs and assigns forever against the lawful claims and demands of all persons."

This mortgage was conditioned upon the payment of notes for \$90,000 and also upon the performance of a complex and important contract between the parties relating to lumbering operations.

August 6, 1890, Charles G. Saunders made a peaceable entry into the east portion of Elkins grant (being that territory described in his deed of October 15, 1887, to George B. James and the New Hampshire Land Company) in the presence of two witnesses, for the purpose of foreclosing his mortgage on that portion of the grant, and duly published and recorded a notice of his entry as required by the laws of the state of New Hampshire. In that proceeding foreclosure would have become absolute on the 6th day of August, 1891, but for a temporary injunction staying the proceeding, which the mortgagors procured August 3, 1891. The injunction proceeding was dismissed in 1896 at the November term of court for Grafton county, and the foreclosure became absolute.

May 28, 1895, the same day on which James and the New Hampshire Land Company had their settlement with the Winnipiseogee Paper Company and obtained from the latter a deed of all their title to the eastern and western ends of Allen's grant which embraced the Stephen Thayer title to those lands, James and the New Hampshire Land Company entered into an agreement with Charles G. Saunders (the exhibit shows that it was with him as an individual and not as trustee) containing the following stipulations:

"The said James and the N. H. Land Co. are to convey or cause to be conveyed to said Saunders by good and sufficient deed conveying title thereto that portion of land situate in Livermore, New Hampshire, which lies between a line run by George T. Crawford as the north line of Waterville, and a line drawn west from the northwest corner of Albany, to the height of land dividing the waters which flow into the waters of the Saco and Pemigewasset rivers, respectively, the east boundary of said tract being the west line of the town of Albany.

"The said James and the N. H. Land Co. agree to indemnify and save harmless the said Saunders from any claim of trespass, or for stumpage for trees cut by him on lands in Allen's grant, so called, or in the town of Waterville.

"The said James and the N. H. Land Co. agree that they will cause the action commenced by them against the said Saunders and Daniel Saunders in reference to foreclosure and settlement of accounts, now pending in the Supreme Court within and for the county of Grafton, and state of New Hampshire, to be dismissed.

"The said James and the N. H. Land Co. agree to procure from the Winnipiseogee Paper Co. an agreement * * * that said paper company will make no claim that the north line of Waterville extends north of the aforesaid line run by said Crawford as the north line of Waterville.

"In consideration of the above agreements on the part of said James and the N. H. Land Co. * * * the said Saunders agrees that the notes for

\$90,000 secured by mortgage to said Saunders, made by the said James and the N. H. Land Co., shall no longer be a personal claim upon said James and the N. H. Land Co., or on either of them, and that neither shall be called upon personally to pay the same, or any part thereof, and that said Saunders will look to his foreclosure of said mortgage upon the lands mentioned in said mortgage which are drained by the Saco river and its tributaries, for the payment of that part of said notes which have not already been paid.

"The said Saunders also agrees to waive the agreements which the said James for himself or in behalf of the N. H. Land Co. has made concerning the covenants of warranty in certain mortgages made by him and the N. H. Land Co. in relation to lands in any part of Elkins grant, so called, but this waiver is not to allow the said James and the N. H. Land Co., or either of them, or any one in their behalf, to acquire any disputed title in said Elkins grant, so as to hold the same against the said Saunders or his assigns.

"The performance of the terms of this agreement on the part of said James and the N. H. Land Co. is to be a condition precedent to the performance of the same on the part of said Saunders."

On May 28, 1895, the Winnipiseogee Paper Company having conveyed to James and the New Hampshire Land Company the territory in dispute in this suit, James and the land company conveyed to Charles G. Saunders the same territory by a quitclaim deed, in which the grantee was not described as trustee, containing a covenant agreeing to "warrant and defend the said premises to him (the said Charles G. Saunders), his heirs and assigns, against the lawful claims and demands of any person or persons claiming by, from, or under us, but against no other."

This deed the grantee failed to record until March 9, 1907.

April 1, 1902, George B. James "remised, released, and quitclaimed" to the White Mountain Paper Company certain tracts of land, including "all that part of said grant (Allen's grant) at the easterly end which is drained by the Saco river and its tributaries." February 10, 1902, the New Hampshire Land Company "remised, released, and forever quitclaimed" to Samuel A. Merrill certain described real estate, including the following:

"Also such part of Allen grant as lies west of the height of land in the Mad river valley, and such part of said grant as is drained by the brooks running into the town of Thornton, being all and the same lands conveyed by the said Winnipiseogee Paper Company to said George B. James and the New Hampshire Land Company by deed dated May 28, 1895, and recorded in said Registry Book 423, p. 377."

It is through these deeds of James to the White Mountain Paper Company and of the New Hampshire Land Company to Merrill that the defendants derive whatever title they have to the land in question.

The defendants' position is that the Stephen Thayer title acquired by James and the New Hampshire Land Company May 28, 1895, did not inure to the benefit of the plaintiff under the covenant of warranty in the mortgage of October 15, 1887, and that James and the land company would not be, and that the defendants claiming under them are not, estopped from setting up this title. They concede that, as a general principle of law, a mortgagor is bound by the covenant of warranty in a mortgage the same as in an absolute deed but contend (1) that Charles G. Saunders received the mortgage in the same capacity (that of trustee for the Grafton County Lumber Company)

that he made the conveyance to James and the land company; (2) that the mortgage was given to secure the purchase money; and (3) that, the mortgage being given to secure the purchase money, the covenant of warranty would not estop the mortgagors from setting up a subsequently acquired title as against the mortgagee.

The referee, however, has found that the capacity in which the mortgagee received the mortgage was as trustee for the Saunders family and not as trustee for the Grafton County Lumber Company, which was the capacity in which he made the deed to James and the land company. If this finding is correct, it would seem that the mortgage was not a purchase-money mortgage in the strict sense, and that a novation must have taken place whereby the right to the balance of the purchase price was transferred from Saunders, trustee for the Grafton County Lumber Company, to Saunders, trustee for the Saunders family, and the mortgagors' obligation to Saunders, trustee for the Grafton County Lumber Company, was discharged. But in this discussion we will assume that the mortgage was in fact a purchase-money mortgage given to Saunders as trustee for the Grafton County Lumber Company. Such an assumption being made, does it follow, when the terms of the deed and mortgage are considered, that the mortgagors would not be estopped by their covenant of warranty from setting up the subsequently acquired Thayer title? It seems to me that it does not, and that the authorities cited by the defendants, instead of supporting their contention, as applied to the terms of this deed and mortgage, support the position of the plaintiff. It is to be noted that, in the deed from Saunders, trustee for the Grafton County Lumber Company, to James and the Land Company, the grantor (mortgagee) does not undertake to convey to the grantees (mortgagors) a particular estate but merely the right, title, and interest of the grantor in and to the land described, and that the covenant is limited to defending the conveyance only as against previous conveyances or incumbrances made or suffered by the grantor. *Loomis v. Bedel*, 11 N. H. 74; *Bell v. Twilight*, 26 N. H. 401. On the other hand, in the mortgage the mortgagors undertake to convey to the mortgagee an estate in fee simple. By that deed they did "give, grant, bargain, sell, alien, enfeoff, convey, and confirm" unto the mortgagee a particular estate in the lands described. And in addition to this the mortgage contains a covenant of warranty by which the mortgagors not only covenant to warrant and defend the title against previous conveyances or incumbrances made or suffered by them but against any and all outstanding titles, however created.

As it appears that the mortgagee did not undertake by his deed to convey a particular estate, and as there is no claim that he ever owned the Stephen Thayer title or made a conveyance of any interest in the property, prior to the conveyance to the mortgagors, he clearly cannot be said to have broken the covenant in his deed or to be in any way in default to the mortgagors with reference to the transaction. But the mortgagors, having undertaken to convey an estate in fee simple and covenanted to warrant and defend it against all claims and demands, were clearly in default to the mortgagee, and, when they obtained the

outstanding Thayer title, every reason existed why it should inure to the mortgagee under the covenant.

In *Randall v. Lower*, 98 Ind. 255, upon which the defendants chiefly rely in support of their contention, the mortgagee by his deed had undertaken to convey to the mortgagor an estate in fee simple in the land described, and the mortgagor in his purchase-money mortgage had undertaken to reconvey the same estate. Both conveyances contained full covenants of warranty. The mortgagee did not have the title which he assumed to convey, and, the mortgagor having purchased in an outstanding title, the question was whether it inured to the mortgagee under the mortgagor's covenant. In that case both deeds undertook to convey a particular estate in fee simple. The covenants which they contained were the same and were agreements to warrant and defend against all outstanding titles. On its face it was a case of covenant against covenant, and the facts disclosed that the situation was such it would be inequitable to permit the mortgagee to avail himself of the mortgagor's covenant as an estoppel, for, although the mortgagor's covenant was broken, the covenant of the mortgagee in his deed was likewise broken, and besides this he was the party first in the wrong. The gist of the opinion is contained in these words, where the court said:

"The mortgage was made upon the faith of the representation contained in the deed of the mortgagee, and he cannot reap any benefit from covenants, which his own representations justified the mortgagor in making, by extending the covenants to an estate derived from another source. It is not consistent with good conscience for a grantor to grasp after-acquired property where he himself assumed to vest all the title which his mortgagor undertook to grant back to him by way of mortgage to secure the purchase money."

And it was held that the after-acquired title did not inure to the mortgagee.

In this case, however, the facts are different from those, for here the mortgagee did not undertake to convey a particular estate or covenant to defend against any outstanding title other than such as he might himself have previously created, and he had created none. The mortgagors, therefore, could not have been misled into making a conveyance in fee simple with full covenants of warranty upon the faith of any representation that the mortgagee had made in his deed; and, such being the fact, there is no reason why they should not be holden to fulfill their covenant. The following cases cited by the defendants are to the same effect: *Brown v. Staples*, 28 Me. 497, 48 Am. Dec. 504; *Hardy v. Nelson*, 27 Me. 525; *Smith v. Cannell*, 32 Me. 123; *Sumner v. Barnard*, 12 Metc. (Mass.) 461; *Brown v. Phillips*, 40 Mich. 264; *Haynes v. Stevens*, 11 N. H. 33.

The defendants also contend (1) that the mortgage was discharged, and (2) that the covenant of warranty which it contained was waived, by the agreement of May 28, 1895, and hence the Thayer title did not inure to the plaintiff.

The first claim is based upon that part of the agreement of May 28, 1895, which provides that the notes for \$90,000 secured in the plaintiff's mortgage should no longer be a personal claim upon James and the Land Company, and that he should look to the foreclosure of his

mortgage upon the lands which were drained by the Saco river and its tributaries for the payment of the notes that remain unpaid. This agreement did not contemplate a discharge of the mortgage upon that portion of the land upon which the plaintiff had entered for the purpose of foreclosure and was not a discharge of the mortgage as to that land. It was rather an affirmation of the existence of the mortgage and an agreement that, upon the foreclosure becoming absolute, the value of the land should be considered sufficient to satisfy the mortgage debt, and that the plaintiff should not be entitled to claim otherwise. *Fletcher v. Chamberlin*, 61 N. H. 445.

[5] The second claim is based upon that part of the agreement of May 28, 1895, in which Saunders "agrees to waive agreements which the said James, for himself or in behalf of the New Hampshire Land Company, has made concerning the covenants of warranty in certain mortgages made by him and the New Hampshire Land Company in relation to lands in any part of Elkins grant," etc.

If, by this agreement, it was intended to waive the covenant of warranty which we are considering, and the term "Elkins grant" was employed in the contract to define that portion of the land described in the mortgage that lay north of a line running due west from the hemlock corner, the covenant as to the strip of land that lay south of that corner and described in the mortgage was in no way affected or waived.

Again, if it was intended by that description to include land south to the Waterville line, the waiver was not absolute, for it was expressly agreed that it should not permit the mortgagors to purchase outstanding titles and hold them as against the plaintiff. In other words, the fair meaning of the contract is that the waiver should relieve the mortgagors from purchasing outstanding titles, except that held by the Winnipiseogee Company, which they had agreed to purchase, and, with this exception, should relieve them from liability for damages for failure of title; but that if they purchased in any outstanding titles the covenant was not to be considered as waived as to such titles.

Another answer to the defendants' contention is that the waiver of the covenant of warranty, like all the stipulations entered into by Saunders in this agreement, was expressly conditioned upon the performance of the obligations assumed by James and the New Hampshire Land Company, one of which was that they should procure a dismissal of their proceeding in equity against Saunders. This they did not do until some time in 1896, with the result that the waiver did not become operative until that time. Such being the case, the covenant of warranty in the mortgage was in full force on May 25, 1895, when James and the New Hampshire Land Company acquired the Stephen Thayer title, and it inured to the mortgagee under the covenant.

Furthermore, if the deed to Allen in 1839 conveyed a valid title, and the deed of 1830 to Elkins and his associates did not extend to the Waterville line, I am of the opinion that, when James and the New Hampshire Land Company acquired the Allen's grant title in 1895 to the extent that that title embraced the territory here in question, it

inured to the plaintiff under the covenant of warranty in his mortgage the same as the Thayer title did.

I pass by the question whether the plaintiff's failure to record the quitclaim deed from James and the Land Company of May 28, 1895, precluded him from setting up that deed as against the defendants, and the question whether the facts found as to notice were such as to do away with the necessity of recording the quitclaim deed, as both questions seem to me immaterial in view of the conclusions reached on the other branches of the case.

It appeared in evidence that, when Charles G. Saunders changed the character of his trusteeship from that of trustee for the Grafton County Lumber Company to that of trustee for the Saunders family, he executed a written declaration of trust, and that some time before 1902 this declaration was lost, and although a search had been made it could not be found. Saunders was then permitted to testify, subject to the defendants' exception, as to the contents of the lost declaration, and in doing so said that it covered the same lands, was in favor of the same parties, and was upon the same terms as those set out in a declaration of trust made by him in 1902, confirmatory of that of 1887. This declaration was then introduced and read in evidence. The regular method no doubt would have been for the witness to have testified from memory as to the contents of the instrument of 1887, without reference to that of 1902, but I am of the opinion that this was in substance what took place, and that the defendants were in no way prejudiced by the course pursued. This testimony was of no consequence, except as showing who were the beneficiaries under the trust in which Mr. Saunders held the mortgage of October 15, 1887, and as to which he had already testified that he held it for the benefit of himself and his three sisters. This disposes of defendants' second exception.

As to defendants' twenty-fifth exception, it may be said that the question whether on the facts found there was an estoppel in pais involved a conclusion of law and not of fact, and that the referee so regarded it, for his finding that there was no estoppel in pais was conditional upon its being a question of fact and not of law. The important finding on this question was that the Winnipiseogee Paper Company did not change its position "in respect to the course of their proceeding by reason of Saunders being in the case as counsel." This fact being found, it followed as a matter of law, so far as this question was concerned, that there was no estoppel in pais.

I see no occasion for questioning the finding of the referee that Saunders did not intend to submit his claim for decision in the case of the Winnipiseogee Paper Company against James and the New Hampshire Land Company. It seems to be abundantly supported by the evidence.

I have examined all the other exceptions upon which the defendants rely and find nothing in them calling for extended consideration. They all relate to findings, or the introduction of evidence, on questions which in no way enter into this decision and which could in no way have prejudiced the rights of the defendants.

It follows, therefore, from the foregoing conclusions and findings, that the plaintiff is entitled to maintain his action, and that the case should proceed to trial upon the question of damages.

TAGGART v. GREAT NORTHERN RY. CO.

(District Court, E. D. Washington, N. D. November 25, 1912.)

No. 1,542.

1. PUBLIC LANDS (§ 92*)—GRANTS TO RAILROADS—FILING MAPS—"PROFILE"—"OUTLINE."

Under Act Cong. March 3, 1875, c. 152, § 1, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), granting a right of way through public lands of the United States to any duly authorized railroad company which shall file with the Secretary of the Interior a copy of its articles of incorporation and due proof of its organization, and section 4, providing that any such company, desiring to secure the benefits of that act, shall within 12 months after the location of any section of 20 miles of its road, or if upon unsurveyed lands, within 12 months after their survey, file with the register of the land office a profile of its road, and that upon approval thereof by the Secretary of the Interior it shall be noted upon the plats in such office, and that thereafter all lands over which such right of way shall pass shall be disposed of subject to such right of way, a railroad corporation, which had duly filed its articles of incorporation and proof of its organization, sufficiently complied with section 4 by filing maps showing the definite location of its line of railroad as surveyed and located through the public lands, without filing a profile showing the elevations and grades of the proposed road, since, while technically "profile" means a side or sectional elevation, or a drawing showing a vertical section of the ground along a surveyed line or graded work, it also means an outline or contour, and "outline" means the line which marks the outer limits of an object or figure, an exterior line or edge, contour, and Congress must have intended something more than a mere side or sectional elevation, which would convey little or no information to the government or prospective settlers, especially as the Secretary of the Interior for nearly 40 years has construed the term "profile" as meaning a map of definite location or a map of alignment.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282; Dec. Dig. § 92.*]

2. STATUTES (§ 219*)—CONSTRUCTION BY ADMINISTRATIVE OFFICER—FORCE.

The construction placed upon an act of Congress by the officer charged with its administration, acquiesced in by all departments of the government for nearly 40 years, should be accepted by the courts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. § 219.*]

3. PUBLIC LANDS (§ 92*)—GRANTS TO RAILROADS—FORFEITURE.

Under Act Cong. March 3, 1875, c. 152, § 1, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568) granting to railroad companies the right of way through the public lands of the United States, and section 4, providing that any such company, desiring to secure the benefits of that act, shall file with the register of the land office a profile of its road, that upon approval thereof by the Secretary of Interior it shall be noted upon the plats in such office, and that thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way, but that, if any section of such road shall not be completed within five years after its location, the rights therein granted shall be forfeited as to such un-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

completed section, upon the filing and approval of such profile or map, the title of the railroad company thus acquired could be divested only by forfeiture declared by the government for breach of condition, or by the voluntary act of the company itself.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282; Dec. Dig. § 92.*]

4. PUBLIC LANDS (§ 92*)—GRANTS TO RAILROADS—FORFEITURE.

Under Act Cong. March 3, 1875, c. 152, § 1, 18 Stat. 482 (U. S. Comp. St. 1901, p. 1568), granting to railroad companies a right of way through all public lands of the United States, and section 4, requiring such a company to file with the register of the land office a profile of its road, and providing that upon approval thereof by the Secretary of Interior it shall be noted upon the plats in such office, that thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way, but that, if any section of the road shall not be completed within five years after the location of such section, the rights therein granted shall be forfeited as to such uncompleted section, where a railroad company filed maps showing the location of its line of railway, which were duly approved, and subsequently revised the survey and location of the road, and filed new maps, showing a deviation in the central line of the road not exceeding 20 feet, which were approved by the Secretary upon its executing a relinquishment of its rights to the right of way shown on the original maps, excepting such part of such right of way as was situated within the limits of the right of way shown upon the revised maps, this change in its located line was not a waiver or forfeiture of its pre-existing rights, as the Secretary, in demanding a relinquishment only of the overlap outside the exterior limits of the two located lines, acted within his authority.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282; Dec. Dig. § 92.*]

In Equity. Suit by George H. Taggart against the Great Northern Railway Company. Temporary injunction denied, and bill dismissed.

France & Helsell, of Seattle, Wash., for complainant.

F. V. Brown, of Seattle, Wash., and Charles S. Albert and Thomas Balmer, both of Spokane, Wash., for defendant.

RUDKIN, District Judge. [1] This is a controversy between a railway company and a settler over a right of way through certain lands which were heretofore public lands of the United States. The railway company claims its right of way under the Act of Congress of March 3, 1875 (18 Stat. p. 482, c. 152), sections 1 and 4 of which read as follows:

"Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, sidetracks, turn-outs and water stations, not to exceed in amount twenty acres for each station, to the extent of one station to each ten miles of its road."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

"Sec. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

The complainant, on the other hand, claims title under a patent from the United States, issued pursuant to the homestead laws. The case has been submitted to the court on the application for a temporary restraining order and for a final decree upon the merits upon an agreed statement of facts. Omitting jurisdictional and other facts not deemed material, the agreed case is this:

During the year 1906 the Washington & Great Northern Railway Company, a corporation organized and existing under and by virtue of the laws of the state of Washington, and authorized to locate and construct lines of railroad within the state, surveyed and located a line of railway from Wenatchee in a northerly direction along the west bank of the Columbia river to the mouth of the Okanogan river, and thence northerly to the international boundary line between the United States and the Dominion of Canada. The line of road as thus surveyed and located crossed lot 4 of section 13, township 28 N., of range 23 E., W. M., in a northerly and southerly direction. The lot thus described is the lot in controversy here, and was at that time unoccupied public land of the United States, and so remained until the 17th day of September, 1907. The line of road as thus surveyed and located by the Washington & Great Northern Railway Company was adopted by resolution of its board of directors as the definite location of its line of railway, and the railway company, having filed with the Secretary of the Interior of the United States a copy of its articles of incorporation and due proofs of its organization under the same, on the 2d day of January, 1907, filed in the United States land office at Waterville, Wash., maps showing the definite location of its line of railway as surveyed and located through the public lands of the United States, a copy of which maps is attached to the agreed statement. The maps thus filed were duly approved by the Secretary of the Interior on the 23d day of March, 1908, and were returned to the local land office, where the proper notations were made upon the plats, showing the located line across the public lands of the United States. In the month of July, 1907, the Washington & Great Northern Railway Company conveyed to the defendant, the Great Northern Railway Company, all its right, title, and interest in and to the right of way thus located and acquired, and the Great Northern Railway Company has since been and is now the owner of the same.

The Great Northern Railway Company filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, and during the years 1908 and 1909

revised the survey and location of the road as theretofore made by its predecessor in interest, and on the 31st day of July, 1909, filed with the register and receiver of the United States land office at Waterville maps of such revision and of such amended definite location. A copy of this amended map is attached to the agreed statement and made a part thereof. The difference between the central line of the road as shown on the original maps and the central line of the road as shown on the amended map does not exceed 20 feet at any point where the lines cross lot 4, but at other places the variation is as much as 200 feet. On the 12th day of January, 1912, the local land office at Waterville, Wash., by direction of the Commissioner of the General Land Office, called the attention of the Great Northern Railway Company to the fact that its amended map of definite location was not accompanied by a relinquishment under seal of all rights under the original approval of the maps filed by the Washington & Great Northern Railway Company as to the portions thereof amended by the map filed by the Great Northern Railway Company, as required by section 19 of the circular of the General Land Office, issued on May 21, 1909, which reads as follows:

"When the railroad is constructed, an affidavit of the engineer and certificate of the president must be filed in the local office, in duplicate, for transmission to the General Land Office. No new map will be required except in case of deviations from the right of way previously approved, whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case. The map must show clearly the portions amended, or bear a statement describing them, and the location must be described in the forms as the amended survey and amended definite location. In such case the company must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior."

Thereafter, on the 6th day of February, 1912, the Great Northern Railway Company released and relinquished to the United States all its right, title, and interest in and to the right of way pertaining to the line of railway as shown upon the maps filed by its predecessor and approved by the Secretary of the Interior—

"excepting and excluding, however, any and all of such right of way that is or may be situated within the limits of the right of way pertaining to the revised and relocated line of such company's railway shown upon the maps thereof filed in the United States district land office at Waterville, Washington, on the 31st day of July, 1909."

The relinquishment expressly provided that it should not take effect until the revised and amended map of definite location was approved by the Secretary of the Interior. The amended map thus filed was formally approved by the Secretary on the 13th day of July, 1912. Neither the Great Northern Railway Company nor its predecessor in interest filed a profile showing the elevations and grades of the proposed road across the public lands of the United States and was never requested so to do until the 17th day of November, 1910. On the latter date the register and receiver of the land office at Waterville, by direction of the Secretary of the Interior, notified the defendant that, since the line of its railway as described in the map of

amended definite location, crossed certain lands suitable for power sites, which had been temporarily withdrawn from entry and sale, the company would be required to file a profile showing the elevations and depressions at which the line of railway crossed such lands, and on the 4th day of May, 1911, pursuant to this request, the company did file a profile in the United States land office at Waterville, showing the elevations and depressions of its entire line from the crossing of the Okanogan river to the junction with the main line near Wenatchee. It is further stipulated that at all times since the 4th day of November, 1898, the regulations promulgated by the General Land Office of the United States, and approved by the Secretary of the Interior, under the Act of Congress of March 3, 1875, supra, contained the following:

"The word 'profile,' as used in this act, is understood to intend a map of alignment. All such maps and plats of station houses are required by the act to be filed with the register of the land office for the district where the land is located. If located in more than one district, duplicate maps and field notes need be filed in but one district, and single sets in the others. The maps must be drawn on tracing linen, in duplicate, and must be strictly conformable to the field notes of the survey of the line of route or of station grounds."

Such is the claim of the railroad company.

The complainant, on the other hand, made entry of lot 4, above described, together with other lands, on the 17th day of September, 1907, under the homestead laws of the United States, and received patent therefor on the 13th day of February, 1912, after a full compliance with the homestead laws. The patent made no reservation of any railroad right of way.

The railroad company is now about to enter upon the strip of land 180 feet in width, included in both the original and amended maps of definite location across lot 4, and the complainant instituted this suit to restrain it from so doing. It will be seen from the foregoing statement that the railway company is at least first in point of time, but the complainant claims that his rights are superior to those of the company for two reasons: First, because of the failure of the railroad company to file a *profile* of its road with the register of the land office as required by law; and, second, because any rights acquired under the original location were forfeited or abandoned by filing the map of amended location.

I am not convinced that either of these contentions is sound. Technically speaking, the term "profile" means "a side or sectional elevation"; "a drawing showing a vertical section of the ground along a surveyed line or graded work"; but it also means "an outline or contour"; and the term "outline" means "the line which marks the outer limits of an object or figure; an exterior line or edge; contour." Webster's International Dictionary, titles, "Profile" and "Outline."

It is very evident that Congress intended something more than a mere side or sectional elevation of the railroad, for such a map or profile would convey little or no information to either the government or prospective settlers. It would not show the location of the railroad upon the ground, or describe the lands taken, and could in no event show the station houses. Furthermore, for a period of nearly 40

years the Secretary of the Interior, who is charged with the administration of this law, has construed the term "profile" to mean a map of definite location, or a map of alignment. Circular of January 13, 1888 (12 Land Dec. Dept. Int. 423); Circular of November 4, 1898 (27 Land Dec. Dept. Int. 663).

[2] This construction of the law by the officer charged with its administration has been acquiesced in by all departments of the government for so long a period that it should now be accepted by the courts. *United States v. Burlington R. Co.*, 98 U. S. 334, 25 L. Ed. 198; *Hewitt v. Schultz*, 180 U. S. 139, 21 Sup. Ct. 309, 45 L. Ed. 463.

In the recent case of *United States v. Minidoka & S. W. R. Co.*, cited by the complainant from the Circuit Court of Appeals for this circuit (190 Fed. 491, 111 C. C. A. 323), the court, in the course of its opinion, said:

"The defendant railroad in this case filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, but has filed no profile map of its road with the register of the land office where the land is located, and no such profile map has been filed with or approved by the Secretary of the Interior."

I take it from this that no map of any kind was filed in that case, and that the court did not have before it the validity or sufficiency of the regulations promulgated by the Secretary of the Interior or of a map filed in compliance therewith. If it had, I doubt very much whether it would have declared invalid regulations and maps, the validity of which have been recognized and acquiesced in for so long a period; for later in its opinion the court referred to the general authority conferred upon the Secretary of the Interior by the various acts of Congress relating to the public lands, and said:

"All this is clearly included in the authority of the Secretary to approve or disapprove the profile of the road. * * *"

And:

"We think the approval of the conditions upon which the railroad company may have a right of way through the lands of an irrigation project is imposed by the statute on the Secretary of the Interior as a judicial act, to be evidenced by his approval or disapproval of the profile map."

Again, in the recent case of *Stalker v. Oregon Short Line*, 225 U. S. 142, 32 Sup. Ct. 636, 56 L. Ed. 1027, the Supreme Court uses indiscriminately such expressions as "map of location," "map showing the termini of such portion and its route over the public lands," "map of alignment," etc.

[3] For these reasons, I am of opinion that the profile or map filed with the Secretary of the Interior by the predecessor in interest of the present defendant was sufficient in law and vested title to the right of way in the defendant company. And if title vested in the defendant company upon the approval of the map by the Secretary of the Interior, and if that approval related back to the time of filing the original map of alignment (*Stalker v. Oregon Short Line*, *supra*), the title thus acquired could only be divested in one of two ways: First, by a forfeiture declared by the government for breach of condition; and, second, by the voluntary act of the company itself.

[4] No forfeiture has been declared by the government, and the act of the company in making so slight a change in its located line should not be construed as a waiver or forfeiture of pre-existing rights, contrary to the expressed intentions of both the government and its grantee. In demanding the relinquishment, the Secretary of the Interior recognized the fact that title had already vested in the company; and he required only a relinquishment of the overlap outside the exterior limits of the two located lines. In so doing, he, in my opinion, acted within his authority. The defendant is therefore claiming only what the Congress has granted to it, and what the Congress has a right to grant; and, if so, the complainant has no just ground for complaint.

The temporary injunction must therefore be denied, and the bill dismissed; and it is so ordered. Let judgment be entered accordingly.

In re ULMER.

(District Court, N. D. Ohio, E. D. May 29, 1913.)

1. CONTEMPT (§ 13*)—WHAT CONSTITUTES—PERJURY.

Perjury committed by a witness on the stand is a criminal contempt of court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 30-35; Dec. Dig. § 13.*]

2. CONTEMPT (§ 34*)—POWER TO PUNISH—FEDERAL COURTS.

Power to punish for contempt is inherent in all courts of the United States on the theory that its existence is essential to preserve order in judicial proceedings and to enforce the court's judgments.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 99, 101-104; Dec. Dig. § 34.*]

3. ATTORNEY AND CLIENT (§ 60*)—DISBARMENT OF ATTORNEY—FEDERAL COURTS.

Disbarment of attorneys licensed to practice in the federal courts for misconduct is a matter which concerns only the court in which the proceedings are had, which court must proceed in the exercise of a sound judicial discretion, guarding equally the independence of the bar and the rights and dignity of the court itself.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 83; Dec. Dig. § 60.*]

4. ATTORNEY AND CLIENT (§ 57*)—DISBARMENT OF ATTORNEY—REVIEW.

Neither appeal nor writ of error lies to review an order of a federal court disbarring an attorney licensed to practice before it; the only right of review being obtainable in a proceeding in the nature of mandamus, raising the question whether or not judicial discretion was exercised in the order of removal.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 81, 82; Dec. Dig. § 57.*]

5. ATTORNEY AND CLIENT (§ 39*)—DISBARMENT OF ATTORNEY—GROUNDS.

Under a federal court rule authorizing disbarment of attorneys for malpractice or other sufficient cause, an attorney may be disbarred for perjury committed in a federal court hearing, whether he has been convicted

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

or not, and whether the false testimony related to a material or an immaterial matter.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 52; Dec. Dig. § 39.*]

6. JUDGES (§ 49*)—DISQUALIFICATION—DISBARMENT OF ATTORNEY—PROCEEDINGS.

Where, on a rule to show cause why an attorney of a federal court should not be disbarred for perjury committed while a witness before the court, respondent's answer did not tender an issue of fact, but merely repeated the perjury in a reaffirmation of the truth of the statements given in the testimony, which had previously been determined by the court to be false, so that "rule absolute" for disbarment should be granted on the face of the record, the proceeding was not one in which the respondent was entitled to disqualify the judge under Judicial Code, § 21 (Act March 3, 1911, c. 231, 36 Stat. 1090 [U. S. Comp. St. Supp. 1911, p. 133]), authorizing the disqualification of a judge for prejudice, by the filing of an affidavit charging personal bias or prejudice against the respondent.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 187, 188; Dec. Dig. § 49.*]

Proceedings for the disbarment of Leo Ulmer. Application granted.

John J. Sullivan and William H. Boyd, both of Cleveland, Ohio, for Leo Ulmer.

U. G. Denman, Dist. Atty., of Cleveland, Ohio, opposed.

KILLITS, District Judge. The facts in this matter appear sufficiently from the rule nisi entered by the court on the 5th of April, 1913, as follows:

"Whereas, during the February, 1913, term of this court, to wit, on the 24th to the 29th days of March, 1913, inclusive, one Dan Ulmer was on trial in this court before a jury at the prosecution of the United States upon an indictment charging the said Dan Ulmer with perjury; and

"Whereas, one Leo Ulmer, a member of the bar of this court, and son of said defendant, Dan Ulmer, was present at said trial during each session of the court therein and assisted, and advised with, the counsel of said Dan Ulmer in and about the defense of said defendant, and was present at the taking of all the testimony heard upon said indictment in said trial; and,

"Whereas, said Leo Ulmer offered himself and became a witness in behalf of said defendant on said trial, being duly sworn by the clerk of this court to well and truly give testimony on the issues joined in said trial; and

"Whereas, on the 27th day of March, 1913, in said trial as such witness, and in the presence and hearing of the court, said Leo Ulmer did testify upon his oath to a matter material to the issues then on trial between the said United States and said Dan Ulmer, in substance, to wit, that he, the said Leo Ulmer, on the 13th day of February, 1908, did deposit to the credit of the said Dan Ulmer with the National City Bank, of Cleveland, Ohio, the sum of eleven hundred and fifty dollars, all in currency, namely, paper money of the United States; and

"Whereas, it appears from all the testimony presented in the trial of said case and in the hearing of said Leo Ulmer that said testimony of said Leo Ulmer was false and untrue in this, that at least the sum of ten hundred and fifty dollars of said deposit so by him made to the credit of Dan Ulmer as aforesaid was in the form of a check for that amount instead of currency or paper money of the United States; and

"Whereas, it appears from all the testimony in said trial and in the hearing of said Leo Ulmer that said Leo Ulmer knowingly so testified falsely and untruthfully with a willful and corrupt purpose; and,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Whereas, it was a material question in the trial of said cause on said indictment whether said deposit to the extent of ten hundred and fifty dollars had been in currency, paper money of the United States, or check; and

"Whereas, it is the judgment of the undersigned, judge of said court, presiding at the trial of the cause wherein the United States, upon indictment, prosecuted the said Dan Ulmer for perjury as aforesaid, and so hearing the testimony of said Leo Ulmer, as the testimony of all the other witnesses in the case, given in the presence of said Leo Ulmer as aforesaid, that the said Leo Ulmer in so falsely testifying as aforesaid did commit deliberate and willful perjury, and was thereby and because thereof, and is, in contempt of this court, and thereby and because thereof became, and is, guilty of misconduct involving moral turpitude and constituting a sufficient cause for the disbarment of said Leo Ulmer from the bar of this court:

"Now, therefore, it is ordered that unless the said Leo Ulmer, on or before the 26th day of April, 1913, at ten o'clock in the forenoon of said day, show cause why his name should not be stricken from the rolls of this court as an attorney at law, solicitor in chancery and proctor and advocate in admiralty, because of his contempt for this court so as aforesaid manifested through his aforesaid deliberate and willful perjury and because of his aforesaid misconduct in that behalf involving moral turpitude, his name shall thereupon be stricken from the rolls of this court as an attorney at law, solicitor in chancery and proctor and advocate in admiralty, and he shall be debarred from thereafter exercising either of said functions at the bar of this court.

"It is further ordered that service of a certified copy of this rule be made upon said Leo Ulmer personally by the marshal of this court, returnable on the 15th day of April, 1913.

John M. Killits, Judge."

On the 26th of April the respondent answered as follows:

"Your respondent, Leo Ulmer, reserving to himself the benefit of all exceptions to the uncertainty and insufficiency of the rule made herein, prays leave to object thereto as upon demurrer upon the grounds:

"First. The court had no jurisdiction to enter said rule and has no jurisdiction to try your respondent thereunder.

"Second. There are no facts stated in said rule with sufficient certainty to call upon or to require your respondent to answer thereto.

"Third. The recitals of fact contained in said rule are not sufficient cause for disbarment of your respondent, and are not sufficient in law to require your respondent to make answer thereto.

"Your respondent, being advised of the propriety of making definite and specific answer to the recitals of fact contained in said rule, makes answer thereto as follows:

"Your respondent admits that during the February term of this court, to wit, on the 24th to the 29th day of March, 1913, inclusive, one Dan Ulmer was on trial in this court before a jury at the prosecution of the United States upon an indictment charging the said Dan Ulmer with perjury, and that your respondent is and was a member of the bar of this court and a son of the said Dan Ulmer, that he was present at said trial during each session of the court and was present at the taking of all the testimony had upon said indictment in said trial, and that he became a witness in behalf of said Dan Ulmer, being duly sworn by the clerk of this court to well and truly give testimony on the issues joined in said trial, but your respondent denies that he was present at said trial or during any portion thereof in his capacity as an attorney and counselor at law, solicitor in chancery, or proctor and advocate in admiralty, and he avers that in so far as he did assist and advise with counsel for the said Dan Ulmer at said trial he did so solely on account of his relationship to his said father, Dan Ulmer, so on trial as aforesaid, and in no sense as an attorney and counselor at law, and that he was not recognized or advised with by his father's counsel in said trial as associate counsel therein.

"Your respondent further admits that, after being duly sworn as hereinbefore admitted, he did on the 27th day of March, 1913, in said trial as such witness, and in the presence and hearing of the court, testify in substance

that on the 13th day of February, 1908, he did deposit to the credit of the said Dan Ulmer with the National City Bank of Cleveland, Ohio, the sum of \$1,150, all in currency. And your respondent herein avers that his testimony so given as aforesaid upon said trial was true, and he hereby and herein reaffirms the same; but, being advised that the questions of the materiality of the said testimony in said trial is a question of law, your respondent therefore denies that the testimony so given was material to the issues then on trial as alleged in said rule.

"Further answering, your respondent avers that it is not true, as stated in said rule, that at least the sum of \$1,050 of said deposit so made by him to the credit of Dan Ulmer as aforesaid was in the form of a check for that amount instead of currency or paper money of the United States, and that it is not true in testifying as aforesaid that he knowingly so testified falsely and untruthfully with a wilful and corrupt purpose.

"And further answering, your respondent says that he is advised that the question as to whether or not the said deposit to the extent of \$1,050 consisted of a check or currency was material in the trial of said cause is a question of law, and he therefore denies that the same is or was material to the issues in the trial of said cause.

"And further answering your respondent respectfully avers that, in so testifying in the trial of said cause as aforesaid, he testified truthfully to the best of his knowledge, recollection, and belief; that he was actuated by no corrupt motive, but only by a desire to tell the truth as a witness as he understood it; and that he in no wise committed or intended to commit contempt of this honorable court either by testifying falsely or in any other manner.

"And having fully answered, your respondent prays this honorable court to dismiss the above rule."

Owing to other engagements of the court, the matter passed over several separate days set for hearing until May 19th, when, it being assigned for that day, counsel privately expressed the desire of the respondent that the matter be passed for final determination to some other judge with an alternative intimated that otherwise the respondent would file an affidavit of prejudice under section 21 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1090 [U. S. Comp. St. Supp. 1911, p. 133]), which reads:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated. * * * Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. * * * No such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith."

Thereupon the case was again passed for a few days to give the court an opportunity to consider whether the question was one which, in his judgment, warranted a vacation of the bench to some other judge. Subsequently, notice was given to counsel for respondent that it was deemed proper for the judge, for reasons hereinafter given, not to vacate the bench, and it was advised that, if respondent's counsel deemed it necessary to protect his rights to file an affidavit under the section quoted, such course might be taken without offense. Thereafter, on May 24th, an affidavit was filed charging the court with bias against respondent.

The statements in this affidavit upon which bias and prejudice are predicated are nothing more than references to facts found by the court in the rule itself, and the affidavit could just as well have been founded upon the filing of the rule as upon remarks of the court made at the time when the court was manifestly seeking a way to relieve its bar of the presence of respondent without using the drastic method of formally finding him a perjurer as a ground for disbarment. The court assumed at this time, from an erroneous statement made by respondent himself on the records of the court as to the date of his admission to the bar, that the rules of admission had been violated in his case, and sought that as an easy way, less reflective upon respondent, to effect his removal. It was a well-meant attempt to be as easy as circumstances warranted upon respondent, and came to naught through no fault of the court. It is apparent from the spirit, if not the language, of the statute quoted, that this affidavit, filed four weeks, after the date set for the answer of the respondent, was filed out of time. If the statute applies to a matter of this character, the affidavit certainly, within the spirit of the act, should have been filed on or before April 26th. It was not even suggested to the court as a possibility in the case until May 19th, which was at least the third day to which the matter had been passed for final issue. The affidavit was stricken from the files, not however because filed out of time, but because, in the court's judgment, the statute has no application to such circumstances as were involved here.

[1] That perjury on the witness stand is contempt of court, direct and criminal as contempts are classified, there can be no room for controversy. The subject is admirably treated by Mr. Chamberlyne in his "Modern Law of Evidence," sections 249 to 255, inclusive. We quote from certain of these sections:

"Sec. 249. Of all possible acts, few are so antagonistic to the business of judicial administration as the intentional false swearing which seeks to baffle the search for truth, without which justice is impossible. Such swearing is a flagrant insult to the dignity of the court, and the same offense is committed by an attorney or other persons who procures the giving of perjured testimony."

"Sec. 253. As mentioned elsewhere, the executive powers of the court are most frequently ascertained and vindicated upon proceedings for contempt so called. The proceeding is a special one without direct connection with the matter in which it occurs. A contempt proceeding is summary, and the extent of the hearing as to questions of law rests in the discretion of the court, though one charged with contempt has the right to be heard in his defense.

"Sec. 254. Criminal contempts are those which are committed in the presence of the court and disturb its administration of justice either physically and directly, as by disorderly conduct, or morally and indirectly by bringing the administration of justice into public disgrace. Criminal contempts are all acts committed against the majesty of the law or against the court as an agency of the government, and in which, therefore, the whole people are concerned.

"Sec. 255. Direct Contempts.—The administrative power and dignity of the court necessarily involves the right of punishing summarily for offenses against justice committed in the immediate presence and hearing of the judge, or so near as to interrupt proceedings before him. These are called direct contempts. An act by any person done in the presence of the presiding judge which shows disrespect for his person or authority while acting in his offi-

cial capacity is an offense against the power and dignity of the court. The judge needs no evidence; he is himself in such cases the percipient witness; should pleadings be deemed advisable, they may be of the briefest and simplest description."

These statements of the law are not only supported by the cases cited in the text, but by the authorities generally. See article "Contempt" in 9 Cyc.

[2] The law of the United States provides a definition for direct and criminal contempt which may subject the offender to summary punishment, in section 725, which, after providing for punishment by fine or imprisonment, at their (the court's) discretion, says:

"Such power to punish contempts shall not be construed to extend to any case except the misbehavior of any person in the court's presence or so near thereto as to obstruct the administration of justice."

The federal courts hold, without qualification, that the power to punish for contempts is inherent in all the courts of the United States, its existence being essential to preserve order in judicial proceedings and the enforcement of the court's judgments, and, consequently, to the due administration of justice; that it inheres in the dignity of the court itself, and is an attribute as essential and indispensable to the due administration of justice as the person of a judge. In *re Nevitt*, 117 Fed. 448, 54 C. C. A. 622; *Ex parte Robinson*, 86 U. S. (19 Wall.) 505, 22 L. Ed. 205; *Bradley v. Fisher*, 80 U. S. 340 (13 Wall.) 20 L. Ed. 646. This being the necessary power of the court, with the right to summarily exercise it inherent in the fact itself, we hold that Congress cannot embarrass a court in the exercise of this duty by providing for the disability of the particular judge the dignity of whose court was affronted by the conduct under consideration, and that no attempt was made to do so by the act in question. Such construction of section 21 of the Judiciary Act would lead to manifest absurdities; it would tend to weaken the proper power of the courts to duly administer justice by requiring an individual judge who is, as Mr. Chamberlyne says, the "percipient witness" of the transaction to pass over the question whether or not the dignity of his court was affronted to some other tribunal or judicial officer of merely co-ordinate powers, who, as the Supreme Court in the case of a removal from the bar said, could not decide "with the same means of information as the court itself." We hold, then, that this statute cannot be applied to the case of a direct and criminal contempt, because of the very nature of such a matter.

[3] It has been held by the courts of the United States that disbarment is a matter which concerns only the court in which the proceedings are had. In *Ex parte Secombe*, 60 U. S. (19 Wall.) 13, 15 L. Ed. 565, the Chief Justice said:

"It has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed."

This principle has been upheld in many subsequent cases without diminution of effect; the courts simply holding that the disbarring

court must proceed in the exercise of a sound and judicial discretion, guarding equally the independence of the bar and the rights and dignity of the court itself. *Ex parte Garland*, 71 U. S. (4 Wall.) 333, 18 L. Ed. 366; *Ex parte Bradley*, 7 Wall. 373, 377, 19 L. Ed. 214; *Bradley v. Fisher*, 13 Wall. (80 U. S.) 335, 20 L. Ed. 646; *Randall v. Brigham*, 7 Wall. (74 U. S.) 523, 535, 19 L. Ed. 285; *Ex parte Wall*, 107 U. S. 265, 281, 285, 2 Sup. Ct. 569, 27 L. Ed. 552.

In *Ex parte Burr*, 9 Wheat. (22 U. S.) 529, 6 L. Ed. 152, Chief Justice Marshall, after balancing the interests of the attorney and the desirability that the respectability of the bar and its harmony with the bench should be preserved, says:

"For these objects, some controlling power, some discretion, ought to reside in the court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself."

[4] Moreover, as a matter of practice, the Supreme Court, up to and including its last enunciation, has held that neither appeal nor error lies from an order of disbarment, but that the only right of review exists in a proceeding in the nature of mandamus raising the question whether or not judicial discretion was exercised in the order of removal. *Ex parte Burr*, *supra*; *Ex parte Secombe*, *supra*; *Ex parte Bradley*, *supra*, 7 Wall. page 376, 19 L. Ed. 214; *Ex parte Robinson*, second case, 19 Wall. (18 U. S.) 513, note, 22 L. Ed. 205; *Ex parte Wall*, 107 U. S. 565, 2 Sup. Ct. 569, 27 L. Ed. 552.

[5] The court's rule for disbarment provides that it may occur "for malpractice or other sufficient cause." That perjury, in addition to being contempt, may be ground for disbarment, ought not to require authorities, although there is no lack of them. *In re Ryan*, 143 N. Y. 528, 38 N. E. 963; *Ex parte Walls*, 64 Ind. 461; *Perry v. State*, 3 Greene (Iowa) 550; *People v. Beattie*, 137 Ill. 553, 27 N. E. 1096, 31 Am. St. Rep. 384. And disbarment for a cause involving a crime may precede conviction. *Ex parte Wall*, *supra*; *Ex parte Walls*, *supra*; *Perry v. State*, *supra*.

The court then was confronted, after the entry of the rule nisi, with the situation which, if unameliorated by any act of the respondent, permitted both punishment for contempt and disbarment for sufficient cause, and, too, under circumstances which in either case, under the authorities cited, clothed the court with summary power if the facts were as stated in the rule.

Ordinarily, such a statement as contained in the rule, made formally by the court, imports absolute verity. *Holman v. State*, 105 Ind. 513, 5 N. E. 556; *Mahoney v. State*, 33 Ind. App. 655, 72 N. E. 151, 104 Am. St. Rep. 276.

[6] We are now where we must consider the sufficiency of the so-called answer to the rule, having reference to the applicability of the statute providing for an affidavit of prejudice. If that statute applies to a disbarment proceeding, is there anything in the situation of this matter, after the filing of the so-called answer, involving even a judicial discretion remaining to be done? That there is not seems mani-

fest to us. The answer does not answer. It raises no issue of fact. It is first in the nature of objections that the rule is not specific and does not state circumstances which warrant disbarment, and those are so plainly not well taken as to require no consideration at all. The rule is specific in these particulars almost to the particularity of an indictment. The question of whether or not the subject-matter of the alleged perjury was material is not of itself of consequence in this inquiry. Perjury by an attorney as a witness upon an immaterial matter would be equally as good ground for disbarment as if his testimony were material; it would involve the same degree of moral turpitude. The rule finds the false testimony to have been material, and the language of the answer presents no justiciable issue in that question. In fact, as the whole record in the main case shows, the incident involved in the alleged perjury was a crucial fact in the government's case and defendant's testimony alluded to in the rule was the most important testimony in defense. Otherwise the answer but repeats the perjury in its reaffirmation of the truth of the statements given in testimony, determined by the court in the rule to have been false. The answer is therefore no answer; the rule is absolute on the face of the record, and the declaration of the fact, which was all remaining to be done when the affidavit was filed, was hardly more than a formal matter.

Should the answer have tendered new testimony upon the circumstances out of which the alleged perjury grew, we concede that some issue then would have been raised which, requiring a hearing, would have involved some draft of judicial discretion as to which perhaps some color of right to ask the judge to vacate the bench might appear; but, as the answer stands, the record upon which perjury by respondent is predicated is nothing more than the record in the case in which he was a witness, all the testimony in which the judge issuing the rule heard, and all of which was fully considered by him in entering it. So that, with respect to the application of section 21 of the Judiciary Act, the precise question is: Can the judge, who may summarily punish for a direct and criminal contempt involving an act which also is cause for disbarment, be removed by an affidavit purporting to be drawn under the section, in face of the fact that no defense is offered to the final establishment of a rule nisi fully setting up the circumstances? In our judgment, there can be but one answer to this question.

An order shall be entered striking the name of Leo Ulmer from the rolls of this court as an attorney and counselor at law, solicitor in chancery, and proctor and advocate in admiralty.

NORTHERN PAC. RY. CO. v. MITCHELL.

(District Court, E. D. Washington, N. D. January 10, 1913.)

No. 1,539.

1. PUBLIC LANDS (§ 92*)—RESERVATION FROM SALE—WHAT CONSTITUTES.

A recommendation by an inspector of the Indian Department in a report to the Commissioner of Indian Affairs that a tract of land be set apart for certain Indians was not a reservation of such tract from sale or other disposition, so as to prevent a railroad company locating its line on such tract under a grant of a right of way across public lands, since, while the power vested in Congress by Const. art. 4, § 3, to dispose of and make all needful rules and regulations respecting the territory belonging to the United States, has in some cases been delegated to the President, and, if exercised by the head of an executive department, might be presumed to have been exercised by the President's direction, it has not been delegated to other subordinate officers of the government, and their acts without authorization from the President or from Congress are ineffectual for any purpose, and, moreover, such inspector did not attempt to reserve such land from sale or other disposition.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282; Dec. Dig. § 92.*]

2. UNITED STATES (§ 31*)—EVIDENCE (§ 83*)—EXECUTIVE DEPARTMENTS—PRESUMPTIONS AS TO ACTS.

The President may act through the heads of the different departments, and where the head of a department acts, it will be presumed, in the absence of evidence to the contrary, that he acted by direction of the President.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 19; Dec. Dig. § 31; * Evidence, Cent. Dig. § 105; Dec. Dig. § 83.*]

3. PUBLIC LANDS (§ 92*)—RESERVATION FROM SALE—EFFECT.

An order of the President, reserving certain public lands from sale or other disposition, was ineffectual as against a railroad company, which had already, prior to such order, acquired title to such land by locating its line of road thereon under a grant from Congress of a right of way across the public land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282; Dec. Dig. § 92.*]

4. PUBLIC LANDS (§ 92*)—RESERVATION FROM SALE—WHAT CONSTITUTES.

An order of a brigadier general in command of a department of the army, reciting that, in consequence of a promise made by an inspector of the Interior Department to have a certain tract of land set aside for certain Indians, the Indians were expecting an executive order to that effect, and therefore directing that, in order to preserve the peace until the pledge of the government should be fulfilled, or other arrangements accomplished, such tract, until surveyed, or until further instructions, should be protected against settlement by other than such Indians, did not reserve such tract from sale or other disposition, so as to prevent a railroad company locating its line of road thereon under a grant from Congress of a right of way, since under Rev. St. § 463 (U. S. Comp. St. 1901, p. 262), the Commissioner of Indian Affairs has the management of all Indian affairs and all matters arising out of Indian relations, under the direction of the Secretary of the Interior, and subject to such regulations as the President may prescribe, and it was therefore unlikely that the War Department would attempt to establish an Indian reservation or reserve lands for that purpose, the order showed plainly on its face that it was a temporary emergency order, and moreover, while the court might presume that the head of a department acted by direction of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the President, in the absence of evidence to the contrary, it could not so presume with regard to other civil and military officers, of whatever grade.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282; Dec. Dig. § 92.*]

At Law. Action by the Northern Pacific Railway Company against Dennis Mitchell. Judgment for plaintiff.

E. J. Cannon, of Spokane, Wash., for plaintiff.

Oscar Cain, U. S. Atty., of Spokane, Wash., for defendant.

RUDKIN, District Judge. This is an action in ejectment to recover a quarter section of land lying in an odd section within the limits of what was heretofore known as the Spokane Indian reservation, and also within the limits of the grant to the Northern Pacific Railroad Company, under the Act of Congress of July 2, 1864 (13 Stat. 365, c. 217).

Inasmuch as the rights of the parties depend upon the solution of a single question, an extended statement of the facts in the case is at this time deemed immaterial. It is conceded that the plaintiff is the owner in fee of the land, and is entitled to recover unless the land was *reserved* when its predecessor in interest filed the map of definite location of its road, opposite this land, in the office of the Commissioner of the General Land Office on the 4th day of October, 1880. The defendant, who is a homesteader on the land, and who is defending through the United States attorney for this district, claims that the land was reserved at the date of the filing of the map of definite location by reason of the following recommendations and orders:

[1] 1. On the 23d day of August, 1877, E. C. Watkins, an inspector of the Indian Department, made a report to the Commissioner of Indian Affairs containing the following recommendations:

"The Spokans wanted a separate reservation along the Spokan river, but, with the contemplated plan of consolidating Indians, and reducing reservations, in my mind, as also the fact of much of the best land along the Spokan river, being already in the possession of the whites, I could not favor it. But after much talk, and full description of the country, given by white men, and Indians familiar with it, I decided to recommend that a piece of land lying north of the Spokan, near its mouth, about twenty miles square, be set apart for the Spokan Patonse, and other roaming Indians of the vicinity. The description is as follows: Beginning at the mouth of the Nomchin creek; thence easterly, to the source of the Chamokane creek; thence down the Chamokane to the Spokan river; thence down the Spokan river to the Columbia; thence up the Columbia to the place of beginning. There are no white settlers living on this tract, and it is a central point for the Indians, proposed to be placed on it, adjacent to the present Colville reserve and forming the proposed addition, and a suitable place for a permanent Indian reserve. It has natural boundaries, is not large, but has a fair proportion of arable land, enough to furnish a farm to every Indian, and is entirely satisfactory to the Lower Spokans, and many of the Upper band, and the Patonse Indians. All these gave me their written promise to remove to this location by the 1st of November next. (I inclose the agreement with this report.)"

On the 3d day of September, 1880, Brigadier General Howard, of the Department of the Columbia, made the following special order:

"Headquarters Department of the Columbia.

"In the Field, Spokane Falls, W. T., September 3, 1880.

"Special Field Orders. No. 8.

"Whereas, in consequence of a promise made in August, 1877, by E. C. Watkins, inspector of the Interior Department, to set apart, or have set apart, for the use of the Spokane Indians, the following described territory, to wit: Commencing at the mouth of the Cham-a-kane creek; thence north eight miles in direction of said creek; thence due west to the Columbia river; thence along the Columbia and Spokane rivers to the point of beginning—the Indians are still expecting the executive order in their case, and are much disturbed by the attempts of squatters to locate land within said limits; it is hereby directed that the above described territory, being still unsurveyed, be protected against settlement by other than said Indians, until the survey shall be made, or until further instructions. This order is based upon plain necessity to preserve the peace until the pledge of the government shall be fulfilled, or other arrangements accomplished. The commanding officers of Forts Cœur d'Alene and Colville and Camp Chelan are charged with the proper execution of this order.

"By command of Brigadier General Howard:

"H. H. Pierce,

"1st Lieutenant, 21st Infantry,

Acting Aide-de-Camp.

"Official:

"H. H. Pierce, Acting Aide-de-Camp."

On the 18th day of January, 1881, the President of the United States made the following order:

"Executive Mansion, January 18, 1881.

"It is hereby ordered that the following tract of land situated in Washington territory be, and the same is hereby, set aside and reserved for the use and occupancy of the Spokane Indians, namely: Commencing at a point where Chemekane creek crosses the forty-eighth parallel of latitude; thence down the east bank of said creek to where it enters the Spokane river; thence across said Spokane river westwardly along the southern bank thereof to a point where it enters the Columbia river; thence across the Columbia river northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude; thence east along said parallel to the place of beginning.

R. B. Hayes."

Before taking up these several recommendations and orders, it may not be out of place to inquire briefly into the source of the power to reserve public lands of the United States from sale or other disposition. This power is vested in Congress by article 4 of section 3 of the Constitution of the United States. The power thus conferred may doubtless be exercised by legislative act or by treaty, and it may also be delegated to the President by Congress, as has been done in numerous instances. Thus in *Grisar v. McDowell*, 6 Wall. 363, 381 (18 L. Ed. 863), the court said:

"But, further than this, from an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses. The authority of the President in this respect is recognized in numerous acts of Congress. Thus, in the Pre-emption Act of May 29, 1830, it is provided that the right of pre-emption contemplated by the act shall not 'extend to any land which is reserved from sale by act of Congress, or by order of the President, or which may have been appropriated for any purpose whatever.' Again, in

the Pre-emption Act of September 4, 1841, 'lands included in any reservation by any treaty, law, or *proclamation of the President* of the United States, or reserved for salines or for other purposes,' are exempted from entry under the act. So by the act of March 3, 1853, providing for the survey of the public lands in California, and extending the pre-emption system to them, it is declared that all public lands in that state shall be subject to pre-emption, and offered at public sale, with certain specific exceptions, and among others 'of lands appropriated under the authority of this act, or *reserved by competent authority*.' The provisions in the acts of 1830 and 1841 show very clearly that by 'competent authority' is meant the authority of the President, and officers acting under his direction."

[2] It is also well settled that the President may act through the heads of the different departments, and if the head of one of the executive departments acts it will be presumed, in the absence of evidence to the contrary, that he acted by direction of the President. *Wilcox v. Jackson*, 13 Pet. 513, 10 L. Ed. 264; *Scott v. Carew*, 196 U. S. 100, 25 Sup. Ct. 193, 49 L. Ed. 403.

But, so far as I am advised, no such power has been delegated to other subordinate officers of the government, whether civil or military, and the acts of such officers, without authorization from the President or from Congress, are ineffectual for any purpose.

Let us return, now, to the report of Inspector Watkins. It does not appear that that officer had any authority, except such as his official title might import. He could not establish Indian reservations, or reserve public lands from sale or other disposition, and did not attempt to do so. No action was taken upon his report by his superior officers, except by letter of the Commissioner of Indian Affairs transmitting the report to the Secretary of the Interior, and by letter of the latter transmitting the report to the Senate, in obedience to a resolution of that body, copies of which follow:

"Department of the Interior, Office of Indian Affairs.

"Washington, January 22, 1878.

"Sir: I have the honor to submit herewith a copy of the report of Inspector E. C. Watkins, dated November 26, 1877, concerning the consolidation of the Indians of Oregon and Washington Territory, together with copy of letter of November 24, from G. A. Henry, special Indian agent at the Quinaielt Agency, Washington Territory. I entertain no doubt of the advisability of consolidating these Indians. I am clearly of the opinion, however, that it will be unwise policy to encourage those Indians who are now farming to remain in their present locations. They should all be consolidated upon the reservation selected, and the title, which may be given to them in severalty, should be made inalienable. The experience which has heretofore attended the granting of individual titles to Indians in localities where they are surrounded by the whites, versed in all the machinations by which the Indians are systematically circumvented and ruined in property and discouraged in civilization, compels me to disapprove of so much of Inspector Watkins' recommendation as is included in brackets on pages — and — of said copy of his report. Such consolidation, accompanied with individual proprietorship, would relieve the country outside of their presence, and would enable the government to exercise a system of direct protection, education, and civilization, of which the Indians are in imperative need, and without which their general improvement cannot be anticipated. With these brief suggestions, and except as above stated, I heartily recommend the speedy adoption of the proposed plan.

"Very respectfully, your obedient servant,

"E. A. Hayt, Commissioner.

"Hon. Secretary of the Interior."

"Department of the Interior.

"Washington, January 23, 1878.

"Sir: In compliance with the terms of a resolution of the Senate, adopted January 15, 1878, I transmit herewith a copy of the report of Indian Inspector E. C. Watkins, dated November 26, 1877, relative to the establishment of a large Indian reservation or territory in the Colville country, for the use and occupation of a portion or all reservation Indians now on the various reservations in the state of Oregon and in the territory of Washington. I inclose also a copy of a letter addressed to me by the Commissioner of Indian Affairs on the 22d instant, forwarding a copy of said report, and recommending the adoption, in part, of the plan of the inspector. I am of opinion that the proposed consolidation of agencies will be of advantage both to the government and to the Indians, and I respectfully suggest such appropriate legislation by Congress as will enable the department to carry it into effect.

"I have the honor to be, sir, with great respect, your obedient servant,

"C. Schurz, Secretary of the Interior.

"The Vice President."

In so far as this report and the action taken thereon is concerned, it seems manifest, therefore, that the lands in question were not reserved by Congress or by competent authority at the time of the filing of the map of definite location.

[3] 2. We will next take up, out of order, the executive order of President Hayes. It will be at once conceded that this order reserved the lands therein described, if public lands of the United States at that time; but title had vested in the railroad company some months prior to the date of the order, and it was without the power of the President to divest that title or affect the status of the land in any way. *Scott v. Carew*, supra.

[4] 3. The chief, if not the sole, reliance of the attorney for the government on the argument was the order of Brigadier General Howard. It seems to me there are several insuperable objections to this view:

First. The Commissioner of Indian Affairs had the management of all Indian affairs and of all matters arising out of Indian relations, under the direction of the Secretary of the Interior, and subject to such regulations as the President might prescribe, at the time this order was made (R. S. U. S. § 463 [U. S. Comp. St. 1901, p. 262]), and it is far from likely that the Secretary of War would attempt to establish an Indian reservation or reserve lands for that purpose, as such action on his part would be a plain encroachment on the prerogatives of another department of the government.

Second. The order of Brigadier General Howard shows very plainly on its face that it was a temporary emergency order, made by him on his own responsibility, by virtue of his authority as an army officer to maintain peace among the Indians.

And, lastly, although the court will presume that the head of a department acts by direction of the President, in the absence of evidence to the contrary, this presumption does not extend down the line to all civil and military officers of the government of whatever grade. The effect of a similar order was considered by Judges Sawyer and Dundy of the Circuit Court for this Circuit in *United States v. Tich-*

enor (C. C.) 12 Fed. 415, and in answer to the contention now made the court said:

"It may be admitted, as suggested in *Wilcox v. Jackson*, 13 Pet. 513 [10 L. Ed. 264], that if the order directing the reservation to be made had been issued by the Secretary of War, the head of the department through whom the President would speak and act upon the subject, in the absence of evidence to the contrary, it would be presumed that he acted by the direction of the President. But neither Gen. Hitchcock nor Lieut. Wyman had any authority to designate or establish a reservation at Port Orford for any purpose. It is not alleged that they were acting in the premises under the authority of the President, and there is no presumption of law that they were. It may also be admitted that Gen. Hitchcock could direct his subaltern, engaged in military operations in Oregon, to establish and occupy a camp or fort on the public lands therein, or that the latter might do so under the circumstances without any direction from the former. But such use or occupation would not have the effect to impart any special character to the land, or constitute it a reservation for any purpose, within the purview of the donation act. It would still remain open to the claim of any qualified settler under the act, and as soon, at least, as the camp or post was removed or abandoned by the military force, might be actually occupied by any such settler."

The above language was quoted by the Supreme Court of the United States with apparent approval in *Scott v. Carew*, *supra*.

For the foregoing reasons, I am of opinion that the land in controversy was not reserved by Congress or by competent authority at the time the Northern Pacific Railroad Company filed its map of definite location of its line opposite thereto, and if I am correct in this conclusion the plaintiff is entitled to recover. Let a judgment be entered accordingly.

NOTE.—The court was in error in stating that the report of Inspector Watkins, dated Lewiston, Idaho, August 23, 1877, was transmitted by the Commissioner of Indian Affairs to the Secretary of the Interior and by the latter to the Senate, because there is no evidence before the court that any action whatever was taken on that report. The report referred to in the letters of the Commissioner and Secretary was a later one, made at Washington City under date of November 26, 1877. This error, however, in no wise affects the conclusion of the court on the merits of the case.

BUCK et ux. v. FELDER et al.

(District Court, M. D. Tennessee, Nashville Division. December 30, 1912.)

No. 3,673.

EQUITY (§ 362*)—INVOLUNTARY DISMISSAL BEFORE HEARING—WANT OF PROSECUTION.

While a court of equity has power in its discretion to dismiss a suit for want of prosecution because of complainant's failure to diligently take steps to bring the defendants before the court, such action should usually be preceded by a rule to speed served on complainant. A summary dismissal without such rule is not authorized, where some of the defendants

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

have been served with process and appeared and the motion to dismiss followed within seven months of the disposition of motions and demurrers filed by them.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 758-761; Dec. Dig. § 362.*]

In Equity. Suit by Thomas Buck and Katie Buck, his wife, against Thomas J. Felder and wife and others. On motion by defendants to dismiss. Overruled on condition.

See, also, 196 Fed. 419.

This bill was filed in the Chancery Court of Davidson County, Tennessee, by Thomas Buck and Katie Buck, his wife, residents of said county, against Thomas J. Felder and wife, residents and citizens of the State of New York, the Columbia Finance & Trust Company, a corporation under the laws of the State of Kentucky, and the Murphy Land Company and Ward's Seminary, both corporations under the laws of the State of Tennessee. The bill alleged that the complainant, Katie Buck, was one of the next of kin and heirs at law of Mrs. Anna H. Murphy, deceased, and sought, among other things, to set aside a deed of trust that had been executed by Mrs. Murphy to the Columbia Finance & Trust Company, conveying to it certain property for the use of Felder and wife, her adopted children and the devisees and beneficiaries under her will; and also to set aside the proceedings by which Felder and wife had been adopted by Mrs. Murphy, and other separate conveyances of property that had been made by Mrs. Murphy to the Murphy Land Company and to Ward's Seminary. Before any process had been issued in the Chancery Court for either the Columbia Finance & Trust Company, or for Felder and wife, the case was removed to the United States Circuit Court for the Middle District of Tennessee, on the petition of the Trust Company; and complainants' motion to remand the case was subsequently overruled. Buck v. Felder (C. C.) 196 Fed. 419 (erroneously entitled as in the District Court, the provisions of the Judicial Code abolishing the Circuit Court not having then gone into effect). Certain other proceedings having been had in the cause, as more fully appears from the opinion, the defendants, Felder and wife, the Land Company, and the Trust Company, on Oct. 17, 1912, jointly entered their special appearance and moved the court to dismiss the bill for want of proper prosecution.

Theo. Parker and Laurent Brown, both of Nashville, Tenn., for complainants.

John J. Vertrees, Jas. C. Bradford, R. T. Smith, and Wm. O. Vertrees, all of Nashville, Tenn., for defendants.

SANFORD, District Judge. The defendants, Felder and wife, Murphy Land Company, and Columbia Finance & Trust Company, appeared especially for the purpose and moved to dismiss the bill "for want of proper prosecution."

The status of the suit is as follows: This bill was filed in the Chancery Court of Davidson County, Tennessee, on April 19, 1911, against Felder and wife, citizens of New York, the Columbia Finance & Trust Company, a citizen of Kentucky, and the Murphy Land Company, and Ward's Seminary, citizens of Tennessee. Subpoena for the Murphy Land Company and Ward's Seminary was issued April 21, 1911, and returned as executed on April 24, 1911. On May 3, 1911, the Columbia Finance & Trust Co., for which no subpoena to answer had been issued, filed a petition in the Chancery Court for the removal of the suit to this court, which was granted. The transcript of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

record having been filed in this court, the Murphy Land Co., on October 9, 1911, appeared specially and moved to quash the sheriff's return of process as to it; and on October 11, 1911, Ward's Seminary filed a demurrer to the bill. The complainants did not file briefs in opposition to either the motion to quash or the demurrer, as required by the rules of court, but on October 13, 1911, moved to remand the cause to the Chancery Court. On December 20, 1911, an order was entered overruling the complainants' motion to remand. On March 14, 1912, an order was entered sustaining the demurrer of Ward's Seminary and dismissing the bill as to it. On March 25, 1912, an order was entered quashing the return of process as to the Murphy Land Co. On March 25, 1912, complainants filed a paper stating that they "will move" the court for leave to amend the bill. This was treated by the clerk as merely a notice that they intended to make a motion, and not as a motion, and was never submitted to the court for action thereon.

No other step having been taken in the prosecution of the cause, the aforesaid defendants on October 18, 1912, jointly entered their special appearances and moved the court to dismiss the bill for want of proper prosecution. The grounds of this motion, in so far as made specific in the supporting brief, are that the record shows that no process has ever been issued against Felder and wife and the Columbia Finance & Trust Co. and that no further attempt has been made to serve process on the Murphy Land Co. since the first return of process was quashed.

Notice of this motion having been given to complainants' solicitor, he has appeared and resisted the motion to dismiss the suit, stating at the bar as the reason that steps have not been taken to bring Felder and wife before the court that it was expected that they would enter their appearances; but no ground for such expectation has been stated. He also now insists in a brief filed in opposition to the motion that the defendants through their so-called special appearances have in law entered their general appearances in the case, and asks in his brief that, if this be not the case, an order of publication be now made for Felder and wife and the Columbia Finance & Trust Co., and for alias process as to the Murphy Land Co.

From a certificate filed with the motion to dismiss it appears that the complainants have received, since the bill was filed, from thirteen different purchasers from the Murphy Land Co. of lots or tracts lying within the lands involved in this litigation, various sums, ranging from \$10.00 to \$150.00, in consideration of which they have executed quitclaim deeds or other releases to the claimants to such lots; and it is insisted in behalf of the defendants that the prosecution of the suit has been delayed in order to enable complainants to levy this toll upon purchasers of lots, and that by reason of the lack of diligent prosecution, this suit is a burdensome cloud upon the title to the property involved, which impedes the making of deeds, the execution of mortgages by purchasers of lots, and the like.

The Equity Rules promulgated by the Supreme Court of the United States in 1842 do not provide for the dismissal of a bill for failure to

diligently take steps to bring the defendant before the court, but merely for failure to take the required steps in pleading after the defendant has filed a demurrer, plea or answer to the bill. Equity Rules 38, 66; 2 Bates' Fed. Eq. Prac. § 661, p. 712.

Nor was there, it seems, any such provision in the then practice of the English High Court of Chancery, which was adopted by Equity Rule 90 so far as reasonably applicable; the English chancery practice at that time apparently only providing for a motion to dismiss for failure to prosecute at the instance of a defendant who had answered the bill. See 1 Daniell's Chanc. Pract., Amer. Ed. 1846, McKinley & Lescure's Law Library, 540; Thomson v. Wooster, 114 U. S. 104, 112, note by the court (5 Sup. Ct. 788, 29 L. Ed. 105); 1 Street's Fed. Eq. Pract. § 121, p. 74. By later rules, however, the English High Court of Chancery appears to have permitted a defendant who had not been required to answer the bill, and had not answered it, to apply for an order to dismiss the bill for want of prosecution at any time after the expiration of three months from the time of his appearance. 1 Daniell's Chanc. Pract. 4th Amer. Ed. 803.

However, the general authority of a court of equity, independently of statute or rule of court, to dismiss a suit for want of diligence in its prosecution, in the exercise of a sound judicial discretion, is well settled. *Picquet v. Swan*, 5 Mason, 561, 19 Fed. Cas. 617, 619 (Story, Circuit Justice); *Colorado Ry. Co. v. Railway Co.* (C. C. A. 8) 94 Fed. 312, 36 C. C. A. 263; *Jessup v. Railroad Co.* (C. C.) 36 Fed. 735, 736; *Brown v. Fletcher* (C. C.) 140 Fed. 639; 14 Cyc. 443, 444, 451; 6 Enc. Pl. & Pr. 904; 2 Street's Fed. Eq. Pract. § 1345, p. 815.

In general, however, the practice is that a rule on the complainant to proceed in the cause, commonly called a rule to speed, must precede a motion to dismiss for want of prosecution. 14 Cyc. 448, and cases cited. And see *Picquet v. Swan*, *supra*, giving details as to the English practice in this respect. And such rule to speed is specifically provided for by the statutory rules of chancery practice in Tennessee. Code of Tennessee, §§ 4389-4390 (Shannon's Code, §§ 6199, 6200). See *Ford v. Bartlett*, 3 Baxt. (Tenn.) 20; *Kain v. Ross*, 1 Lea (Tenn.) 76.

In only two cases that I have been able to find does it appear that the court has, in the exercise of its discretion, dismissed a bill for failure to diligently prosecute, without a preliminary rule to speed, and at the instance of a defendant who had not been served with process, and who appeared specially for the purposes of the motion.

In *Houston v. San Francisco* (C. C.) 47 Fed. 337, the bill was filed on June 20, 1889, against the city and county of San Francisco and about one hundred individual defendants to assert title to property of the value of many millions of dollars. No subpoena having ever issued under this bill, the complainant filed an amended bill naming about fifteen thousand other persons as defendants, but although a subpoena and alias subpoena issued under the amended bill, neither of them was placed in the hands of the marshal for service. And in the meantime the complainant exacted and obtained in a multitude of instances pecuniary compensation from persons in possession of the

property claimed, for the release of his claims. In August, 1891, more than two years after the filing of the bill, the city and county appeared specially and moved to dismiss the bill upon the ground that no effort had ever been made to obtain service upon the defendants. It was held by Mr. Justice Field, sitting at circuit, that under these circumstances, for such failure to prosecute, the suit might properly be dismissed, no reasonable or just excuse having been offered for the delay, which, in his opinion, was evidently intentional and in pursuance of a dishonest purpose on the part of the complainant and his solicitor; the court furthermore expressing the opinion that the suit was entirely without substantial foundation.

And in *Bancroft v. Sawin*, 143 Mass. 144, 9 N. E. 539, it was held that where a bill to redeem land from mortgage was filed, but no subpoena was taken out and served upon the defendants for more than two years, and the defendants appeared specially and moved to dismiss the bill for want of prosecution, the same was properly dismissed. The court said: "We have no doubt that, in case of gross and improper delay between the time of filing the bill and of taking out or service of the subpoena, a court of equity, in the exercise of the judicial discretion belonging to it, may refuse its assistance to the plaintiff and direct the bill to be taken off the file. Such also is the plain intimation of several English and Irish decisions. *Coppin v. Grey*, 1 Y. & C. (Ch.) 205, 209; *Boyd v. Higginson*, Flan. & Kel. 603, 613; *Forster v. Thompson*, 4 Dru. & War. 303, 318."

The differences between these cases and that at bar are, however, obvious. In each of these cases no effort was made to bring any of the defendants before the court for more than two years, or other step taken, except the filing of an amended bill in the *Houston Case*. In the present case the bill had been filed about eighteen months before the motion to dismiss was filed. The Finance & Trust Co., after the bill was filed, voluntarily entered its appearance in the State court and caused the suit to be removed to this court, and has never in any way taken any step indicating that it did not consider itself now before this court for all purposes, a point which is not now decided. After this removal the complainants seasonably moved to remand the cause. The order overruling this motion was not entered until December 20, 1911, or about ten months before the motion to dismiss was filed. In the meantime the demurrer of Ward's Seminary was not finally disposed of until March 14, 1912, nor the process as to the Murphy Land Co. quashed until March 25, 1912, about seven months before the motion to dismiss was filed.

Furthermore, it does not appear that in either *Houston v. San Francisco*, supra, or *Bancroft v. Sawin*, supra, the complainant replied to the motion to dismiss by any offer to proceed in the prosecution of the case, as has been done in the case at bar. And in general a motion to dismiss may be avoided by supplying the defect complained of. *Gibson's Suits in Chancery* (2d Ed.) § 274, p. 227.

On the whole I conclude that in this state of the record, in spite of the delay in prosecution, it would be an improper exercise of judicial discretion to dismiss this bill summarily upon the defendants' motion,

without allowing the complainants an opportunity to take steps to prosecute within a reasonable time, and upon just conditions. 14 Cyc. 452, 453; 6 Enc. Pl. & Pr. 914, 915; and cases cited. An order will accordingly be entered providing that if within thirty days from its entry the complainants shall pay all the accrued costs in the cause and take steps to prosecute the cause, the defendants' motion will be overruled; but otherwise the motion will be sustained and the bill dismissed.

The question as to whether the effect of the defendants' appearance is to bring them generally before the court, is not properly before me at this time and is not adjudicated.

In re D. LEVY & SONS CO.

(District Court, D. Maryland. Oct. 31, 1913.)

1. MASTER AND SERVANT (§ 24*)—CONTRACT OF EMPLOYMENT—BREACH—BANKRUPTCY.

Where claimant continued to work and receive weekly payment of wages under a contract of employment after her employer had placed his affairs in the hands of a liquidating committee of his creditors, his act in so doing did not constitute a breach of the contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 18; Dec. Dig. § 24.*]

2. BANKRUPTCY (§ 318*)—CONTRACT OF EMPLOYMENT—BREACH.

An employé of a bankrupt under a contract for annual employment at a specified sum per week is not entitled to prove a claim against the estate in bankruptcy for damages for breach of the contract resulting from the adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482; Dec. Dig. § 318.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the D. Levy & Sons Company. Claim of employé for breach of contract of employment. On review of a referee's order denying the claim. Affirmed.

Myer Rosenbush, of Baltimore, Md., for exceptant.
Martin Lehmayr, of Baltimore, Md., for claimant.

ROSE, District Judge. The bankrupt corporation made ladies' shirt waists. The claimant, a Miss Grinoch, was a designer of them. On the 21st of September, 1912, she entered into a contract with the bankrupt to continue in its employ for a period of one year at the rate of \$60 per week. In December, 1912, the bankrupt became financially embarrassed. It placed its affairs in the hands of a liquidating committee of its creditors. This committee retained claimant's services. An involuntary petition in bankruptcy was filed in February, 1913. An adjudication promptly followed. While the referee liquidated the

*For other cases see same topic & § NUMBER in D. c. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiff's claim for \$1,000, he ruled that it was not provable. The claimant filed a petition for review. The specific question is whether installments of salary which have not been earned and are not due at the time of the filing of the petition in bankruptcy are then debts absolutely owing.

Claimant's contention may be briefly summarized. Whether claims for such salary are or are not provable depend entirely upon whether or not a breach of the contract of employment has been committed before bankruptcy or whether the bankruptcy itself operates as a breach. 3 Remington, 167.

So soon as one of the parties to an executory contract breaks or repudiates it, the other may sue, although the time for performance has not arrived. *Hochster v. Delatour*, 2 E. & B. 678; *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.

An adjudication in bankruptcy is, as of the date of the filing of the petition, an anticipatory breach by the bankrupt of its unfulfilled contracts. In *re Neff*, 19 Am. Bankr. Rep. 23, 157 Fed. 57, 84 C. C. A. 561, 28 L. R. A. (N. S.) 349; In *re Pettingill*, 14 Am. Bankr. Rep. 757, 137 Fed. 840, 70 C. C. A. 338; In *re Swift*, 7 Am. Bankr. Rep. 374, 112 Fed. 315, 50 C. C. A. 264; In *re Spittler* (D. C.) 18 Am. Bankr. Rep. 425, 151 Fed. 942; In *re Stern*, 8 Am. Bankr. Rep. 569, 116 Fed. 604, 54 C. C. A. 60; *Wood v. Fisk*, 156 App. Div. 497, 141 N. Y. Supp. 343; *Woodman on the Law of Trustees in Bankruptcy*, § 447. The above-stated principles are specifically applicable to a claim such as hers. In *re Silverman* (D. C.) 4 Am. Bankr. Rep. 83, 101 Fed. 219; In *re Dunlap Carpet Co.*, 20 Am. Bankr. Rep. 882, 163 Fed. 541. Some of the authorities say that it is not every adjudication in bankruptcy which amounts to an anticipatory breach but only those in which the adjudication is the result of a voluntary act on the part of the bankrupt.

[1] Claimant says that, when the bankrupt placed its affairs in the hands of a liquidating committee of its creditors, it voluntarily incapacitated itself from the further performance of the contract. This contention can scarcely be sustained. Neither the committee nor the claimant treated the contract as at an end. It continued to make weekly payments to her; she continued to accept them from it.

In this case the adjudication was in form voluntary. She asserts that it was in substance otherwise. It is unnecessary to pass on that question. It is one which may be raised in not a few cases. Sometimes a bankrupt is anxious, and perhaps legitimately anxious, to have bankruptcy proceedings instituted at once. A voluntary petition must be accompanied by proper schedules. The preparation of such schedules may take some time. A creditors' petition can be filed with greater expedition. It does not seem desirable that the provability of such a claim as that here at issue shall depend upon a distinction which may so often be without real substance. The trustee and the objecting creditors rely upon *In re Inman & Co.* (D. C.) 171 Fed. 185; *In re American Vacuum Cleaner Co.* (D. C.) 192 Fed. 939. In the former of those cases Judge Newman made an elaborate review of all the authorities. If the cases of *In re Silverman* and *In re Dunlap*

Carpet Co., *supra*, go to the length for which claimant contends, he refused to follow them. It should be stated that the opinion in the later one of the two, viz., *In re Dunlap Carpet Co.*, was delivered by then District, now Circuit, Judge McPherson. Judge McPherson sat as a member of the Circuit Court of Appeals for the Third Circuit in the subsequent case of *In re Dr. Voorhees Awning Hood Co.*, 188 Fed. 425, 110 C. C. A. 215. From an examination of the report of that case in the District Court in 187 Fed. 611, it would appear that in effect the decision of the Circuit Court of Appeals is in harmony with *In re Inman & Co.* rather than with *In re Dunlap Carpet Co.* I do not feel certain, however, that the mind of the court was specifically directed to the particular question now under consideration.

[2] The more persuasive case is one which does not deal with this specific question at all. *In Re Roth & Appel*, 181 Fed. 668, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270, the Circuit Court of Appeals for the Second Circuit held that a claim for installments of rent falling due after the filing of a petition in bankruptcy was not provable, because in their opinion such claim was altogether contingent. They say rent is a sum stipulated to be paid for the use and enjoyment of land. The occupation of the land is the consideration for the rent. If the right to occupy terminates, the obligation to pay ceases. Consequently a covenant to pay rent creates no debt until the time stipulated for payment arrives. The compensation contracted to be given in the future for services still to be rendered is a sum stipulated to be paid for such services. The rendition of the services is the consideration for it. If the right to demand such services terminates, the obligation to pay for them ceases precisely as in the case of rent.

The Circuit Court of Appeals further says that the lessee may quit the premises with the lessor's consent precisely as in contracts of service the contract may at any time be terminated by mutual consent. That distinguished court felt that rent contracts and contracts for services were in the same class and cited as authority for their own decision *In re Inman & Co.*, *supra*.

Roth v. Appel has been expressly followed by the Circuit Court of Appeals for the Ninth Circuit in *Colman v. Withoft*, 195 Fed. 250, 115 C. C. A. 222. It is not easy to distinguish between contracts which are contingent and those which are not. It is highly important that the rule applied in such matters shall be uniform. The later cases and those of the higher authority reject such claim as that made in this case. I should not feel justified in differing with them even if I had a greater theoretical doubt as to their correctness than I do in fact entertain. They certainly are not opposed to any sound public policy. There are some grave objections to upholding such contracts against a bankrupt's estate. No one will ever try to do so when the market value of his services is equal to or exceeds the value placed upon them by his contract with the bankrupt. Claims of this kind will be most insistently urged in those very cases in which the disparity between the contract and the market value of the services is the greatest. Such differences will be perhaps most marked when the contract valuation is the result of the partiality of relatives and friends or of the recipro-

cally high appreciation which the different salaried officers of a corporation may have of each other.

For the reasons stated, the order of the referee will be affirmed at the cost of the claimant.

FALLS CITY CONST. CO. v. MONROE COUNTY.

(District Court, E. D. Arkansas, W. D. October 27, 1913.)

1. ABATEMENT AND REVIVAL (§ 12*) — OTHER ACTION¹ PENDING — DIFFERENT JURISDICTIONS—STATE AND FEDERAL COURTS.

The pendency of an action in a state court is no bar to proceedings concerning the same matter in a federal court having jurisdiction; since, where both the state and federal courts have concurrent jurisdiction, the federal jurisdiction may be invoked and the cause carried to judgment, notwithstanding the state court may have taken jurisdiction of the same controversy.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 87-91, 94, 95, 98; Dec. Dig. § 12.*]

2. ABATEMENT AND REVIVAL (§ 5*)—NATURE OF PROCEEDING—COUNTY COURT.

Const. Ark. adopted Oct. 30, 1874, art. 7, § 28, vested in the county courts jurisdiction of the fiscal affairs of their counties, and Kirby's Dig. § 1175, provides that whenever the county court may deem it expedient to call in outstanding warrants of the county to redeem, cancel, reissue, or classify the same, the court shall make an order to that effect fixing the time for the presentation of such warrants which shall be at least three months from the date of the order. *Held*, that proceedings in the county court under such section to call in county warrants were not judicial in character, so that the pendency thereof was not a bar to an action against the county to enforce the outstanding warrants.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 27-30, 99-104; Dec. Dig. § 5.*]

At Law. Action by the Falls City Construction Company against Monroe County. On demurrer to plea. Sustained.

The plaintiff seeks to recover a judgment on county warrants issued to it by the defendant county in payment for the construction of a courthouse. One of the defenses set up is the plea that there is another action pending in the county court of Monroe county, Ark., upon the same warrants. The plea is that "on the 7th day of July, 1913, the county court of Monroe county made an order that all warrants outstanding against said county of Monroe, issued prior to May 15, 1913, be called in, and all persons holding, owning, or controlling any warrants issued prior to May 15, 1913, were ordered to present the same to the county court on the 9th day of October, 1913, that the court may examine, redeem, cancel, reissue, or classify the same or allow same in such sums as may be legally due from Monroe county; that this suit was instituted after said order had been made and published, to wit, on September 8, 1913"; and that for this reason this action cannot be maintained.

The calling of the warrants for presentation to the county court was made under the provisions of section 1175 of Kirby's Digest of the Statutes of Arkansas, which is as follows: "Sec. 1175. Whenever the county court of any county may deem it expedient to call in the outstanding warrants of said county, in order to redeem, cancel, reissue or classify the same, or for any lawful purpose whatever, it shall be the duty of said court to make an order for that purpose, fixing the time for the presentation of said warrants, which shall be at least three months from the date of such order."

To this plea a demurrer was filed by the plaintiff upon two grounds: First, that the pendency of an action in a state court is not a good plea in abate-

¹For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment or in bar to an action involving the same issues in a court of the United States; and, second, that the proceeding in the county court is not a judicial proceeding nor an action at law or equity.

G. W. Smith and George F. Youmans, both of Ft. Smith, Ark., and A. B. Shafer, of Memphis, Tenn., for plaintiff.

C. F. Greenlee, of Brinkley, Ark., Thomas & Lee, of Clarendon, Ark., and Manning, Emerson & Morris, of Little Rock, Ark., for defendant.

TRIEBER, District Judge (after stating the facts as above). [1] Assuming for the present that the county courts of the state of Arkansas when calling in warrants for examination and reissuance under the provisions of the statutes of that state, as hereinbefore set out, are acting in a judicial capacity, and that the order calling in such warrants makes it an action pending in that court, the plea is bad, for it is well settled by all the authorities that the pendency of an action in a court of a foreign jurisdiction is no bar to maintaining an action in a domestic court of competent jurisdiction. For that purpose the national courts are deemed to be foreign to the state courts, although they are in the same state. It would serve no useful purpose to cite the numerous authorities sustaining this rule, as the late decision of the Supreme Court in *McClellan v. Carland*, 217 U. S. 268, 282, 30 Sup. Ct. 501, 505 (54 L. Ed. 762), is conclusive on this court. It was there held:

"The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction, for both the state and federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different states the federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case."

In that case the judge of the national court did not dismiss the action, but had stayed the hearing thereof until the state court, in which an action involving the same issues, and between the same parties, was pending, had disposed of it; the state court having first obtained jurisdiction. The Supreme Court granted a mandamus directing the judge to proceed with the case. The same rule has been recognized and followed by the Supreme Court of Arkansas in *Grider v. Apperson*, 32 Ark. 332, 335; *Moore v. Emerick*, 38 Ark. 203, 204. See, also, *Barber Asphalt Co. v. Morris*, 66 C. C. A. 55, 58, 132 Fed. 945, 948.

[2] Is the proceeding in the county court of Monroe county, as set out in the plea, a pending action or judicial proceeding?

The order of the county court calling in the warrants was made on July 7, 1913, calling in the warrants to be presented on the 9th day of October, 1913. On September 8, 1913, the plaintiff in this cause, not having made itself a party to the proceeding in the county court by filing or presenting its warrants, or in any way submitting itself to the jurisdiction of that court, instituted this suit, more than a month before the holders of these warrants were required to present them to the county court under its order.

Leaving out of consideration, for the present, the question whether there was any proceeding pending before the time the holders of the warrants were required to present them (October 9, 1913), are these proceedings in the county court of a judicial nature so that it may be said there is a pending cause affecting all holders of warrants issued prior to May 15, 1913?

At the time the present Constitution of this state was framed and adopted (it was adopted October 30, 1874), there were no county courts in this state. The fiscal affairs of the counties were then under the control of boards of supervisors, and the judicial powers vested by the present Constitution in the county courts were then in the circuit courts of the state. Chapter 17, Gantt's Digest of the Statutes of Arkansas 1874, entitled "Boards of Supervisors," and sections 1182 to 1184, c. 40, Gantt's Digest, entitled "Courts-Circuit." Among the powers granted to the boards of supervisors was that of calling in warrants, now exercised by the county court. Section 614, Gantt's Digest. Section 614 of Gantt's Digest is identical with section 1175 of Kirby's Digest, except that by an amendatory act, approved February 26, 1875, that section, which originally was enacted January 6, 1857, was changed, permitting such calls to be made annually instead of "not oftener than once in three years." That the board of supervisors had no judicial powers is unquestioned, as will be noticed by reference to chapter 170 of Gantt's Digest, and it was so expressly held by the Supreme Court of this state in *Maxey v. Mack*, 30 Ark. 472, 482. The present Constitution abolished the boards of supervisors and created the county courts. Section 23 of Schedule to the Constitution of 1874, which is as follows:

"The county courts provided for in this Constitution shall be regarded in law as a continuation of the boards of supervisors now existing by law."

By section 28 of article 7 of the Constitution of 1874, now in force, the jurisdiction of the county courts is as follows:

"The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties. The county court shall be held by one judge, except in cases otherwise herein provided."

Under these provisions of the Constitution, the county courts have been invested with power and jurisdiction to manage the fiscal affairs of the county, duties performed, under the old Constitution, by the boards of supervisors, and in addition thereto, with judicial powers in certain cases. Among the latter, county courts are given exclusive original jurisdiction in all cases and matters relating to bastardy proceedings (chapter 13, Kirby's Digest); to hear contests of elections involving county and township offices (section 2860, Kirby's Digest); to hear contests of elections for liquor licenses (section 5119, Kirby's Digest); to settle the accounts of collectors of the revenue (section 7162, Kirby's Digest); to render judgment against a defaulting collector and the sureties on his bond (*Pettigrew v. Washington County*, 43 Ark. 33); to determine contests for the removal of county seats

(*Russell v. Jacoway*, 33 Ark. 191); and certain other matters which it is unnecessary to set out in this opinion. In these cases the acts of the county courts and their judgments are entitled to the same respect, and have the same effect, as those of other courts of record; the statute making them courts of record. But that it is exercising judicial functions in matters of the nature here in controversy has been expressly negatived by this court in *Shirk v. Pulaski County*, 4 Dill. 209, 213, Fed. Cas. No. 12,794, and in *Wall v. Monroe County*, 103 U. S. 74, 79, 26 L. Ed. 430. In the last-cited case it was sought to obtain a judgment against the same county on its warrants which had been reissued under the provisions of the statute under which the county court is now seeking to proceed as set out in defendant's plea. The county pleaded a set-off against the original payee of the warrants. On behalf of the plaintiff, who had become the owner of the warrants by purchase for a valuable consideration, it was claimed that the action of the county court was a judicial determination and therefore conclusive, and not subject to collateral attack; that, the set-off having existed at the time those warrants were upon examination reissued, the judgment of the county court concluded the county. This contention was denied by the court without any extended argument upon the authority of *Shirk v. Pulaski County*. That case was therefore approved by the Supreme Court, which adopted it as its own conclusion as to the law governing acts of county courts of the state of Arkansas in matters of this nature.

The opinion in the *Shirk Case* was delivered by Circuit Judge Dillon and concurred in by the then District Judge Caldwell, at a later day and for many years the senior Circuit Judge of this circuit. The court there said:

"It is insisted, however, by the warrant holder, that the auditing of claims by the county court, or by its predecessor, the board of supervisors, and the issuing of a warrant for the amount found due a claimant, is a judicial act and a judicial determination of the question of the county's liability, which is binding on both the claimant and the county, unless reversed on appeal or set aside in some direct manner; and, as a consequence, that the liability of the county on warrants, or the consideration therefor, cannot be inquired into collaterally, or by way of defense to an action on the warrants. The statute of this state gives the county court power 'to audit, settle and direct the payment of all just demands against the county.' * * * The claimant may appeal from the allowance, or refusal to allow, but it has been decided that the county cannot. (Since then statutes have been enacted permitting any citizen or taxpayer to appeal on behalf of the county.) There is nothing peculiar in the legislation of Arkansas in the matter of auditing claims and issuing warrants therefor; and it has been decided in many states, and repeatedly, that such settlements have not the force of judicial judgments, which estop or conclude either the claimant or the county. * * * (Citing a number of cases.) Many more cases might be cited, but it is hardly necessary. The true rule is this: Within the limits of their power, as conferred by statute, the action of the county court, in determining the amount due a creditor of the county, in the absence of fraud, or, perhaps, mistake, binds the county; but the county court cannot bind the county by ordering a claim to be paid which is not made a county charge by statute, or by allowing more than the statute distinctly limits, or by an allowance in the face of a statutory prohibition."

The demurrer to the plea is sustained upon both grounds.

In re LEIGH.

CHICAGO TITLE & TRUST CO. v. NATIONAL HOLLOW BRAKE
BEAM CO.

(District Court, N. D. Illinois, E. D. November 4, 1913.)

No. 13,652.

1. BANKRUPTCY (§ 288*)—PREFERENCE—PAYMENT AFTER BANKRUPTCY—JURIS-
DICTION OF COURT.

A payment, made by a bankrupt to a creditor on an execution from money belonging to his estate after the filing of the petition in bankruptcy against him and received by the creditor with knowledge of his insolvency and the proceedings, is recoverable as a preference, and the court of bankruptcy has jurisdiction to make a summary order for its return.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

2. BANKRUPTCY (§ 140*)—LIABILITY OF ESTATE FOR TRUST FUND—EVIDENCE.

To charge a bankrupt estate with liability for a trust fund it must be clearly traced.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

In the matter of Edward B. Leigh, bankrupt. On review of order of referee for repayment of a preference by the National Hollow Brake Beam Company. Affirmed.

Gregory, Poppenhusen & McNab, of Chicago, Ill., for Chicago Title & Trust Co.

Randolph Laughlin, of St. Louis, Mo., for National Hollow Brake Beam Co.

SANBORN, District Judge. This is an application for review of an order made by the referee, directing that the beam company pay to the trustee the sum of \$4,811.13, paid to the beam company by the bankrupt as a preference.

On June 28, 1906, a petition was filed seeking to have Edward B. Leigh adjudged a bankrupt. The petitioning creditors were Henry D. Laughlin, National Hollow Brake Beam Company, and I. Brooks Anderson. Thereafter in said cause Leigh was adjudicated a bankrupt, and the Chicago Title & Trust Company appointed trustee.

On May 8, 1906, in the case of National Hollow Brake Beam Co. v. Edward B. Leigh, in the superior court of Cook county, a decree was entered against Leigh and in favor of the beam company for the sum of \$5,097. Upon that decree an execution was issued, and a levy made on certain real estate. This real estate was sold under said execution for \$775, and the execution satisfied to that extent. Later it was discovered that Leigh had no title to this real estate, and thereupon an order was entered by said superior court setting aside the sale. From this order Leigh appealed, and gave a surety bond. To obtain this bond he deposited with the surety company a certificate of deposit for \$775.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On July 11, 1906, 13 days after the filing of the petition in bankruptcy herein, the sheriff of Cook county, Ill., acting for the National Hollow Brake Beam Company, the complainant in the aforementioned case, made a demand upon Leigh on said execution, and thereupon Leigh paid to said sheriff the sum of \$4,811.13.

[1] The present proceedings were instituted by the trustee to secure to the estate, for the benefit of all of the creditors of Leigh, the said sum of \$4,811.13, so paid under said execution.

The grounds upon which the trustee relies are:

(a) The payment was made after the filing of the petition in bankruptcy, and at a time when Leigh was insolvent. The levy of an execution by a petitioning creditor after the filing of the petition in bankruptcy is a contempt of court.

(b) The National Hollow Brake Beam Company had full knowledge of Leigh's insolvency, as prior to the payment upon execution it had subscribed and sworn to the petition for bankruptcy, alleging the insolvency of Leigh.

(c) The effect of the payment to the National Hollow Brake Beam Company of the sum of \$4,811.13 was to prefer the beam company over the other creditors of Leigh, in that it obtained a larger percentage of its claim than the other creditors.

To sustain the allegations of the petition of the trustee, Edward B. Leigh, the bankrupt, was sworn and examined. His testimony, which has been forwarded to the court, shows that the money was paid by him out of salary due him from the Chicago Railway Equipment Company; that the money was never deposited in any bank, but the check of the equipment company was cashed and used in payment upon execution.

After a full hearing and argument before Referee Wean, an order was entered on June 24, 1909, directing the National Hollow Brake Beam Company to pay to the trustee the sum of \$4,811.13 within 30 days, unless good and sufficient cause be shown within that time. Thereupon the beam company attempted to show why the nisi order should not be made absolute, and by its present counsel filed a brief, which is attached to the papers forwarded to the court, and in which brief all the points and authorities were cited. Sufficient cause not being shown, an order was entered on December 2, 1909, directing the payment of this sum to the trustee.

[2] It was claimed by counsel for the beam company that although the money paid it by Leigh on the execution was his own money, drawn by him from the equipment company as his salary as an officer of the latter company, yet the proof shows that the beam company had the equitable ownership of a larger sum, by reason of Leigh's possession of a trust fund belonging to the beam company, and therefore it should not be compelled to restore the execution money. The facts relating to the handling of this trust fund are quite complicated, and need not be stated, because the evidence does not clearly show that this fund is still in existence. The money which Leigh paid the beam company on the execution was not its money, but his own, which he had paid himself as salary. Nor does it sufficiently appear that

the trust fund, of which Leigh had control a long time before, was still in his hands. Not only is the evidence on this point vague, but the special master and referee have both found the contrary. So there is no just course except to affirm the referee's order, if the court has jurisdiction. The following decisions affirm the rule that a trust fund must be clearly traced: *In re Marsh* (D. C.) 116 Fed. 396; *In re John Deere Plow Co.*, 137 Fed. 802, 70 C. C. A. 422; *In re Acheson Co.*, 170 Fed. 429, 95 C. C. A. 597; *In re Smith, Thorndyke & Brown Co.* (D. C.) 159 Fed. 269; *Id.*, 170 Fed. 900, 96 C. C. A. 76.

It is urged that the referee was without jurisdiction to direct the repayment, because the beam company was an adverse claimant, so that a plenary suit against it to recover the money was necessary. Since Leigh paid the execution 13 days after the filing of the bankruptcy petition, it is clear that a summary proceeding was proper. *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; *Bryan v. Bernheimer*, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; *In re Blum*, 202 Fed. 883, 121 C. C. A. 241.

An order should be entered confirming the orders of the referee.

In re STERN.

(District Court, N. D. Ohio, W. D. February 8, 1913.)

No. 2,046.

1. BANKRUPTCY (§ 398*)—EXEMPTIONS—CLAIMS FOR PURCHASE MONEY.

Gen. Code Ohio, § 11,738, provides for exemption to a debtor in lieu of homestead in a sum not exceeding \$500, to be selected out of personal property, but declares that no personal property shall be exempt from execution on a judgment for purchase money or any part thereof. *Bankr. Act* July 1, 1898, c. 541, § 47, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by *Act* June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), declares that the trustee as to all property coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings. *Held*, that where a bankrupt without means bought a stock of goods for \$1,900, giving a note to the seller for \$1,400, and borrowed \$500 from his father-in-law, and thereafter incurred certain other debts for goods purchased to renew the stock, and then became a bankrupt, he was not entitled to exemptions as against the claims for merchandise so purchased, but only as against creditors for money loaned.

[*Ed. Note.*—For other cases, see *Bankruptcy*, Cent. Dig. §§ 676, 677; Dec. Dig. § 398.*]

2. BANKRUPTCY (§ 399*)—EXEMPTIONS—SELECTION.

Gen. Code Ohio, § 11,738, provides an exemption to a debtor in lieu of homestead, and declares that he may hold exempt from levy and sale real or personal property to be selected by him, his agent, or attorney, before sale, not exceeding \$500 in value. *Held*, that where a bankrupt in Ohio permitted a sale of his assets without having selected the property he desired to hold exempt in lieu of homestead under such section, on the theory that he could claim the amount of the exemption in money

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from the proceeds of the sale of all of his assets, his right to such exemption was lost.

[Ed. Note.—For other cases, see Bankruptcy. Cent. Dig. §§ 657, 669; Dec. Dig. § 399.*]

In Bankruptcy. In the matter of Elias O. Stern. On petition to review a referee's order allowing exemptions. Petition granted in part.

W. A. Gossard, of Fremont, Ohio, for bankrupt.

Lewis B. Hall, of Toledo, Ohio, for trustee.

KILLITS, District Judge. This case is before the court on petition of the trustee for the review of the order of the referee allowing exemptions. The facts are as follows: In May, 1911, Stern, who is the head of a family and entitled to exemptions generally under the law of Ohio, bought a stock of merchandise for the agreed price of \$1,900. Stern testified with reference to the purchase price as follows:

"I had no money when I bought him out, I gave him a note for \$1,400 and borrowed \$500 from my father-in-law and paid this. The full consideration price was \$1,900."

He conducted the business until August 20, 1912, when he filed a voluntary petition in bankruptcy. His creditors are his father-in-law for the \$500 borrowed to make the first payment on the stock of goods, the holder of the note of \$1,400, given in part payment of the stock of goods, a man of whom he borrowed \$50 in cash (for what purpose the record does not suggest), and five wholesale houses, on open account, for merchandise purchased by him and placed in the store, in the amount of \$531. He scheduled as his assets his household furniture, some bills receivable of minor consequence, and the stock of merchandise, and with his petition demanded his exemptions as a householder in lieu of a homestead. The merchandise was appraised in the sum of \$1,218 and ordered sold. No selection was demanded by the bankrupt to meet his claim of homestead exemption, but the goods were permitted to be sold in bulk by the trustee. We judge from some of the comments of the referee that the sale was by the consent of the bankrupt, who expected to be allowed his exemptions out of the proceeds of sale. The stock brought the sum of \$660, and the referee allowed the bankrupt, in lieu of homestead, upon his claimed exemption, that proportion of \$500 which \$660 bore to the appraised value of the merchandise, namely, \$1,218, or the sum of \$270.75. The trustee contends that under the circumstances the bankrupt is not entitled to exemption.

Section 11,738, General Code of Ohio, providing for exemption in lieu of homestead in a sum not exceeding \$500, to be selected out of the personal property, contains, as its concluding sentence, this:

"No personal property shall be exempt from execution on a judgment rendered for the purchase price or any part thereof."

By the amendment of 1910 to section 47 of the Bankruptcy Act it is provided:

"And such trustee, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, reme-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dies, and powers of a creditor holding a lien by legal or equitable proceedings thereon."

Our view of this latter provision is that the trustee represents the several creditors, under this language, with varying powers and opportunities appropriate to the different status of the several creditors. He is, with respect to each of the five creditors holding accounts for merchandise going into the stock and becoming part of the stock of goods, in the position of a creditor holding a judgment rendered for the purchase price and, with respect to the several other creditors, a judgment creditor with the limitations inherent in the nature of their several claims.

[1] If this construction of the amendment of 1910 is valid—and we feel that we must so construe it to enable it to meet the purposes for which it was enacted—it follows that, as to the five claims for merchandise, the bankrupt is entitled to no exemptions; but as to the two creditors for money loaned, in the sum of \$1,400 and \$50, respectively, he would be entitled to exemptions under the General Code of Ohio. The claim for \$500 due his father-in-law is secured by chattel mortgage and is not considered here.

This solution of the question not only, it seems to us, squares with a proper construction of the several statutes, but approximates abstract justice, for it shocks one to think that a man in the bankrupt's position could acquire property in this way without the expenditure of a dollar of his own, live off of it for a length of time, and support his family from it, and through the exemption laws and the provisions of the Bankrupt Act actually make a profit out of the transaction at the expense of those who trusted him.

[2] If it may be objected to this solution that the language which we quote from section 11,738, General Code of Ohio, limits the right of the creditor holding a claim for the purchase price to avoid the exemption only as to the goods which he himself sold and which remain in the hands of the debtor and that the course outlined above permits such creditor to extend his opportunity beyond these limits and hold out against the debtor and the debtor's exemption rights moneys which were derived from the sale of property other than that involved in his claim, it is sufficient, we think, to call attention to the fact that the same section (11,738, General Code) provides an exemption in lieu of a homestead only in this language:

He "may hold exempt from levy and sale, real or personal property to be selected by such person, his agent or attorney, before sale, not exceeding five hundred dollars (\$500.00) in value."

In this case the debtor failed to select it. Had he followed the statute and made his selection in kind at the appraised value before sale and had he attempted to hold some of the goods involved in these claims for their purchase price, an opportunity then would have been given to the several creditors of this character to save their claims. Failing to select in kind before sale and permitting the goods to be sold in bulk, he has effected such a commingling of goods as renders it impossible for his creditors of the character under consid-

eration to secure their rights in any other way than that suggested above.

The referee finds in his report that the bankrupt did not make a selection in kind for the reason that "a part of the stock of merchandise would have been of no use to him save and except as to the amount he could sell the same for, and that he in good faith elected to have the whole stock disposed of together." Having made this selection, the bankrupt must bear the inconveniences it entails. The section of the Ohio Code quoted casts upon him the duty of moving first in the matter of selection of specific articles up to the value of \$500, to remain exempt from sale, in lieu of homestead. No one is obliged to perform this service for him or even to suggest to him that such is his right.

The petition for review will be granted so far as the order of the referee affects the creditors for merchandise sold; otherwise the order of the referee will be effective.

In re NUNEMAKER.

(District Court, N. D. Ohio, W. D. June 30, 1913.)

No. 2,066.

BANKRUPTCY (§ 398*)—ADMINISTRATION OF ESTATE—EXEMPTIONS—PROPERTY—SUBJECT—CLAIM FOR PURCHASE PRICE.

Since no property held by a bankrupt's trustee, which in case of an execution levy could not be selected in lieu of homestead exemption, is subject to such selection in bankruptcy proceedings, it was error to permit the bankrupt to select a stallion and an automobile as exempt in lieu of his homestead exemption, where such property had not been paid for, under Gen. Code Ohio, § 11,738, providing that no personal property shall be exempt from execution on a judgment rendered for the purchase price or any part thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 676, 677; Dec. Dig. § 398.*]

In Bankruptcy. In the matter of Cecil W. Nunemaker. On review of referee's order allowing certain personal property as exempt to the bankrupt in lieu of homestead. Reversed.

E. R. Voorhees, of Woodville, Ohio, for bankrupt.

Stephens & Reed, of Fostoria, Ohio, for petitioners.

KILLITS, District Judge. This case is now before the court on the exceptions of creditors Henry J. Adams and A. W. Green to the decision of the referee, confirming the allowance of a stallion and automobile to the bankrupt in lieu of homestead exemptions; these being property selected by him for that purpose. The question involves the application of General Orders in Bankruptcy No. 17 (89 Fed. viii, 32 C. C. A. xix), in connection with section 11,738, General Code of Ohio.

The General Order in question provides that objections to the report of the trustee allowing exemptions must be filed within 20 days,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which rule was not observed in this case; the objecting creditors not moving for a considerable time after the expiration of the 20 days.

The purchase price for the property in question had never been paid, so the referee finds; but he overrules the objections because they were not filed within 20 days.

The language of the section of the General Code pertinent here reads:

"No personal property shall be exempt from execution on a judgment rendered for the purchase price or any part thereof."

In the case of *In re Stern*, 208 Fed. 488, we held that creditors were entitled, through their representative, the trustee, to the status of judgment creditors, as contemplated by section 11,738, and that no property held by the trustee in bankruptcy, which, in case of an execution levy, could not be selected in lieu of homestead exemption, may be subject to such selection in bankruptcy proceedings. The consequence of such holding is that the action of the trustee in allowing selection to be made of property not subject to such treatment is absolutely void, not merely voidable, and that General Order No. 17, in our judgment, is not applicable. Absolutely no title to the bankrupt could be conferred to this property, at least not while the bankruptcy proceedings were pending.

Our judgment, therefore, is that the referee was wrong in permitting the bankrupt to retain the property in question.

UNITED STATES v. BREINHOLM.

(District Court, E. D. Washington, N. D. February 21, 1913.)

No. 1,549.

POST OFFICE (§ 48*)—MAILING NONMAILABLE MATTER—INDICTMENT.

To make good an indictment, under Cr. Code (Act March 4, 1909, c. 321) § 211, 35 Stat. 1129 (U. S. Comp. St. Supp. 1911, p. 1651), for mailing a nonmailable letter, giving information as to where and how and by whom and by what means certain acts and operations could and would be done and performed for procuring and producing an abortion, the letter set out need not be such that a stranger would know what information it gave, nor need the indictment contain explanatory matter to show that the letter did give such information.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.*]

Emma Breinholm was indicted for mailing a nonmailable letter. On demurrer to indictment. Demurree overruled.

Oscar Cain, U. S. Atty., of Spokane, Wash.

Smith & Mack, of Spokane, Wash., for defendant.

RUDKIN, District Judge. The indictment in this case, returned under section 211 of the Criminal Code of March 4, 1909, charges that on the 7th day of September, 1912, the defendant Breinholm did, with-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in the jurisdiction of this court, unlawfully and knowingly deposit and cause to be deposited for mailing and delivery, with knowledge of the contents thereof, in the post office of the United States at Spokane, Wash., a certain envelope then and there containing a nonmailable letter giving information as to where and how and by whom and by what means certain acts and operations could and would be done and performed for procuring and producing an abortion, which said letter was in words and figures as follows:

"Spokane, Wash., Sept. 7th, 1912.

"Mr. C. Pierson—Dear Sir: Your letter recd. I cannot say any thing in a letter—but the earliest you can come will be better for all around—your stay will be from four days to a week. Kindly write and let me know what time you will be here—and oblige yours,

Dr. E. Breinholt."

A demurrer has been interposed to the indictment for the reason that the facts and allegations therein contained do not constitute a crime against the laws of the United States. The argument in support of the demurrer is that the letter set forth in the indictment does not give any information as to where, how, by whom, or by what means acts and operations could and would be done and performed for procuring and producing an abortion. The demurrer is not well taken. A similar question came before the Supreme Court of the United States in the case of *Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550, and in answer to the contention now made Mr. Justice Brewer said:

"The gravamen of the complaint is that the defendant wrongfully used the mails for transmitting information to others of the place where such pictures could be obtained, and the allegation of possession is merely a statement of a fact tending to interpret the letter which he wrote and placed in the post office. It is said that the letter is not in itself obscene, lewd, or lascivious. This also may be conceded. But, however innocent on its face it may appear, if it conveyed, and was intended to convey, information in respect to the place or person where, or of whom, such objectionable matters could be obtained, it is within the statute."

True, in that case a letter written to the defendant and the possession in the defendant of certain obscene, lewd, and lascivious pictures were charged, for the purpose of explaining and interpreting the letter upon which the prosecution was based; but the court does not seem to have considered these allegations necessary or material, for further on in the opinion the court says:

"But it does not follow that everything referred to in the letter, or concerning which information is given therein, should be spread at length on the indictment. On the contrary, it is sufficient to allege its character and leave further disclosures to the introduction of evidence."

In *De Gignac v. United States*, 113 Fed. 197, 52 C. C. A. 71, the circular deposited in the mail contained little except an advertisement of a quartoscope or picture machine, together with the place where the machine was manufactured and for sale; but the indictment charged that the circular gave information where and of whom might be obtained certain obscene, lewd, and lascivious photographic pictures in the said circular called "Views." A demurrer was interposed to

the indictment in that case, as in this, and the argument of counsel for the defendant is thus stated by the court in its opinion:

"Counsel contend that an indictment drawn under this section for mailing prohibited matter, or for mailing a writing giving information where such matter may be obtained, is subject to the rule of pleading applicable to indictments for slander, libel, forgery, etc.; that the case at bar is strictly analogous to an indictment for criminal libel; that therefore, in order to make a good indictment, the writing itself must upon its face purport to be what is prohibited, or, failing in that, the indictment must contain explanatory allegations, averments, or writings showing that the writing itself, interpreted by such explanations, does contain what is prohibited."

In answer to this argument the Circuit Court of Appeals said:

"This contention cannot be sustained. The primary object of this federal enactment (section 3893, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2658]) is to protect the mails from corrupt communications. The incidental purpose of the law is to protect the public morals. The law has been construed by the Supreme Court. It is not necessary, in an indictment under this section, that all the words constituting the information should be pleaded with the particularity used in cases for libel and forgery. It is sufficient that the character of the information be described, leaving further disclosures to the introduction of evidence. The offense here denounced is the giving of information by mail where obscene matter may be obtained. Any communication by mail which does this is actionable. The gist of the offense is the giving of the information by mail. It is not necessary to aver ownership or possession of the obscene matter. Neither is it necessary to aver that the information was given to one who inquired for or desired the same. One very common purpose of those who violate this statute is the corruption of the young and the innocent. It is not necessary that the writing complained of should in terms describe obscene matter. The writing may be innocent and harmless on its face. Yet if it in fact gives information where obscene matter may be obtained, and the explanatory averment so states, it cannot save the plaintiffs in error harmless because the obscene matter in question is described by the indefinite term of 'Views.'"

A similar conclusion was reached by the Circuit Court of Appeals for this circuit in *Lee v. United States*, 156 Fed. 948, 84 C. C. A. 448, where the letter set forth in the indictment was fully as innocent and harmless as the letter now before the court. See, also, *United States v. Somers* (D. C.) 164 Fed. 259, where the questions decided in the *Lee Case* are more fully discussed.

The demurrer is overruled.

BRANDT et al. v. DAY.

(District Court, S. D. New York. September 16, 1913.)

BANKS AND BANKING (§ 96*)—CONTRACTS WITH CUSTOMER FOR PAYMENT OF DRAFTS—ACTION FOR BREACH.

Plaintiffs, as bankers, by arrangement with defendant, entered a credit on their books in favor of a company dealing in figs in Turkey, to be used by means of drafts with invoices of goods shipped to defendant attached, provided that the shipments should be made and the drafts negotiated prior to October 1st. A draft with invoice attached, dated September 28th, was presented to and accepted by plaintiffs, and defendant supplied the funds for its payment. *Held*, that plaintiffs were not liable for a loss sustained by defendant on the goods because the shipment and draft were in fact made after October 1st and fraudulently antedated, nor because defendant, merely on suspicion, notified them not to accept the draft; the papers being regular on their face and apparently within the contract.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 230; Dec. Dig. § 96.*]

At Law. Action by Augustus P. Brandt and others against Emily D. Day. On demurrer by plaintiffs to counterclaim. Demurrer sustained.

Bigelow & Wise, of New York City, for plaintiffs.
Herbert Goldmark, of New York City, for defendant.

HOLT, District Judge. This is a demurrer by the plaintiffs to a counterclaim set up in the defendant's answer. The counterclaim alleges, in substance, that plaintiffs, who are bankers, agreed with the defendant to open a credit for £3,000, in favor of the Smyrna Fig Packers, Limited, of Smyrna, Turkey, to be availed of by drafts drawn on plaintiffs for cost of figs purchased by defendant, provided shipments were completed and drafts negotiated before October 1, 1912; that a shipment was made and a draft drawn on October 9, 1912, but the bill of lading and draft were fraudulently dated on September 28, 1912; that before the draft was accepted, defendant, being suspicious that the goods had been shipped after October 1st, notified plaintiffs not to accept; that plaintiffs did accept; that after acceptance plaintiffs fraudulently stated to defendant that the goods had been shipped and the draft negotiated before October 1st, knowing that they had not been so shipped and negotiated; that defendant, relying on such statement, paid to plaintiffs funds necessary to meet the draft and accepted such shipment; that the goods sold for less than the amount advanced; and judgment is demanded for the amount of the loss.

The contract for credit provided that shipments were to be completed and drafts negotiated before October 1, 1912, and that duplicate invoices were to be attached to the drafts. It also provided that the plaintiffs should not be held responsible for the correctness or validity of the documents representing shipments. The defendant claims that the plaintiffs violated their contract by accepting the draft knowing that the goods had not been shipped or the draft negotiated before

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

October 1st, and by accepting the draft when it had no consular invoice attached. In respect to this last point I think the contract did not call for a consular invoice to be attached to the draft. That, in the ordinary course of business, would be sent to the importer to enable the goods to be entered in the custom house. The invoice attached to the draft and sent to the banker is usually a shipper's invoice, and I think that was the requirement of the contract in this case.

As to the point that the goods were shipped and the draft negotiated after October 1st, it must be borne in mind that the draft and bill of lading were dated September 28th, and were therefore regular on their face. Assuming that it was the plaintiffs' duty not to accept, if they knew that the shipment had been made after October 1st, all that appears is that the defendant, being suspicious that the shipment had been made too late, notified the plaintiffs not to accept. But the plaintiffs had confirmed their credit to the Fig Company at Smyrna, the vendors of the goods; the bill of lading and draft, when presented for acceptance, were dated September 28th; and in my opinion, the plaintiffs, under such circumstances, had no right to dishonor the draft, which had perhaps been negotiated after acceptance, merely because the defendant was suspicious. They were obliged to accept by their obligation to the Fig Company under their contract of credit, and by the provisions of their contract with defendant they were not to be held responsible for the correctness or validity of the documents.

The allegation that the plaintiffs were guilty of fraud in stating, after acceptance, that the goods has been shipped before October 1st, and by such statement induced the defendant to put them in funds to meet the draft, seems to me immaterial. The plaintiffs, having accepted the draft, were bound to pay it, and the defendant, by the contract, was bound to put the plaintiffs in funds to meet the draft. That obligation was not created, and could not be affected, by any statement made after acceptance.

If the Fig Company contracted with the defendant to ship the figs before October 1st, and the other allegations of the counterclaim are correct, the defendant apparently may have a cause of action against the Fig Company for breach of contract; but I cannot see that she has any ground of action against the bankers.

The demurrer is sustained.

CARY BRICK CO. v. TILTON.

(Circuit Court of Appeals, First Circuit. November 6, 1913.)

No. 1,013.

1. SHERIFFS AND CONSTABLES (§ 138*)—EXCESSIVE ATTACHMENT—ACTION FOR DAMAGES—ELEMENTS—BURDEN OF PROOF.

In an action against a deputy sheriff for an alleged excessive levy on a quantity of brick in plaintiff's kilns, the burden was on plaintiff to show that defendant attached the brick by taking them into his possession or placing them under his control, that the value of the brick taken was more than was reasonably necessary to satisfy the demand in the writ on which the attachment was made, and that defendant had knowledge of the excessive levy and did not honestly believe that the value of the property was no more than necessary to satisfy the *ad damnum* in the writ and, in making the levy, acted maliciously and with intent to harass and annoy plaintiff or to illegally compel payment of the demand.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 290-296; Dec. Dig. § 138.*]

2. SHERIFFS AND CONSTABLES (§ 109*)—ATTACHMENT—EXCESSIVE LEVY.

While a sheriff, in attaching a debtor's personal property, must determine the amount to be taken to answer the demand in the writ, he is not bound at his peril to see that the property taken does not exceed the sum demanded, but in the performance of his duty is vested with discretion and is only required to exercise an honest judgment and act in good faith, having due regard to the circumstances of the particular case.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 194; Dec. Dig. § 109.*]

3. ATTACHMENT (§ 175*)—BULKY ARTICLES—MODE OF ATTACHMENT—POSSESSION.

Rev. St. N. H. 1843, c. 184, § 14 (Pub. St. 1901, c. 220, § 16, as amended by Laws 1905, c. 43, § 1, and Laws 1907, c. 44, § 1), provides that the officer attaching grain unthreshed, hay, potatoes, and certain other designated bulky articles may leave an attested copy of the writ and of his return of such attachment thereon as in the attachment of real estate, and in such case the attachment shall not be dissolved or defeated by any neglect of the officer to retain actual possession of the property. *Held*, that such provision only prescribed an easier method of preserving attachments of various enumerated articles without changing the requirement that the officer must take the property into his possession or control in order to establish a valid attachment in the first instance; and hence the fact that an officer levying an attachment on a quantity of brick in plaintiff's kilns sought to preserve the same by leaving an attested copy of the writ with the town clerk did not indicate that the attachment did not divest plaintiff of possession and dominion over the brick attached and operate to transfer the same to the officer.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 518-523; Dec. Dig. § 175.*]

4. ATTACHMENT (§ 328*)—RETURN—CONCLUSIVENESS.

A sheriff's return of an attachment is conclusive as against him; it being presumed that he has taken such possession or control of the property as is necessary to render the attachment valid.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 1170-1173; Dec. Dig. § 328.*]

5. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action against a deputy sheriff for an alleged excessive levy, it appeared that he attached a large quantity of brick in plaintiff's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
208 F.—32

kilns by taking the same into his possession and preserving the attachment by leaving a copy of the writ with the town clerk as authorized by Rev. St. N. H. 1843, c. 184, § 14 (Pub. St. 1901, c. 220, § 16, as amended by Laws 1905, c. 43, § 1, and Laws 1907, c. 44, § 1), an erroneous instruction that in attaching bulky articles under such act, the debtor's possession and control of the property was not taken from him, and that the attachment of plaintiff's brick was for only the amount specified in the writ irrespective of their value, was prejudicial in preventing the jury from deciding what was the value of the property attached and whether the attachment was excessive, which were necessary elements of plaintiff's action for excessive levy.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

6. SHERIFFS AND CONSTABLES (§ 100*)—EXCESSIVE LEVY—"MALICE."

Negligence of a deputy sheriff in making a levy of an attachment is not "malice," and gross negligence is not the legal equivalent of willful and malicious conduct, since, while one's conduct may be so recklessly indifferent to another's welfare that it may be found to be malicious in fact, there is no presumption of law that such conduct is willful and malicious.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 158-173; Dec. Dig. § 100;*

For other definitions, see Words and Phrases, vol. 5, pp. 4298-4304; vol. 8, pp. 7712, 7713.]

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action by the Cary Brick Company against Frank O. Tilton. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Charles W. Lovett, of Lynn, Mass. (N. D. A. Clarke, of Lynn, Mass., on the brief), for plaintiff in error.

Edwin G. Eastman, of Exeter, N. H. (Eastman, Scammon & Gardner, of Exeter, N. H., on the brief), for defendant in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

BINGHAM, Circuit Judge. This is an action brought by the Cary Brick Company against Frank O. Tilton, a deputy sheriff, to recover damages for an alleged excessive and illegal attachment of the plaintiff's personal property in a suit brought by one Peaslee against the plaintiff. The declaration contains three counts, as follows:

"In a plea of the case, for that, on, to wit, the fifth day of March, 1910, at Plaistow, in said county of Rockingham, said defendant, Frank O. Tilton, being then and there a deputy sheriff for said county of Rockingham, and being ordered to serve a certain writ in an action brought by Edson E. Peaslee, of said Plaistow, against said plaintiff, the Cary Brick Company, and being commanded by said writ to attach the goods or estate of said Cary Brick Company to the value of \$300 did, on, to wit, March 7, 1910, levy an excessive attachment on the property of said Cary Brick Company, and attached all the brick belonging to said Cary Brick Company, in its yards at Plaistow, of the value of, to wit, \$6,900, and, to wit, twenty-three times the amount of the ad damnum named by said writ. And thereby said plaintiff, the Cary Brick Company, suffered great loss and damage, and irreparable injury to its reputation, and was subjected to great inconvenience and expense because of said excessive attachment, being prevented thereby from making delivery of brick

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to its customers at times agreed upon, and otherwise prevented from complying with its agreements, resulting in great loss to said Cary Brick Company; and the plaintiff, said Cary Brick Company, was also occasioned great loss, inconvenience, damage and expense in effecting the dissolution of said excessive attachment by being obliged to pay certain hotel bills, traveling expenses, counsel fees and other expenditures.

"And in a further plea of the case, for that, on, to wit, the fifth day of March, 1910, said defendant, Frank O. Tilton, being then and there a deputy sheriff for said county of Rockingham, and being ordered to serve a certain writ in an action brought by Edson E. Peaslee, of said Plaistow, against said Cary Brick Company to the value of \$300, did, on, to wit, March 7, 1910, at said Plaistow, levy an excessive attachment upon the property of said Cary Brick Company, and did unlawfully, negligently, maliciously and oppressively attach all the brick belonging to said Cary Brick Company, in its yard at said Plaistow, of the value of, to wit, \$6,900, and, to wit, twenty-three times the amount of the ad damnum named in said writ, said defendant, Frank O. Tilton, being then and there well aware of the fact that said property so attached was of the value of, to wit, twenty-three times the amount of the ad damnum named in said writ, and having ample opportunity to readily ascertain the value of said goods so attached; and the said Edson E. Peaslee and said defendant, Frank O. Tilton, was thereafter informed by said Cary Brick Company as to the value of said property so attached, and requested to dissolve said excessive attachment, but, notwithstanding such knowledge, information and request, said defendant, Frank O. Tilton, still unlawfully, negligently, maliciously, and oppressively refused and neglected to dissolve said attachment, and thereby this plaintiff, said Cary Brick Company, did and will suffer great loss and damage, and irreparable injury to his reputation and business, and has and will be subjected to great inconvenience and expense and damage because of said malicious and excessive attachment, and refusal to dissolve the same, being hindered and prevented thereby from making delivery of brick in accordance with its contracts, and otherwise hindered and prevented from complying with its agreements, and also being occasioned great loss, inconvenience, damage and expense to effect the dissolution of said illegal, negligent, malicious and oppressive attachment by being obliged to pay certain hotel bills, traveling expenses, counsel fees and other expenses.

"And in a further plea of the case, for that, on, to wit, the fifth day of March, 1910, said defendant, Frank O. Tilton, being then and there a deputy sheriff for said county of Rockingham, and being ordered to serve a certain writ in an action brought by Edson E. Peaslee, of said Plaistow, against said Cary Brick Company, and being commanded by said writ to attach the goods or estate of said Cary Brick Company to the value of \$300 did, on, to wit, March 7, 1910, at said Plaistow, make an unlawful and excessive attachment of the property of said Cary Brick Company, and did negligently, unlawfully, maliciously and oppressively attach all the brick belonging to said Cary Brick Company, in its yard at said Plaistow, of the value of, to wit, \$6,900, and, to wit, twenty-three times the amount of the ad damnum named in said writ, said defendant, Frank O. Tilton, being then and there well aware of the fact that said property so attached was of the value of, to wit, \$6,900, and that said attachment was excessive and unlawful and would be of great damage to said Cary Brick Company, and having ample opportunity and means to readily ascertain the value of said property so attached, and of the fact that such attachment was, and would be, of great damage to said Cary Brick Company, and said Edson E. Peaslee and Frank O. Tilton were thereafter informed as to the value of the property so attached, and of the fact that the attachment was excessive, and was, and would be, of great damage to said Cary Brick Company, and were requested by said Cary Brick Company to dissolve said excessive attachment, but, notwithstanding such information and request, said defendant, Frank O. Tilton, still unlawfully, negligently, maliciously and oppressively refused and neglected to dissolve said excessive attachment. And thereby this plaintiff, said Cary Brick Company, suffered great loss and damage and inconvenience, and irreparable injury to its reputation and business, and was subjected to great inconvenience, expense and damage because of said excessive attachment and refusal to dissolve the same as aforesaid, being,

prevented thereby from making delivery of brick to its customers in accordance with its contracts, and otherwise hindered and prevented from complying with its contracts and agreements, and this plaintiff, said Cary Brick Company, was also occasioned great loss, inconvenience, damage and expense to effect the dissolution of said excessive attachment, and being obliged to pay certain hotel bills, traveling expenses, counsel fees and other expenditures."

[1] No question is raised as to the sufficiency of the allegations in either of the counts in the declaration, but it will be seen from what is later said that the allegations contained in the first count do not state a good cause of action. It is plain that to entitle the plaintiff to recover under the second and third counts he must prove: (1) That the defendant placed an attachment upon the plaintiff's bricks by taking them into his possession or placing them under his control, thereby invading the plaintiff's dominion over the property. *Johnson v. Farr*, 60 N. H. 426. (2) That the value of the property thus taken from the plaintiff was more than was reasonably necessary to satisfy the demand in the writ upon which the attachment was made. (3) That the defendant knew the property attached was of a greater value than was reasonably necessary to satisfy the *ad damnum* in the writ, or that he did not honestly believe that its value was no more than necessary for that purpose. *Williams v. Eastman*, 208 Mass. 579, 95 N. E. 401; *Friel v. Plumer*, 69 N. H. 498, 501, 43 Atl. 618, 76 Am. St. Rep. 190; *Ahearn v. Connell*, 72 N. H. 238, 56 Atl. 189; *Davis v. Webster*, 59 N. H. 471. And (4) that the attachment was made maliciously, and with a purpose to harass and annoy the plaintiff, or to illegally compel payment by it.

[2] A sheriff in attaching a debtor's personal property must determine the amount to be taken to answer the demand in the writ. He is not bound at his peril to see that the property taken does not exceed the sum demanded. In the performance of this duty the law vests in him a discretion, which he must exercise honestly and in good faith, having due regard to the circumstances of the particular case. The nature of the property attached, its liability to depreciate in value before it can be sold to satisfy the demand, and the amount it will probably bring at a sheriff's sale are some of the circumstances he is entitled to consider. If in the exercise of this discretion he acts in good faith, but makes an honest mistake to the prejudice of the debtor, he will not be liable therefor. To charge him with damages, he must be shown to have acted maliciously and without an honest belief that the property taken would bring at a sheriff's sale no more than was reasonably necessary to satisfy the *ad damnum* in the writ. *Watson v. Todd*, 5 Mass. 271, 272; *Davis v. Webster*, 59 N. H. 471; *Williams v. Eastman*, 208 Mass. 579, 581, 95 N. E. 401; *Zinn v. Rice*, 154 Mass. 1, 3, 27 N. E. 772, 12 L. R. A. 288; *Savage v. Brewer*, 16 Pick. 453, 28 Am. Dec. 255.

It appears that the defendant in serving the process in question made the following return upon the writ:

"State of New Hampshire, Rockingham—ss.:

March 7, 1910.

"I then attached as the property of the within-named Cary Brick Company the goods and chattels following, to wit: One whole kiln of brick unopened, situated on the southerly end of yard. Also one kiln of eight whole arches

estimated to be about 200,000 of brick. All of the brick on said yard—said to belong to the said Cary Brick Company, situated on the brickyard enclosure known as the 'Cary Brickyard,' in Plaistow, in said county, occupied by said Cary Brick Company, and in order to preserve my said attachment, and within forty-eight hours thereof, I left at the dwelling house of Joseph S. Hills, the town clerk of said town of Plaistow, a true and attested copy of this writ and of this return indorsed thereon, to wit, at twenty-five minutes past ten o'clock in the forenoon of said day. Frank O. Tilton, Deputy Sheriff."

[3] In 1842 the Legislature of New Hampshire enacted a law relating to the attachment of bulky articles, as follows:

"The officer attaching grain unthreshed, hay or potatoes, any lumber or fuel, bricks, stone, lime, gypsum or ore, manufacturing or other machinery, bark or hides in the process of tanning, may leave an attested copy of the writ and of his return of such attachment thereon, as in the attachment of real estate; and in such case, the attachment shall not be dissolved or defeated by any neglect of the officer to retain actual possession of the property." Revised Statutes of N. H. c. 184, § 14.

The only material changes made in this statute since its enactment relate to an increase in the number of articles classed as bulky and an enlargement of the time within which an attested copy of the writ and of the return of the attachment may be left with the town clerk. Public Statutes of N. H., c. 220, § 16; Laws N. H. 1905, c. 43, § 1; Laws N. H. 1907, c. 44, § 1.

The District Court, in charging the jury as to the effect of this statute upon the attachment of bulky articles, said:

"Before these statutes it used to be necessary to physically take property like a drove of cattle or a barn full of horses, taking them into possession and carrying them away, or keep officers there to preserve the attachment, but that was a great expense to a man who had a little claim. It was a great trouble to sheriffs, and it was very oppressive and inconvenient to defendants, like the brick people here, to have the property either removed in order to preserve the attachment or to keep officers there, night and day, to protect it. So the Legislature said, for purposes of convenience and in the interest of economy, that a man who thinks he has a claim against another may secure his claim by attachment by leaving a copy."

And again:

"So far as I can see, so far as it is a question of law or a question of fact, an attachment for \$300 on a brickyard or on a lumberyard, or on a house or on a pile of logs on a landing, would merely operate to the amount named in the writ, the same as a mortgage would, if any of us should be unfortunate enough to put a mortgage on our house for \$100; although the house may be worth a good deal more, and although the mortgage may be on a whole house, it would simply be security for \$100. That would be the incumbrance, and, so far as I can see, I do not consider that there is any incumbrance upon this property beyond the \$300; but entirely aside from that an attachment could be made by a sheriff upon property less than the value named in the writ, and he might have managed it so indifferently and oppressively, like the case of attaching the belt and taking it out of the mill when there is unincumbered property which he could have attached by leaving a copy of the writ. That would be manifestly arbitrary and an oppressive thing to do, because on the face of it it would be unreasonable. So, I say, it is not a question altogether to be decided as an abstract question whether this writ was placed on too much property."

It appears from the above that the court in effect charged the jury that the defendant did not divest the Cary Brick Company of its

possession and dominion over the brick when he made the attachment, and that it operated as an attachment of but \$300, irrespective of the value of the brick attached. The plaintiff excepted to this portion of the charge, and we are now called upon to consider whether it is correct.

In the case of *Scott v. Manchester Print Works*, 44 N. H. 507, 508, the state court, in considering the question whether bulky articles could be attached under section 14, c. 184, of the Revised Statutes of New Hampshire by leaving a copy of the writ and return with the town clerk, said:

"The provision is not that the attachment may be made, as in case of real estate, by leaving a copy. Rev. Stat. c. 184, § 3; *Kittredge v. Bellows*, 7 N. H. 427. Indeed, no attempt is made to change the mode of making the attachment, but a new and easier method of preserving it is provided. Before this statute there was not so much difficulty in making as in preserving attachments of the various articles enumerated in the fourteenth section of chapter 184. *Hemmenway v. Wheeler*, 14 Pick. (Mass.) 410 [25 Am. Dec. 411]; *Sanderson v. Edwards*, 16 Pick. (Mass.) 144; *Reed v. Howard*, 2 Mete. (Mass.) 38; *Shepard v. Butterfield*, 4 Cush. (Mass.) 425 [50 Am. Dec. 796]; *Bicknell v. Trickey*, 34 Me. 273; *Miller v. Baker*, 1 Mete. (Mass.) 32. As the statute has only provided a new mode of preserving attachments of the articles specified, it is still essential to a valid attachment of them that they should be taken into the possession or placed under the control of the officer. *Odiorne v. Colley*, 2 N. H. 66 [9 Am. Dec. 39]; *Huntington v. Blaisdell*, 2 N. H. 318, 319; *Chadbourn v. Sumner*, 16 N. H. 132 [41 Am. Dec. 720]."

This has been the uniform construction of this statute by the state court, as will be seen from the following cases: *Bryant v. Osgood*, 52 N. H. 182; *Smart v. Batchelder*, 57 N. H. 140; *Wheeler v. Eaton*, 67 N. H. 368, 39 Atl. 901. In these cases, and in many others, it is held that an attachment of the bulky articles enumerated in this statute and its amendments must be made in the same way as an attachment of other personal property—that is, the property must be taken into the possession or placed under the control of the officer—and, being thus taken into his possession and control, the attachment may be preserved by filing a copy of the writ and of the return of the attachment in the town clerk's office.

[4] This is exactly what the evidence in the case discloses the defendant did. But, further than this, it has been repeatedly held that an officer's return of an attachment is conclusive as against him, and that it is to be presumed he has taken such possession or control of the property as is necessary to render the attachment valid. *Johnson v. Farr*, 60 N. H. 426; *Smart v. Batchelder*, 57 N. H. 140, 142; *Bailey v. Kimball*, 26 N. H. 351.

[5] It is thus manifest the court erred when it instructed the jury that, in attaching bulky articles under this statute, the debtor's possession or control of his property is not taken from him, and that the attachment of the plaintiff's bricks was for only \$300, irrespective of their value. Moreover, this instruction prevented the jury from deciding what the value of the property attached was, and whether the attachment was excessive, facts which, as we have seen, must be first ascertained before a proper disposition of the case can be made.

Numerous objections were taken by the plaintiff to the admission and

exclusion of evidence, as to many of which exceptions were not properly preserved. But however this may be, there is no occasion for considering them at this time, for upon another trial the same questions may not arise.

[6] The requests for instructions relate largely to the question of damages. The instructions of the court upon this subject are not before us. Whatever they were or should have been they could not have harmed the plaintiff, as the jury did not consider the question of damages; their verdict being for the defendant. It may be said, however, with reference to these requests, that negligence is not malice, and that gross negligence is not the legal equivalent of willful and malicious conduct; that, while one's conduct may be so recklessly indifferent to another's welfare that it may be found to be malicious in fact, there is no presumption of law that such conduct is willful and malicious. *Shackett v. Bickford*, 74 N. H. 57, 65 Atl. 252, 7 L. R. A. (N. S.) 646, 124 Am. St. Rep. 933; *Derry v. Peek*, 14 App. Cas. 337; *Conway Bank v. Pease*, 76 N. H. 319, 323, 331, 82 Atl. 1068.

The judgment of the District Court is reversed, the verdict is set aside, and the case is remanded to that court for further proceedings in conformity with this opinion; and the plaintiff in error recovers its costs of appeal.

McCLELLAND v. ROSE et al.

(Circuit Court of Appeals, Fifth Circuit. October 13, 1913. Rehearing Denied December 1, 1913.)

No. 2,461.

1. WILLS (§ 476*)—CONSTRUCTION—WILL AND CODICIL.

In determining the quality of an estate conveyed by will and codicil, both instruments must be construed as one.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 997; Dec. Dig. § 476.*]

2. WILLS (§ 687*)—CONSTRUCTION—TRUSTS—LIMITATION OVER.

By the fourth paragraph of a will testator bequeathed to plaintiff, his son, the residue of his estate, to be enjoyed under certain trusts and stipulations provided for, and to be held by testator's executors in trust for plaintiff for 25 years after testator's death, subject to such provisions and legacies as were made for the son's support and maintenance during that period. The fifth clause provided that the executors holding the residue in trust should pay monthly installments to plaintiff until he should come into possession of the estate, which the eighth clause provided should be turned over to him if he was living at the expiration of the 25 years; but if plaintiff died before the expiration of such period, then the trust should end, and the residue should pass to testator's heirs. *Held* that, plaintiff having survived the period, the devise over was wholly inoperative, and plaintiff took the estate either under the will or independent thereof as sole heir.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1638-1643; Dec. Dig. § 687.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. TRUSTS (§ 60*)—TERM—LIFE OF BENEFICIARY.

A trust of the residue of testator's estate may properly be created for the life of the donee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 82; Dec. Dig. § 60.*]

4. WILLS (§ 687*)—CONSTRUCTION—TRUSTS.

Testator bequeathed the residue of his estate to his executors in trust for plaintiff, his son, for 25 years after testator's death, and provided that if the son was living at the expiration of that period the entire residue should be turned over to him. A codicil, however, provided that the trust should continue during plaintiff's life, except that, if in the judgment of the executors plaintiff was prudent and careful, they might make such advances to him out of the estate as they might think right and proper, above the provisions made for him in the will. *Held*, that the codicil did not deprive plaintiff of any estate conferred on him by the will or by law, its effect being merely to deprive him of the right of possession at the end of the 25-year period; and hence he, having survived such period, became the absolute beneficial owner of the residue, subject to the trust, during his life, and that testator's collateral heirs, who would have taken under the will in case plaintiff had not survived the period, took no interest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1638-1643; Dec. Dig. § 687.*]

Appeal from the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge.

Suit in equity by Peter McClelland, Jr., against John K. Rose and others. From a decree dismissing the bill on demurrer, plaintiff appeals. Reversed and remanded.

This is a bill in equity by Peter McClelland, Jr., plaintiff, a citizen of California, against John K. Rose, trustee, Mrs. M. E. Grismer, and Hugh McClelland, defendants, citizens of Texas. The defendants demurred to the bill, the demurrer was sustained by the District Court and the bill dismissed, and the plaintiff appealed.

The bill alleges that the plaintiff, Peter McClelland, Jr., is the only child, next of kin and sole surviving heir at law of Peter McClelland, Sr., who died in McLennan county, Tex., September 24, 1886, and that he (the plaintiff) is the identical person named in item 4 and other items of his father's will; that on October 22, 1881, his father, Peter McClelland, Sr., executed with all legal formalities his last will and testament, which has been duly probated. The will and a codicil are copied in the margin.¹

¹ "In the name of God, Amen: I, Peter McClelland, Sr., of the county of McLennan and state of Texas, knowing the uncertainty of life and the certainty of death, and being of sound and disposing memory, do make this, my last will and testament:

"Item 1. I commit my soul to the God who gave it, trusting in His mercy, and my body to the earth from whence it came.

"Item 2. Should I owe any just debts at my death, I desire that my executors shall pay the same out of any money on hand, and if there should be no money on hand, then out of the income of my estate, as soon as the same can be done.

"Item 3. I give and bequeath to my beloved wife, Joanna M. McClelland, should she survive me, the homestead we now occupy, in the western suburbs of the city of Waco—the same that I purchased of Wm. Stone—to be held, used and enjoyed by her during her natural life. I also give and bequeath to my said wife all the household and kitchen furniture, plate, tableware, pictures, ornaments and other personal property used in and about said homestead, and also the carriages, horses, and milk cows that I may die possessed of. I also give and bequeath to my said wife the sum of one hundred and

The following is a condensed statement of the other material averments of the bill:

The testator, Peter McClelland, Sr., was twice married; his first wife died, leaving the plaintiff, her only child; his second wife, Joanna, died after his death, without issue. W. L. Prather qualified on October 10, 1895, as sole and independent executor of the will. The said Joanna, surviving widow of the testator, elected not to take under the will, and on October 10, 1895, the estate was duly partitioned and her community interest was set aside to her, and thereupon all provisions made for her by the will became inoperative. Prather, the executor, died on July 24, 1905, and on March 17, 1906, the district court of the Nineteenth judicial district of the state of Texas appointed the defendant John K. Rose as substitute trustee to act in the place and stead of said Prather, deceased.

The bill then avers that the defendant Rose gave the required bond and qualified as substitute trustee, and that thereupon he took possession of, and ever since has been collecting, the rents and revenues from the estate, and that he is withholding the same from the plaintiff, pretending that the same

fifty dollars per month, or so much thereof as she may see fit to use, during her natural life, should she survive me, to be paid to her in monthly installments, for her support and maintenance, by my executors hereinafter named, in cash, from the date of my death, which shall be a charge upon my estate.

"Item 4. I give and bequeath to my beloved son, Peter McClelland, Junior, should he survive me, all the residue of my estate, real, personal and mixed, to be received, however, and enjoyed by him only in futuro, upon the terms, conditions, incumbrances, trusts and stipulations herein provided for, which said estate shall be held by my executors, controlled and managed as herein provided, in trust for my said son, Peter, for twenty-five years from and after my death, before the same shall be turned over to my said son, except such provisions and legacies as are herein made for the support and maintenance of my said son during the said period of twenty-five years, should he live so long.

"Item 5. I also give and bequeath to my said son, Peter, one hundred dollars per month, to be paid to him from and after the date of my death, in cash, for his maintenance and support, in monthly installments, so long as he shall remain single, or until he shall come into possession of my estate as herein provided; but, should my said son marry before or after my death, this special legacy shall be increased to one hundred and fifty dollars per month from and after the date of such marriage, to be paid to him in cash, in monthly installments, for his maintenance and support after my death, by my executors, as herein provided, which shall be a charge upon my estate until he comes into the possession of same as herein provided, or dies; and in case of such marriage my executors shall provide, by purchase, or otherwise, for my said son, Peter, out of my estate, a suitable house for him to live in, including lots, grounds, and outbuildings, without charge to him, not to exceed in value the sum of five thousand dollars, if purchased by said executors for his use and enjoyment; but upon the death of my said wife, Joanna, my said son, Peter, first having so married, may, at his option, move into, live at, and enjoy the homestead bequeathed to her during her life, free of charge, in lieu of any other provisions for a home, until he shall come into the possession of my estate according to the provisions of this will.

"Item 6. I hereby appoint John E. Gilbert, Chas. F. Gilbert, and Amos W. Gilbert, citizens of the county of McLennan and state of Texas, my executors to carry out the terms and execute the trusts provided for in this will; and as I repose full confidence in their honesty, fidelity and ability, I desire that no bond shall be required of them. Should any one of my said executors leave the state of Texas and remain away for more than two years at one time, he shall thereupon be disqualified from further acting as such executor; and in that event, or if any executor is disqualified to act from any other cause, or if there be a vacancy caused by death or other cause, any two of my other executors may appoint a third, and fill such vacancy by ap-

is in trust and that he has the legal right to withhold the possession thereof from the plaintiff. The other defendants, Hugh McClelland, Hugh L. Grismer, and Otis McClelland—the two last named being made parties by amended bill of complaint—are collateral relatives of the testator, and are embraced within the designation, "my heirs at law," as employed by the testator in item 8 of his will. The bill further alleges that the said collateral kindred of the testator are falsely asseverating that the plaintiff is without interest in the estate of his father, and that upon his death the entire estate will belong to them. The estate consists of real property situated in Waco, McLennan county, Tex., described in paragraph 12 of the bill, of the reasonable market value of a sum in excess of \$500,000. It is alleged that by item 4 of the will, the testator made to plaintiff a clear gift of all the residue of his estate; that all other devises, legacies, and provisions made in the will have been fully discharged and eliminated therefrom; that the clear gift made to the plaintiff by the testator in item 4 of the will was subject only to the condition subsequent set forth in item 8 thereof, to the effect that should plaintiff die, without issue, prior to the lapse of 25 years from the death of the

pointment in writing, to be filed among the records of the county court of McLennan county, with the papers pertaining to the probate of my will; but, should two or more vacancies occur at one time, then the county court of McLennan county shall appoint an executor or executors with the will annexed, to carry out the trusts herein provided for, which executor or executors so appointed, with such original executor as may be then acting, shall be required by said court to give bond in due form of law. The absence of all the executors from the state of Texas at one time for more than six months, or the absence of two of them at one time for more than one year, shall disqualify those so absenting themselves, and the court shall then appoint others as herein provided.

"Item 7. Upon my death it is my desire that my said executors, or either of them, have this will probated in due form of law, and that they, or either of them, have a full and complete inventory and appraisement of my estate returned into court according to law, and that the same be recorded, and that no further action be had in the county court in reference to my estate except as herein provided. If at my death it should appear that any of the above-named executors have died before me, or if, from any cause, they, or either of them, are disqualified from accepting and executing the trusts herein provided for, then such vacancies shall be filled as above provided for.

"Item 8. Upon my death, and after the probate of this will, as aforesaid, my said executors accepting and qualified to act, as aforesaid, are hereby authorized and empowered to take possession of my entire estate, whether in money, real estate, personal or mixed, and the same to keep and hold in their possession and care, upon the trusts, terms and conditions herein provided for, for the full period of twenty-five years after my death, should my son, Peter, live so long; and at the expiration of twenty-five years my said executors shall turn over to my said son, Peter, if living, the entire residue of my estate, whether money, real, personal or mixed, with the increase and accretions to the same as provided for herein, after paying the charges of every kind and legacies herein provided for out of the same; but should my son, Peter, die before the expiration of said period of twenty-five years after my death, or before I do, then it is my desire that said trusts shall end, and that my heirs at law shall take my estate clear of the trusts, charges and incumbrances herein created, according to the laws of the state of Texas, and that my executors turn the same over to them, charged, however, with the bequests to my wife, if living.

"Item 9. It is my desire that my executors shall collect the rents promptly on my rent-paying real estate, and that they shall collect also all other incomes of my estate, from any and all other sources, from the date of my death, during the continuance of the trusts herein provided for, for the said period of twenty-five years, and that they will pay out of such income all taxes that may become due; that they will insure, and pay for same, all the buildings on the real estate belonging to my estate; that they will pay

testator, then the residuary estate should go to the testator's other heirs at law; and that by item 8 of the will, the testator's collateral heirs were constituted executory devisees, and were to take only under an executory limitation over, conditioned as above stated, and that the plaintiff, having survived the testator for the term of 25 years specified in item 8 of the will, became, on the expiration of said period, to wit, September 24, 1911, the sole, legal, equitable, and beneficial owner of all and singular the residuary estate of the testator, and that thereupon the executory limitation over to the collateral kindred became forever closed and wholly extinguished, and that thereby the collateral kindred of the testator ceased to have any interest whatsoever in said estate. That the clear gift to plaintiff by item 4 of the will was subject to a trust, in the nature of a power in trust, which did not extend to or embrace the corpus of the estate, but was confined solely to the income, and that the trustees took a chattel interest in the lands of the testator, which trust or power in trust was, up to September 24, 1911, valid and subsisting, but that upon the last-named day, the executory limitation over becoming extinguished and the plaintiff having then united in himself the en-

all legacies, bequests and charges upon my estate herein created and provided for, and will pay all other charges that may become necessary to preserve and protect said estate, in their judgment; that they will prosecute and defend suits, if necessary, to protect said estate, pay all such costs and charges as may be necessary in their judgment, and may employ and pay counsel for litigation and advice in the preservation and care of said estate, or in making investments of the income of the same, as in their judgment may seem best for the interest of my estate. And in case repairs become necessary, or ordinary improvements calculated to retain renters or increase the rents of the estate, they shall make the same as in their judgment may seem best for the interests of the estate. Should any building or other improvements be destroyed by fire or otherwise, they, my said executors, are hereby authorized to rebuild the same, as to them may seem best for the interests of my estate, and payable out of the income thereof by my said executors. My said executors are authorized and empowered to retain out of all moneys come into their hands from the income of said estate, or other sources, five per centum upon the gross receipts, as a compensation for their care of same, and for executing the trusts herein provided for.

"Item 10. After the payment of said legacies and charges aforesaid as they may accrue and become due, it is my desire that the residue of the income of my estate, as its accrues, shall be deposited in the State Central Bank, doing business in the City of Waco, if it be then in business, of which I am a stockholder; and whenever such deposits, or cash on hand in the hands of my said executors, shall amount to the sum of five thousand dollars, I desire that my said executors shall purchase capital stock of said State Central Bank, and hold the same as assets of said estate, collecting dividends as the same may be declared, and reinvesting whenever the said sum of five thousand dollars may be on deposit or in hand for the credit of my estate as aforesaid. But my said executors are especially authorized and empowered to invest the surplus income of my said estate in government securities, or in rent-paying real estate, as in their judgment may seem best for the interests of said estate, or they may invest in unimproved real estate in the county of McLennan, or city of Waco, in the state of Texas, and may improve the same, or may improve any unimproved property of the estate, as may seem best to them, in their judgment, for the interests of the estate.

"Item 11. All other will or parts of wills, or codicils to the same, heretofore made by me, are hereby revoked.

"In testimony whereof I have hereunto set my hand this the 22nd day of October, A. D. 1881, and declared this to be my last will and testament.

"P. McClelland.

"Signed and executed in the presence of the following witnesses, who sign and witness the same in the presence of the testator and of each other, and at the testator's request:

J. T. Walton.

"Jno. T. Flint.

ture beneficial ownership, such trust ceased and determined, or should be by a court of equity terminated. That the testator did not, either expressly or impliedly, by his said codicil revoke or cut down the clear gift made to plaintiff by item 4 of the will, nor did he by said codicil, either expressly or by necessary implication, change the condition upon which the executory devise, created by item 8 of the will, was to become operative, and that the contingency upon which such executory limitation over was to take effect had become impossible, and that therefore the executory devisees take nothing, and that the plaintiff is entitled to the estate under the will, and, in the alternative, that even though it should be held that the codicil revoked item 4 of the will, yet the plaintiff would take the estate, if not under the will, then by inheritance, because the codicil itself attempted no disposition of the estate, and because the collateral heirs of the testator cannot take under item 8 of the will, as the contingency therein provided for can never happen, and because they cannot take under the statute, as the plaintiff is the sole surviving heir at law of the testator.

The plaintiff averred that the appointment by the district court of the Nineteenth judicial district of Texas, of the defendant Rose, as substitute

"Codicil in lieu of items sixth and seventh of the foregoing will:

"(1) I, Peter McClelland, Sr., now here revoke clause (item 6) sixth of my foregoing will, executed and dated on the 22nd day of October, A. D. 1881, and now here appoint John E. Gilbert and William L. Prather, citizens of the county of McLennan and state of Texas, my executors to carry out the terms and execute the trusts provided for in my said foregoing will; and as I repose full confidence in their honesty, fidelity, and ability, I desire that no bond shall be required of them. Should either of my executors leave the state of Texas, and remain away for more than one year at a time, or fail to accept such executorship upon my death, such executor shall thereafter be disqualified from further acting as such. My estate shall not be considered vacant so long as either of said executors continue to act, but in case of death, resignation, failure to act, or of the disability of both of my said executors, then the county court of McLennan county shall appoint an executor with the will annexed to carry out the provisions of said will and trusts therein provided for, which executor so appointed shall be required to give bond as provided by law.

"(2) And I now here revoke item seventh of my will, and in lieu thereof I desire upon my death that my said executors, or either of them, have my said will probated in due form of law, and that they, or either of them, have a full and complete inventory and appraisal of my said estate returned into court according to law, and that the same be recorded, and that no further action be had in the county court in reference to my estate except as provided in said will or herein, and this codicil now here is made a part of said will as fully as if it had been originally incorporated herein. Upon further consideration, I desire, after my death and the death of my wife, that my son, Peter McClelland, may occupy and enjoy my homestead, if he chooses so to do, but upon the condition that he first convey back to my estate the homestead I have given him on Hogan Hill. In case he does not do so, then my homestead, upon the death of my wife, shall pass to the possession of my executors, to be administered as provided for the balance of my estate. I further desire to continue the trusts created herein in my executors for and during the natural life of my son, Peter; but, if in their judgment he is provident and careful, they may make such advances out of the estate as they may think right and proper, over and above the provisions made herein for him and in said will.

"In testimony whereof I hereunto set my hand this 17th day of August, 1886, and declare it to be my last will and codicil, in presence of the subscribing witnesses hereto.

P. McClelland.

"Signed in our presence, and declared by the testator, in our presence, to be his last will and codicil thereto.

Jno. T. Flint.

"D. S. Wood.

"W. N. Orand."

trustee, was proper, because Prather, the original trustee, died prior to the lapse of 25 years from the death of the testator, and because, at the time of such appointment, to wit, March 17, 1906, the collateral heirs, as executory devisees, had a subsisting contingent interest, and the trust, during that time, was valid, and was not wholly executed at the time of the death of Prather, the original trustee.

The plaintiff averred that he was entitled to the full, quiet, immediate, and undisturbed possession and enjoyment of the estate of the testator, and he prayed for a decree to that effect; and, in the alternative, he prayed that, if, for any reason, he was not now entitled to be let into the possession of the estate, yet that he have a decree adjudging the alleged claims of the collateral heirs or executory devisees, and each of them, void, and that they, and each of them, be decreed not to have any interest whatsoever in the estate or in any part thereof, and, further, that the plaintiff, subject to the trust of the revenues for and during his natural life, should such trust be valid, be decreed to be the owner of the said estate, so that, upon his death, the same should devolve upon his heirs at law, or in accordance with any such testamentary disposition as he may choose to make thereof.

The defendants jointly demurred to the bill, and alleged numerous grounds of demurrer, among others: (a) That the plaintiff has not, by the bill, stated such cause "as doth or ought to entitle him to any such discovery or relief as is hereby sought and prayed for from or against these defendants"; and (b) "that said bill shows that the complainant has no right, title, or estate in the property of said Peter McClelland, his only interest therein being the right to the monthly allowance to be paid to him by the trustee, as provided by said will."

The District Court sustained the demurrer and dismissed the bill. The plaintiff, on appeal, assigns as error, with elaborate and numerous specifications, that the District Court erred in sustaining the demurrer and dismissing the bill.

Francis Marion Etheridge and Joseph Manson McCormick, both of Dallas, Tex., for appellant.

Richard Irby Munroe and James Richard Downs, both of Waco, Tex. (L. C. Penry, of Plainview, Tex., and J. R. Webb, of Waco, Tex., on the brief), for appellees.

Before PARDEE and SHELBY, Circuit Judges, and SHEPARD, District Judge.

SHELBY, Circuit Judge (after stating the facts as above). There is apparently much conflict in the authorities construing wills. This comes from the fact that forms of expressions in wills are often nearly alike, yet varying in minute shades of meaning. But, of all legal instruments, wills are the least to be governed in their construction by the settled use of technical legal terms. Referring to these conflicts and uncertainties, it was said by Mr. Justice Miller that:

"It may well be doubted if any other source of enlightenment in the construction of a will is of much assistance, than the application of natural reason to the language of the instrument under the light which may be thrown upon the intent of the testator by the extrinsic circumstances surrounding its execution, and connecting the parties and the property devised with the testator and with the instrument itself." *Clarke v. Boorman's Executors*, 18 Wall. 493, 502, 503 (21 L. Ed. 904).

The ultimate practical question involved in this controversy is as to the ownership and the right to the possession of the testator's estate. The plaintiff claims it as devisee under the will, and, in the alternative, as sole heir at law. The plaintiff is the testator's only child, and, if

the will be not considered, he would be the owner as sole heir. If the will fails to dispose of any interest in the property, that interest would pass to the plaintiff as the testator's sole heir. The defendants—the testator's collateral kin—claim the estate under the will and codicil. They claim that, properly construed, the will and codicil gives the estate to them, depriving the plaintiff of any right to it.

[1] There is a dispute as to what interest was devised by the will as originally executed, and also a controversy as to the effect of the codicil on the will as first written. Both the will and the codicil must, of course, be construed as one instrument; but the true meaning can be best ascertained by an examination, first, of the will as originally executed, and, then, by an examination of the codicil to see what changes it effects.

[2] Disregarding the codicil for the present, items 4 and 8 are the parts of the will that would be controlling. They are as follows:

"Item 4. I give and bequeath to my beloved son, Peter McClelland, Junior, should he survive me, all the residue of my estate, real, personal and mixed, to be received, however, and enjoyed by him only in futuro, upon the terms, conditions, incumbrances, trusts and stipulations herein provided for, which said estate shall be held by my executors, controlled and managed as herein provided, in trust for my said son, Peter, for twenty-five years from and after my death, before the same shall be turned over to my said son, except such provisions and legacies as are herein made for the support and maintenance of my said son during the said period of twenty-five years, should he live so long."

"Item 8. Upon my death, and after the probate of this will, as aforesaid, my said executors accepting and qualified to act, as aforesaid, are hereby authorized and empowered to take possession of my entire estate, whether in money, real estate, personal or mixed, and the same to keep and hold in their possession and care, upon the trusts, terms, and conditions herein provided for, for the full period of twenty-five years after my death, should my son, Peter, live so long; and at the expiration of twenty-five years my said executors shall turn over to my said son, Peter, if living, the entire residue of my estate, whether money, real, personal, or mixed, with the increase and accretions to the same as provided for herein, after paying the charges of every kind and legacies herein provided for out of the same; but should my son, Peter, die before the expiration of said period of twenty-five years after my death, or before I do, then it is my desire that said trusts shall end, and that my heirs at law shall take my estate clear of the trusts, charges, and incumbrances herein created, according to the laws of the state of Texas, and that my executors turn the same over to them, charged, however, with the bequests to my wife, if living."

Item 4 is a clear gift and bequest of the estate to the plaintiff, with a provision that it is to be held and controlled by the testator's executors in trust for his son for 25 years after the testator's death before it shall be turned over to the plaintiff. Item 8 contains an express provision that, at the expiration of the 25 years after the testator's death, if his son is then living, the executor "shall turn over to my said son, Peter," the entire estate. The 25 years since the testator's death having expired, if there had been no codicil, the executors or trustees would be required to now surrender the entire estate to the plaintiff. The last lines of item 8 contain a devise over, should Peter, Jr., die before the expiration of 25 years after the testator's death, and it is upon this language that the defendants base their claim. But

Peter did not die within the 25 years—he lived beyond the stipulated period, and is still living. There is no bequest over whatever unless the testator's son, the plaintiff, die before the expiration of the period of 25 years; and it is difficult to see how it is possible for the defendants to derive any interest or title from a devise based on a contingency which did not, and now cannot, occur. Peter, Jr., not dying within the 25 years, the devise over is wholly inoperative. Item 5 provides for monthly installments for Peter, Jr., "until he shall have come into possession of my estate as herein provided"; the intention being to afford him a support till the expiration of the 25 years.

It is contended by the plaintiff that the language employed in items 4 and 8 vests in him, subject to the trust created by the will, an equitable estate in fee defeasible by an executory devise over. Revised Statutes of Texas 1879, § 551; *Britton v. Thornton*, 112 U. S. 526, 532, 5 Sup. Ct. 291, 28 L. Ed. 816; *Seay v. Cockrell*, 102 Tex. 280, 115 S. W. 1160; *Laval v. Staffel*, 64 Tex. 370; *Chase v. Gregg*, 88 Tex. 552, 32 S. W. 520. This contention is not material as to issues necessary to be decided now, as the testator died leaving the plaintiff sole heir, and the contingency upon which the devise over depended not having occurred, and there being no other devise of the estate, if it did not pass in fee to the plaintiff by the will, subject to the trust, it so passed to him by inheritance on the testator's death. He is entitled to the protection of his rights by the courts, whether he obtains them the one way or the other.

This brings us to the consideration of the codicil. There is nothing in the codicil which revokes, or is in conflict with, the devise made by item 4. The codicil contains no words that can be construed as a bequest or devise to the defendants. The following is the only part of it which effects any change in the will which is relevant to the question here involved:

"I further desire to continue the trusts created herein in my executors for and during the natural life of my son, Peter; but, if in their judgment he is provident and careful, they may make such advances out of the estate as they may think right and proper, over and above the provisions made herein for him and in said will."

The effect of this clause is to extend the trust from the time of the expiration of the 25 years after the testator's death till the death of the plaintiff, and to allow the executors to make additional advances to the plaintiff. The trust, therefore, did not terminate, giving the plaintiff the right of possession at the expiration of the 25 years, but is a continuing trust during his life. The estate and interest conferred on the plaintiff by item 4 is not affected otherwise than cutting off his right to possession at the end of the 25-year period. The plaintiff appears to be, both by the will and the codicil, the chief object of the testator's bounty and solicitude.

[3, 4] It does not seem to be denied that the trust created by the will to last 25 years was valid. We cannot see why it cannot be extended for the donee's life. There is no reason in the recognized nature of property and in the owner's right of disposition why a testator "who gives without any pecuniary return, who gets nothing of property value

from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence or incapacity for self-protection, should not be permitted to do so, is not readily perceived." *Nichols, Assignee, v. Eaton et al.*, 91 U. S. 716, 727 (23 L. Ed. 254); *Wallace v. Campbell*, 53 Tex. 229. We see nothing in the language of the codicil continuing the trust for the life of the plaintiff which deprives him of any estate conferred on him by the will or by law, or which confers on, or gives to, the defendants any interest in the estate. The effect is, of course, to deprive the plaintiff of the right of possession at the end of the 25-year period fixed by the will. It continues to protect him during life against ill fortune, and probably against his own incompetence and incapacity.

Our attention has been called to a number of cases which relate to the will we are construing.² We have carefully examined them all, and do not find that any one of them is controlling as against the rights of the plaintiff determined by this opinion. Comment on them here would serve no useful purpose.

There are several questions discussed in the briefs that we do not deem it necessary or advisable to decide. Some of them may arise on the further consideration of the case in the court below, and others after the death of the plaintiff. A demurrer has been sustained, and the bill dismissed. If the plaintiff is entitled to any relief on the averments of the bill, the decree must be reversed.

We are of the opinion that, on the averments of the bill, the plaintiff is the owner of the estate devised and in controversy, subject to the trusts created by the will; that the defendants—testator's collateral kin—have no interest, under the will, in the same; and that the plaintiff, the averments of the bill being admitted or proved, should have a decree to that effect.

The decree is reversed and the cause remanded, with instructions to overrule the demurrer, and for further proceedings.

² NOTE.—The following are the cases referred to: *Prather et al. v. McClelland*, 76 Tex. 574, 13 S. W. 543; *Prather v. McClelland* (Tex. Civ. App.) 26 S. W. 657; *McClelland v. McClelland* (Tex. Civ. App.) 37 S. W. 350; *Wood et al. v. McClelland et al.* (Tex. Civ. App.) 53 S. W. 381; *McClelland v. McClelland*, 46 Tex. Civ. App. 26, 101 S. W. 1171; *Sanger v. Rovello et al.*, 173 Fed. 1022, 97 C. C. A. 669.

HANOVER STAR MILLING CO. v. ALLEN & WHEELER CO.

(Circuit Court of Appeals, Seventh Circuit. April 21, 1913.)

No. 1,926.

1. TRADE-MARKS AND TRADE-NAMES (§ 95*)—SUIT FOR INFRINGEMENT OF TRADE-MARK—GROUNDS.

The property right of a complainant which may be protected by a suit to enjoin infringement of a trade-mark is not in the mark itself, in which he has no exclusive right except as appendant to his business, but the basis of the suit is the injury to his trade, business reputation, and good will by the fraudulent use of the trade-mark which constitutes his "commercial signature," and hence where there has been no actual fraud, and no injury to them has resulted from or is threatened by defendants' acts, there is no ground for an injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 79*)—SUITS FOR INFRINGEMENT AND FOR UNFAIR COMPETITION—IDENTITY OF GROUNDS.

In trade-mark and unfair competition cases, the ground of action and the reason for the remedy are identical. They are all cases of unfair competition in trade, and the remedy is to tie the hands of the unfair trader, and to the extent that differences exist they pertain, not to the underlying principle, but to the methods and degrees of proof required to enforce the principle.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 89, 90; Dec. Dig. § 79.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 95*)—SUIT FOR INFRINGEMENT—PROOF REQUIRED.

Since trade-mark and unfair competition cases are the same in nature and principle, the basis of both being fraudulent competition, actual competition must be shown in a suit for infringement of a technical trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 31*)—TERRITORIAL LIMITATION.

Since it is the trade and not the mark that is to be protected, a trade-mark acknowledges no territorial boundaries of municipalities or states or nations, but extends to every market where the trader's goods have become known and identified by the use of the mark; but the mark of itself cannot travel to markets where there is no article to wear the badge and no trader to offer the article.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 35; Dec. Dig. § 31.*]

5. TRADE-MARKS AND TRADE-NAMES (§ 95*)—SUIT FOR INFRINGEMENT—RIGHT TO RELIEF.

Complainant, an Ohio Milling Company, since 1872 has used the name "Tea Rose" as a common-law trade-mark for one of its brands of flour, but has never sold such brand in the territory southeast of the Ohio river comprising the states of Georgia, Florida, Alabama, and Mississippi, although it has recently made some effort to establish a trade there in other brands. Defendant, without knowledge of its prior use by complainant, since 1893 has used the name "Tea Rose" for one of its own brands of flour in which it has built up an extensive trade in the states named, where the name has come to mean defendants' flour and no other kind. *Held*, that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 208 F.—33

complainant was not entitled to an injunction to restrain defendant from using the name in such territory.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*]

6. APPEAL AND ERROR (§ 954*)—PRELIMINARY INJUNCTION—DISCRETION.

Though an order granting or denying a preliminary injunction will not be disturbed except for an abuse of discretion, a proper discretion does not include the misapplication of the law to conceded facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.*]

Appeal from the District Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge.

Suit in equity by the Hanover Star Milling Company against the Allen & Wheeler Company. From an order granting a preliminary injunction, defendant appeals. Reversed.

Henry Fitts, of Birmingham, Ala., Edgar L. Clarkson and Jas. E. Morrisette, both of Tuscaloosa, Ala., and Louis Clements, of Danville, Ill., for appellant.

L. O. Whitnel, H. L. Browning, and Thos. E. Gillespie, all of East St. Louis, Ill., and J. Fred Gilster, of Chester, Ill., for appellee.

Before BAKER, Circuit Judge, and ANDERSON and SANBORN, District Judges.

BAKER, Circuit Judge. This is an appeal from a preliminary injunction. Bill, affidavits, counter affidavits, and exhibits disclose the following facts:

Complainant (appellee), an Ohio corporation, owns and operates a flour mill at Troy, Ohio. Since 1872 it has used the words "Tea Rose" as a common-law trade-mark to designate one of its makes of flour. Though its bill and affidavits say generally that its trade extended throughout the United States, the only particulars exhibited disclose that its trade was within the territory north of the Ohio river. And the showing of defendant clearly establishes, on the present record, that complainant never had any trade in its "Tea Rose" brand in the southeastern territory comprising Georgia, Florida, Alabama, and Mississippi. In recent efforts to establish a trade in said southeastern territory, complainant has used only its "Trojan" and "Eldean Patent" brands. Complainant did not learn until in 1912, shortly before the bringing of this suit, that defendant had built up and was conducting an extensive trade in a "Tea Rose" brand of flour throughout said southeastern territory.

Defendant is an Illinois corporation, owning and operating a flour mill at Germantown, Ill. Continuously since 1893 defendant has used the words "Tea Rose" in marking its flour sacks. Beginning in 1904 defendant conducted an active campaign to build up a large trade in its "Tea Rose" flour in said southeastern territory, with the result that when this suit was filed defendant's sales of "Tea Rose" flour in that market amounted to more than \$150,000 a year. Defendant adopted "Tea Rose" as its mark in perfect good faith, with no knowledge that

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

any one else was using or had used those words in such a connection. In the flour trade in said southeastern territory the mark "Tea Rose" has come to mean defendant's flour, and nothing else.

If this were what is commonly known as an "unfair competition" case in distinction from a technical "trade-mark" case, complainant could not be given any relief for two reasons: (1) There is not and never has been any competition between the two flours in the same markets, hence no "unfair" competition, no palming off of defendant's flour as complainant's, no trespass committed or threatened upon complainant's established good will. And (2) if the words "Tea Rose" were open to common use, like the family name of the maker or the geographical designation of the place of manufacture or words descriptive of the grade of the goods, the make-ups of the two bags are so distinctive in color, lettering, wording, and names and addresses of makers, that, from a comparison alone, it could not be found that confusion would be likely to result. On the facts as now presented this case therefore turns on the correctness of complainant's insistence that, the words "Tea Rose" being proper for adoption as a technical trade-mark, and complainant having appropriated the mark and applied it to its flour, thereby complainant acquired the mark as its property and had the right to exclude others from using it in the flour trade throughout the territory of the United States, irrespective of the questions of how far complainant's trade, reputation, and good will actually extended, and whether defendant had interfered or was threatening to interfere with complainant's established business.

Use of an arbitrary and distinctive mark to indicate the origin or ownership of articles of trade—the dealer's "commercial signature"—is very old. It may have begun because the general run of consumers of those ancient times could not have read the dealer's business name and address if he had written them upon his articles in the vernacular. And throughout, the question whether or not a trade-mark is property has often been mooted. Lord Langdale, in *Perry v. Truefitt*, 6 Beav. 73: "I own it does not seem to me that a man can acquire a property merely in a name or mark." Vice Chancellor Sir W. Page Wood, in *The Collins Co. v. Brown*, 3 K. & J. 423: "It is now settled law that there is no property whatever in a trade-mark." Lord Herschell, in *Reddaway v. Banham*, A. C. (1896) 199: "I doubt myself whether it is accurate to speak of there being property in a trade-mark." On the other hand, the books are full of cases in which by implication or direct statement it is declared that trade-marks are property. But the dispute is only apparent; the minds of the various courts are found to be in accord when the basis of the cause of action and the reason for granting injunctive relief are considered.

In *Perry v. Truefitt*, supra:

"I think the principle upon which both the courts of law and of equity proceed in granting relief and protection in cases of this sort is well understood. A man is not to sell his own goods under the pretense that they are the goods of another man. He cannot be permitted to practice such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other indicia, by which he may induce pur-

chasers to believe that the goods which he is selling are the manufacture of another person."

In The Collins Co. v. Brown, supra:

"A person may acquire a right of using a particular mark for articles which he has manufactured, so that he may be able to prevent any other person from using it, because the mark denotes that articles so marked were manufactured by a certain person; and no one else can have a right to put the same mark on his goods, and thus to represent them to have been manufactured by the person who originally used that particular mark. That would be a fraud upon the person who first used the mark in the market where his goods are sold. The simplest case is where a man puts his name and address on the goods which he manufactures; it would be unlawful for another manufacturer to put that name and address on his goods, because to do so would be to give to all the world the impression that they were manufactured by the person whose name and address they bore.

"The simple question in these cases is: Has the plaintiff, by the appropriation of a particular mark, fixed in the market where his goods are sold a conviction that the goods so marked were manufactured by him; and if so, and if no one else has been in the habit of using that mark, another man has not the right to use that mark, so as to commit the fraudulent act of palming off his goods as being the goods of the person known to have been in the habit of using it."

So it is evident that those who deny that trade-marks are property agree with the others that complainants are entitled to protection in the use of trade-marks. And both sides meet in finding that the cause of action is the injury done or threatened to a complainant's trade in which he has used the marks in question to designate the origin or ownership of his goods and that the appropriate relief is to enjoin the defendant from using the marks to divert trade that otherwise would have gone or would go to the complainant. Whether trade-marks are accurately called property or not, it is clear that some of the rights that are incident to property do attach to them; and therefore, just as courts sometimes state jurisdictional facts by describing corporation parties as "citizens," it may be convenient to speak of trade-marks as "property," as a short way of expressing a limited truth that requires ampler means for a complete and accurate statement. And that limited truth is as compactly defined as anywhere else in *Weston v. Ketcham*, 51 How. Prac. (N. Y.) 455:

"There is no such thing as a trade-mark 'in gross,' to use that term of analogy. It must be 'appendant' of some particular business in which it is actually used upon or in regard to specified articles."

[1] It is not the trade-mark, but the trade, the business reputation, and good will, that is injured; and the property or right in the trade is protected from injury by preventing a fraud-doer from stealing the complainant's trade by means of using the complainant's "commercial signature."

From these considerations of the nature of trade-marks and the basis and scope of trade-mark suits, it would follow that complainant in this case has no property in the mark "Tea Rose," like property in its mill and wheat and flour; has no monopoly of the use of the mark, like the monopoly of a patent or a copyright; has no right at all to the mark "in gross," but a right only to the extent that the mark is

"appendant" to its trade; has no basis of complaint except for injury to its business; and (since defendant has traded honestly in markets where complainant is unknown and has neither committed nor threatened an injury to complainant's reputation and good will) has no cause of action in equity. But complainant nevertheless relies upon expressions to the effect that trade-marks are without "territorial limitation," are the exclusive property of their first adopters throughout the sovereignty within which they were anywhere applied by them to articles of commerce, and contends that the "unfair competition" cases in which the concurrent use of marks or names not susceptible of adoption as technical trade-marks was permitted, provided fraud and deception were sufficiently guarded against, have no application. It is proper, therefore, to inquire: What is the nature of the differences between "unfair competition" and "technical trade-mark" cases? And, in what sense, if any, is it true that trade-marks have no territorial limitations?

When suits were based solely upon the fraudulent use of technical trade-marks, very frequently the controversies were confined to the defense that the marks in question were not susceptible of exclusive appropriation. Under the influence of the fact that the upholding of that defense would defeat a "trade-mark" suit, courts have sustained as "trade-mark" cases many that to-day would probably be classed as "unfair competition." But complainants soon began to reply: If it be true that these marks have no primary signification that we are the originators or owners of the articles so marked, nevertheless consumers in the markets where our goods are sold have come to recognize them as ours by means of these marks, which have thus acquired a secondary meaning that points to us as originators or owners, and the defendant has no more equitable right to use that mark in its secondary meaning than any mark of primary meaning as a mark for robbing us of our trade. This reply called sharp attention to the foundation of the "trade-mark" suit and the reason for granting injunctive relief, and it was seen that, inasmuch as the trade, not the mark, was the property involved, and that the remedy was to stop the defendant's dishonesty in trade, it was immaterial whether the fraud-doer was filching trade by means of using others' marks in their primary meaning, or others' marks in their secondary meaning, or others' real names or nicknames, or simulated dress, or merely oral misrepresentations apart from all marks, names, or dress upon the articles. 38 Cyc. 680 and 756, and cases cited.

If a dealer adopts an arbitrary mark that is then meaningless in trade, his application of it to his article creates its only meaning. He is entitled to protection in the use of that meaning as appendant to his trade. If a dealer marks his shaving soap by the family name of "Williams," or his ale by the name of the village of "Stone," or his starch by the name of the hamlet of "Glenfield," his application of the name does not create its only meaning; but, if his trade creates a new meaning for the name, then he is entitled to just as full protection in the use of that meaning as if that were the only one. Others may use the common word in its common meaning, but they cannot use it in the particular meaning created by the complainant.

[2, 3] In both the "trade-mark" and the "unfair competition" cases the ground of the action and the reason for the remedy are identical. They are all cases of unfair competition in trade, and the remedy is to tie the hands of the unfair trader. To the extent that differences exist, they pertain, not to the underlying principle, but to the methods and degrees of proof required to enforce the principle. If a dealer has adopted a true trade-mark, his trade has given the mark its only meaning, and he need produce no other proof respecting meaning. If he has applied to his article a mark or name that had an existing meaning, it is incumbent on him to establish the fact that his trade has added a new meaning that is exclusively appendant to his trade. If a defendant has put into a common market his articles bearing another dealer's technical trade-mark, no further proof of fraud is required. If a defendant has put into a common market his articles bearing a mark or name that had a common meaning, the complainant must show that the defendant is using the mark or name, not in its common meaning, but in its new meaning created by the complainant. In "trade-mark" cases, it is sometimes said that proof of fraudulent intent need not be made. This is hardly accurate; the truth being that proof of knowing use carries proof of intent. In "unfair competition" cases, it is sometimes said that proof of actual intent must be furnished. But if by this it is declared that to uncover the defendant's malevolent purpose is enough, the statement goes too far, for an intention to filch business unaccompanied by any efficient means is not actionable. The intent that makes the defendant liable is the intent that is found in his proven acts. Now inasmuch as these differences, and any others we have ever noticed, relate to the methods and degrees of proof, and not to the nature and principle of the suit, it follows that "unfair competition" cases are applicable to the determination of the nature and principle of this suit. And in "unfair competition" cases, "of course there must be actual competition before there can be any unfair competition." 38 Cyc. 760, and notes. And since a "trade-mark" suit is an "unfair competition" suit in nature and principle, complainant in this suit has no standing because there is no competition.

"Unfair competition" cases are likewise in point on the question: In what sense, if any, is it true that trade-marks have no territorial limitations?

In *Levy v. Waitt*, 61 Fed. 1008, 10 C. C. A. 227, 25 L. R. A. 190, Levy was the elder adopter of the word "Blackstone" (geographical) as a brand for cigars. At the time of the suit Levy had a large trade in his Blackstone cigars in New York and the west, and Waitt had built up an extensive business in his Blackstones in New England. Waitt adopted the word "Blackstone" without knowledge of its previous use by Levy. Before Waitt established his New England trade, Levy had sold some of his Blackstone cigars in New England. But the sales were few and intermittent and resulted in no trade. To New England dealers and consumers the word Blackstone pointed to Waitt as the maker. Inasmuch as Levy had no property right in the brand except as appendant to his trade, no property right beyond insisting that the public be not deceived to the injury of his trade, he had no rights

against Waitt in New England, whatever might be his rights in the use of that brand against Waitt or others elsewhere.

In *Cohen v. Nagle*, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. (N. S.) 966, 5 Ann. Cas. 553, the complainant Cohen adopted the word "Keystone" to identify a brand of his cigars, and built up a large trade therein throughout New England. He believed that he was the originator of the word as applied to cigars; but, before his time, the word was used as a brand in the cigar business in the middle and western states. Defendant Nagle, after Cohen had established his New England trade, began marketing in New England Keystone cigars which he purchased from a manufacturer in Pennsylvania where it was claimed that the manufacturer had a lawful right to use that word as a brand for cigars. The trial court protected Cohen by an injunction limited territorially to New England. On appeal the decree was affirmed, the majority holding that, inasmuch as Cohen had not taken a cross-appeal, no question whether he had trade rights beyond the limits of his trade was before the court. Three justices expressed the view that Cohen's trade rights did not extend beyond the limits of his trade.

Carroll, in Maryland, and McIlvaine, in New York ([C. C.] 171 Fed. 125) had each in his locality established a trade in Baltimore Club whisky. About 30 years later Carroll extended his trade to New York and sought to stop McIlvaine on the ground that Carroll was the originator of the brand. It was held in substance that, conceding priority to Carroll, and independently of whether the brand was a technical trade-mark or merely a trade-name, Carroll was not entitled to an injunction, because it was not Carroll's prior appropriation of the mark or name, but his prior appropriation of trade through the use of the mark or name, that was to be protected.

[4] These cases indicate to us that it is true in a sense that trade-marks are without territorial limitation; but not in the sense meant by complainant. The sense we perceive is one that goes back to the foundational purpose of the trade-mark suit. Since it is the trade, and not the mark, that is to be protected, a trade-mark acknowledges no territorial boundaries of municipalities or states or nations, but extends to every market where the trader's goods have become known and identified by his use of the mark. But the mark, of itself, cannot travel to markets where there is no article to wear the badge and no trader to offer the article.

Contrary to this view, certain cases are to be noticed.

In *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170, Derringer was a manufacturer of pistols at Philadelphia, Plate at San Francisco. This statement appears in the opinion:

"The manufacturer at Philadelphia who has adopted and uses a trade-mark has the same right of property in it at New York or San Francisco that he has at his place of manufacture."

Yes, if Derringer was selling his pistols in the San Francisco market or any market where Plate was trying to palm off his pistols as Derringer's; and we find nothing in the report to show that such was not the fact.

In *Kidd v. Johnson*, 100 U. S. 617, 25 L. Ed. 769, Johnson was the assignee of the property and good will, including a trade-mark, of a distillery business at Cincinnati. Kidd was causing whisky to be sold in New Orleans under the same trade-mark. Johnson obtained in the United States Circuit Court for the District of Louisiana an injunction, which was affirmed on appeal. The question was the validity and extent of the assignment of the trade-mark. Among other things, the court said:

"That transfer was plainly designed to confer whatever right Pike possessed. It, in terms, extends the use of the trade-mark to Mills, Johnson & Co., and their successors. Such use, to be of any value, must necessarily be exclusive. If others also could use it, the trade-mark would be of no service in distinguishing the whisky of the manufacture in Cincinnati; and thus the company (the assignee of the business and the mark) would lose all benefit arising from the reputation the whisky there manufactured had acquired in the market. *The right to use the trade-mark is not limited to any place, city, or state, and, therefore, must be deemed to extend everywhere.* Such is the uniform construction of licenses to use patented inventions. If the owner imposes no limitation of place or time, the right to use is deemed co-extensive with the whole country, and perpetual."

Complainant lays stress on the sentence we have italicized. But the context shows, we think, that trade-marks were not classed with patent monopolies; that the comparison was between the assignments, not the things assigned; that, inasmuch as Pike had given an unrestricted assignment, "the (assignee's) right to use the trade-mark is not limited to any place"; that, though the distillery was located at Cincinnati, the good will of the business and the trade-mark as the badge thereof could extend throughout the country; and that, since the thing to be protected was "the reputation the whiskey there manufactured (at Cincinnati) had acquired in the market," an injunction should be granted to keep the pirate Kidd out of any market in which the whisky had acquired a reputation. And nothing in the reported case indicates that the genuine Pike's Magnolia Whisky was not sold and well known in the New Orleans market.

In *Griggs, Cooper & Co., Complainant, v. Erie Preserving Co. (C. C.)* 131 Fed. 359, complainant was a wholesale grocer at St. Paul, dealing in canned goods under the common-law trade-mark "Home Brand," adopted in 1889, and having a trade extending through Minnesota, Wisconsin, North and South Dakota, and Montana. Defendant later came into the same territory and undermined complainant's trade by use of the same mark. In 1877 Fry & Co., a Pennsylvania corporation, had adopted the identical mark and in 1885 and 1892 registered the mark under the numbers 11850 and 20913. Complainant, learning this in 1900, took a license or limited assignment from Fry to use this registered trade-mark in said northwestern territory. The extent of Fry's trade is not stated; but seemingly complainant in establishing its trade had not come into collision with Fry. At any rate, Fry's license or assignment does not profess to convey to complainant Fry's business, reputation, and good will, or any part thereof; and throughout the territory in question the mark "Home Brand" pointed exclusively to complainant as producer. On the ground that Fry's

license or assignment of the registered mark gave complainant an exclusive proprietary interest in Home Brand within said northwestern territory, the defendant was enjoined. The decree, we believe, is sustainable on the underlying principle of the trade-mark suit and on the analogies of the Blackstone, Keystone, and Baltimore Club cases. But in looking to the decision as authority for complainant's proposition that a trade-mark has an existence independent of the trade to which it is appendant, we suggest that the registry statute does not purport to create a new right, but only to regulate a pre-existing right; that the regulation is confined to commerce with foreign nations and Indian tribes and does not touch the interstate and intrastate commerce in which the parties to the suit were competing; and that the cases of *Kidd v. Johnson*, 100 U. S. 617, 25 L. Ed. 769, and *Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co.*, 95 Fed. 457, 37 C. C. A. 146, as we read them, are not authorities for the proposition that Fry's license or limited assignment of the registered trade-mark, unaccompanied by any transfer of business and good will, was effectual to give complainant a monopolistic right in Home Brand in interstate and intrastate commerce in said northwestern territory.

Hygeia Distilled Water Co. v. Consolidated Ice Co. (C. C.) 144 Fed. 139, is a case wherein the complainant, beginning in 1885, built up a trade in distilled water under the trade-mark "Hygeia" in the territory of New York and "other states" unnamed. In 1890 defendant innocently adopted the same trade-mark for its distilled water and acquired a trade in "Pittsburgh and the surrounding territory." Each party remained in ignorance of the other and its doings until 1904, shortly before the start of the suit, when complainant's counsel notified defendant to quit. Down to that time, therefore, the mark "Hygeia" was a warrant to the consumers in Pittsburgh and vicinity that defendant was the producer of the water they wanted. The injunction against defendant consequently involves the proposition that complainant by adopting the mark in 1885 and then applying it to its product in New York acquired a monopoly of the mark, good for 19 years and all the years, and dominant in the Pittsburgh market and all the markets of the United States irrespective of the extent to which complainant had entered the markets. The opinion disposes of the question by saying that complainant's right to an injunction is not affected by "the fact that complainant has not up to this time extended its trade to the locality occupied by the respondent," and by citing *Derringer v. Plate*, 29 Cal. 296, 87 Am. Dec. 170, and *Hopkins on Trade-Marks*, § 13.

Derringer v. Plate has already been considered. In section 13 of *Hopkins* the general statement is not made that a trade-mark has no territorial limitation, but, "unlike a patent, a trade-mark has no territorial limitation." If by this it is meant that a patent is a sovereign grant and has no force beyond the territorial limits of the sovereignty, while a trade-mark, which is of a different nature, is not restricted by the bounds of states or nations or continents, but goes wherever the trade to which it is appendant goes, the statement affords complainant no comfort. And that such was the intended meaning seems to be

evidenced by the citation of *The Collins Co. v. Cohen*, 3 K. & J. 428, as supportive of the text. In that case complainant Collins was an American manufacturer who had a large trade and a high reputation not only in the United States but also in various foreign countries, including Cuba and Australia; but no factory, no trade, no good will, no marks registered or unregistered, in England. Defendant was a manufacturer at Sheffield, England, who was exporting his goods to Cuba and Australia and there undermining complainant's trade by using complainant's commercial signature. One of the defenses was that, as complainant had no trade rights in England that had been trespassed upon by the defendant in England, the case in England was not maintainable. It was also argued that there was nothing to show that the laws of Cuba and Australia did not allow traders to cheat others by palming off goods under forged commercial signatures. Vice Chancellor Wood replied:

"I apprehend that every subject of every country, not being an alien enemy—and even to an alien enemy the court has extended relief in cases of fraud—has a right to apply to this court to have a fraudulent injury to his property arrested. And the plaintiffs have the right—a right recognized, I imagine, everywhere in the world, or at least in every civilized community—of saying, 'We, being the manufacturers of certain goods, claim that another man shall not manufacture goods and put upon them our trade-mark and thus pass them off as manufactured by us.'"¹

[5] We find nothing in conscience or in reason or in persuasive precedents that should induce us to permit complainant to dominate the southeastern markets in question, where "Tea Rose" means defendant, and thus absorb or take over the valuable trade that defendant in good faith has built up in virgin territory. If this may be done, then the trade-mark doctrine, which started out to prevent defendants from deceiving consumers to complainants' injury, has come to protect complainants in deceiving consumers to complainants' advantage at the expense of defendants.

If the junior has not established his trade in good faith, or if, having appropriated certain markets in an honest belief, he should attempt to forestall the elder trader by hastening into markets the elder was arranging to occupy, it might be that equity would have no difficulty in recognizing an inchoate right in the elder to precedence and dominance, for honesty and fair dealing should always be a strong appeal to conscience; but no such questions are here, because on the present record defendant's honesty and fairness stand unquestionable.

Another route leads to the same destination: If complainant has trade rights irrespective of the existence of its trade, whence do they come? Monopolies are in derogation of common right; they are special privileges. Every lawful monopoly is a grant from the sovereign to a selected favorite, designated by person or by class. Ohio, complainant's sovereign state, has not by constitution or statute granted it a monopoly of the use of the mark. The federal government has constitutional authority to grant monopolies for limited times to inventors

¹ Compare *Richter v. Reynolds*, 59 Fed. 577, 8 C. C. A. 220; *City of Carlsbad v. Kutnow*, 71 Fed. 167, 18 C. C. A. 24; *Vacuum Oil Co. v. Eagle Oil Co.* (C. C.) 122 Fed. 105.

and authors; but complainant is neither, and a trade-mark may endure forever. How far Congress might go under the commerce clause (Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550; *Sarrazin v. Irby Cigar Co.*, 93 Fed. 624, 35 C. C. A. 496, 46 L. R. A. 541), it is needless to inquire, for the federal statute is not concerned with the commerce in which these parties were engaged. So if the monopoly here sought is the creature of law, it must be of the common law. First. Trade rights were not created by the common law. They are a part of man's natural rights. Man preceded the common law, which recognized, but did not create, the rights he was theretofore exercising. The most the common law did was to regulate their use, or, rather, to adopt and enforce the usages of honest commerce. If, because the common law recognizes and regulates a man's right to trade, it be claimed that the common law created the right, then the common law might also be called the author of his life, liberty, and happiness. And if it be said that a man has a "monopoly" in his own life or liberty or trade, then the word is wrongly used. Second. But if a monopoly in a trade-mark is created or affirmatively granted by the common law, by what common law? We need not consider the mooted question whether, generally, there is a common law of the United States, or whether the common law administered by the federal courts in the several districts is the common law of the respective states, for, with regard to the common law of trade-marks, it is settled that the right does not arise under "the Constitution and laws of the United States." If it did so arise, the federal courts, regardless of the citizenship of the parties, would have jurisdiction to protect the right throughout the territory of the United States. *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; *Warner v. Searle Co.*, 191 U. S. 202, 24 Sup. Ct. 79, 48 L. Ed. 145. If not created by the federal law, then the supposed monopoly must have been created by the law of Ohio; and, if so, complainant's monopoly created by that law can have no extraterritorial effect.

[6] Though an order granting or denying a preliminary injunction will not be disturbed except for an abuse of discretion, a proper discretion does not include the misapplication of the law to conceded facts. *Winchester Repeating Arms Co. v. Olmsted*, 203 Fed. 493, 121 C. C. A. 615.

A further reason appears why complainant's showing did not justify the issuance of an injunction. Defendant proved that complainant's sales of flour in the territory in question were made under the brands "Trojan" and "Eldean Patent." If this was the same flour as its "Tea Rose," made from the same wheat and taken from the same flour bins, to permit complainant to add "Tea Rose" flour would simply tend to confuse trade in those markets, or only come to indicate a difference of grade that did not exist. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 467, 14 Sup. Ct. 151, 37 L. Ed. 1144. Complainant, necessarily knowing the whole truth respecting this matter, did not meet the situation exhibited by defendant.

The decree is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

BIG HILL COAL CO v. CLUTTS.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1913.)

No. 2,360.

1. MASTER AND SERVANT (§ 88*)—CREATION OF RELATION—EVIDENCE.

Where decedent, at the time he was killed, was working in defendant's coal mine at the request of his grandfather, who, under contract with defendant, had undertaken to mine the coal, and defendant exercised supervision and control over the work and paid decedent's wages directly, the relation of master and servant existed between decedent and defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 144-151; Dec. Dig. § 88.*]

2. MASTER AND SERVANT (§ 118*)—DEATH OF SERVANT—MINES—DANGEROUS ENTRY.

Where decedent, a coal miner, was killed by the fall of a part of the roof of an entry which had been completed and in effect accepted, but not measured nor paid for, defendant owed decedent a nondelegable duty to use reasonable care to keep the roof of such place safe, and was liable for a failure to exercise reasonable care to support the roof after notice that it was dangerous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. § 118.*]

3. MASTER AND SERVANT (§ 185*)—INJURIES TO SERVANT—FELLOW SERVANTS.

The fellow-servant doctrine does not apply to an injury sustained by a master's breach of a nondelegable duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 385-421; Dec. Dig. § 185.*]

In Error to the District Court of the United States for the Eastern District of Kentucky; A. M. J. Cochran, Judge.

Action by J. W. Clutts, as administrator of the estate of Edward Clutts, deceased, against the Big Hill Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Helm Bruce and Grover G. Sales, both of Louisville, Ky. (Wm. Marshall Bullitt, of Louisville, Ky., and Chester Gourley, of Beattyville, Ky., of counsel), for plaintiff in error.

J. M. McDaniel, of Beattyville, Ky., and O'Rear & Williams, of Frankfort, Ky., for defendant in error.

Before WARRINGTON, KNAPPEN and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. [1] Suit was brought in the Lee county circuit court of Kentucky, and removed to the court below, where defendant in error (called herein "plaintiff") recovered a verdict and judgment against plaintiff in error (referred to herein as "defendant"), and error is prosecuted. The action was for wrongful death of plaintiff's decedent and was heard and disposed of upon issues of alleged negligence and contributory negligence. Motion was made at the close of plaintiff's evidence, and again at the close of all the evidence, to direct a verdict for the defendant, and both motions were overruled. The death occurred in the coal mine of the defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The deceased was working at the request of his grandfather, who, under contract with defendant, had undertaken to do the work involved in mining the coal. The answer contained a denial that deceased was in the employ of defendant, but counsel do not appear to have treated this as material, as clearly they could not, because of defendant's assent to the employment through the supervision and control it exercised over the work and its direct payment of decedent's wages. *Paducah Box & Basket Co. v. Parker*, 143 Ky. 607, 608, 609, 136 S. W. 1012, 43 L. R. A. (N. S.) 179.

The decisive question, and the relevancy or not of decisions relied on by defendant, will be better understood and more easily determined by observing the condition and the surroundings of the place where the accident occurred. The deceased was killed in a cross-entry by the fall from its roof of a block of slate, called a "horse-back." This cross-entry extended from the main entry about 321 feet. Its width was 10 feet except near the head, where it was somewhat wider than usual, which probably had the effect of weakening the roof. The entry was of the ordinary height of 6 feet for a distance of 285 feet from the main entry, and, in consequence of the dangerous condition of the roof, the height of the entry for most of the remainder of the distance was increased and the part taken down removed from the entry, but nothing was done to the portion embracing the "horse-back" and nearest the head of the entry. It was this latter portion that fell and caused the death. Concededly the first 285 feet of the cross-entry had been approved and accepted by the defendant, but not the rest; and the scene of the controversy is within this portion. It is not contended that this was not of the dimensions requisite for approval and acceptance. Approval and acceptance were formally signified by semimonthly payments of wages, and some of the work in the part last described was done after the last pay day. It is undisputed that the work on this part was done, like all the entry work, under the supervision and direction of the mine foreman, Lunce, who testified that he "had charge of the mine." It was under his order and direction that the portion of the roof before mentioned was removed. His attention was also called to the presence of the "horse-back," but he pronounced that part of the roof safe. For all practical purposes all work on this portion was completed, and a track was laid throughout the length of the cross-entry, including the portion in question, and a car put in operation for the removal of coal and slate, before the accident.

[2] The work of driving the entry beyond the end of the track was continued. After removal of the coal for a short distance beyond, a blast was fired in the overhanging slate, which resulted in leaving the débris to be removed; and at the time of the accident deceased was engaged in carrying pieces of this slate to and loading them upon the car. It is a mistake to suppose, as counsel do, that the work deceased was doing, within the space about the car where he was killed, was either opening that place for work or making it safe. It should constantly be remembered that the work of the deceased within that space was simply to use it as a passageway to carry material to the car; and the decisions upon which counsel rely are inapplicable for that reason.

The inquiry at last is whether within the purview of the master's duty this was a safe place to work.

[3] In the solution of this question we concur in and rest our decision on the opinion rendered by Judge Cochran upon his denial of the motion for a new trial; and in thus disposing of the case we stop to say of the claim that the fellow-servant doctrine is controlling (even assuming that the question was raised by exception to the general charge or by request to charge) that it is irrelevant to the doctrine of nondelegable duty. *Scendar v. Winona Copper Co.*, 169 Mich. 665, 669, 135 N. W. 951; *Illinois Cent. R. Co. v. Hart*, 176 Fed. 245, 100 C. C. A. 49. The portions of the opinion below, which specially bear on the present question, follow.¹ The judgment is affirmed, with costs.

¹ The main ground upon which a new trial is sought is that I erred in not sustaining defendant's motion for a peremptory instruction made at the close both of plaintiff's and defendant's evidence. It is claimed that defendant was entitled to such instruction because the defendant owed the decedent no duty to look after the safety of the roof of that portion of the entry which fell and killed him. I do not understand that it is claimed that if defendant owed decedent such a duty there was no sufficient evidence of a breach of that duty to carry the case to the jury.

It is trite in the law of master and servant that the former owes the latter the duty of exercising reasonable care to provide a reasonably safe place in which to work. *Mr. Freeman*, in his note to *Wellston Coal Co. v. Smith*, 87 Am. St. Rep. 559, as to the application of this rule to miners says:

"The necessity of this rule and the importance of the duty it imposes is in every case apparent, but in no connection more so than when applied to the relation existing between a mine owner and his employes. The peculiarly hazardous conditions under which the work must necessarily be prosecuted make it of the first importance that the employer be required to use all reasonable means to provide a safe place for its performance and the principle is established by almost innumerable authorities that it is the duty of a mine owner to use all reasonable care and diligence to furnish his employes with a safe place for the performance of their duties."

And in the case of *Union Pac. Ry. Co. v. Jarvi*, 53 Fed. 65, 3 C. C. A. 433, Judge Sanborn said:

"Obviously, a far higher degree of care and diligence is demanded of the master who places his servant at work digging coal beneath the overhanging masses of rock and earth in a mine than of him who places his employe on the surface of the earth, where danger from superincumbent masses is not to be apprehended. A reasonably prudent man would exercise greater care and watchfulness in the former than in the latter case, and, throughout all the varied occupations of mankind, the greater the danger that a reasonably intelligent and prudent man would apprehend, the higher is the degree of care and diligence the law requires of the master in the protection of the servant."

* * * * *

It would seem that if the room in which the miner is digging coal was not all made by him and he has been put to work therein by the mine operator after it has been partially made by other miners, as to the portion then so made the exception has no application. Such portion has been furnished to him by the mine operator and not by himself. This was so held in the case of *Western Coal & Min. Co. v. Ingraham*, 70 Fed. 219, 17 C. C. A. 71, where Judge Caldwell said:

"Whatever may be the duty of coal miners with reference to timbering the slopes and roofs of the rooms from which they remove coal, the rule is well settled that, after a mine is once opened and timbered, it is the duty of the owner or operator to use reasonable care and diligence to see that the timbers are properly set, and keep them in proper condition and repair."

Of course, where the same conditions exist in other parts of the mine the

exception should apply as much there as it does to the miner's room. Mr. Freeman, in the note heretofore referred to, thus states this exception without reference to whether it applies to the miner's room or elsewhere (87 Am. St. Rep. 566):

"This rule that the mine owner is bound to use all reasonable care to render safe the place furnished by him to the employes is applicable only where the place in which the latter are at work is such that it can be said to be a place furnished by the mine owner. When, therefore, the employes are engaged in making their own place the rule does not apply. Where, for instance, miners are engaged in cutting down or blasting out the face of a drift, it would be entirely unreasonable to demand of the owner that immediately after each blast he make safe the place which the explosion has created. In such case the miners may with reason be said to furnish their own place. The character of the place is continually changing by reason of the work itself. It is, therefore, uniformly held that as to those places which the employe in the progress of his work furnishes for himself it is his duty and not that of his employer to use reasonable care to render them safe for the further prosecution of the work."

The case we have in hand is not a room case and I have considered the law applicable to room cases to ascertain the principles upon which the mine operator owes no duty to the miner as to providing a safe place to work in such cases, to see if they can have any application to the case in hand.

When it comes to entries the general rule that the mine operator owes the miner the duty of exercising reasonable care to provide a reasonably safe place in which to work finds apt application. The following are certain of the cases in which that rule has been applied as to entries, to wit: Union Pac. Ry. Co. v. Jarvi, 53 Fed. 65, 3 C. C. A. 433; Ellsworth v. Metheney, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389; Parke County Coal Co. v. Barth, 5 Ind. App. 159, 31 N. E. 585; Corson v. Coal Hill Coal Co., 101 Iowa, 224, 70 N. W. 185; Blazenic v. Iowa & W. Coal Co., 102 Iowa, 706, 72 N. W. 292; Wellston Coal Co. v. Smith, 65 Ohio St. 70, 61 N. E. 143, 55 L. R. A. 99, 87 Am. St. Rep. 547.

These are all cases, however, where the entry had been completed and the miner who was injured was using it as a passageway. The difference from the case in hand is that here the entry had not been completed and the decedent was assisting in the work of completing it at the time he lost his life. All the help that can be obtained from these cases, therefore, is in the principles upon which it was held that the general rule applied to them. And the decision of the case in hand must depend upon a consideration of those principles and the principles applicable to room cases as we have found them to be. * * *

* * * It was taken as a matter of course by the mine foreman and the miners concerned that the former could be appealed to by the miners to look after the safety of the roof of the thirty feet and the roof that fell and killed decedent and that upon his being so appealed to he should look thereafter. No question was made as to its being anybody else's place to look thereafter. As soon as Lunce (the mine foreman) became aware of the dangerous character of the roof of the thirty feet, he directed it taken down. When Mink and Clutts, Jr., the next morning doubted the safety of the roof that fell and they so informed him, he went at once and examined it and pronounced it safe, and in the afternoon of his own accord he again examined it. * * * Before decedent went to work that night and after Lunce had examined the roof that fell in the morning the latter assured decedent through his father that the roof was safe. His father had spoken to him the afternoon before, evidently at decedent's instance or because of information obtained from him, concerning the safety of the roof. Did or not the defendant then in view of all these considerations owe decedent as to the roof that fell and killed him the duty of exercising reasonable care to see that it was reasonably safe? In the case of Taylor v. Star Coal Co., 110 Iowa, 40, 81 N. W. 249, Judge Deemer said:

"In the case before us (it being an entry case) the general rule, no doubt, is that the master must provide the servant with a safe place to work; but,

as the servant is from time to time making that place for himself, the law does not fix the exact time when his duty to look after himself ceases, and that of the master begins."

But are not the facts and circumstances of this case such that the law fixes that the duty of defendant to look after the safety of the roof that fell and killed decedent had begun before he placed himself in danger thereof? I think they are. It seems to me that in view of the fact that the law itself irrespective of the particular circumstances of a case does not fix the exact time when the duty of the miner to look after his own safety in an entry case ceases and that of the mine operator begins, it should be held that when in a particular case the miner turns the matter of looking after the safety of the place over to the mine foreman and the latter accepts it the duty of the miner has ceased and the duty of the mine operator has begun. Possibly the law as to the duty of the mine operator to exercise reasonable care to provide the miner a reasonably safe place in which to work may be summed up in this way. The mine operator owes this duty except where it is the reasonable expectation of the parties that the miner himself shall look after his own safety. Generally speaking, such is the expectation where he is working in his room digging coal and hence the mine operator does not owe him such duty. On the other hand, generally speaking, it is not the reasonable expectation that the miner shall do so as to an entry and hence there the mine operator does owe him such duty. But where the miner is engaged in driving or assisting in driving the entry it is the reasonable expectation of the parties that whilst he is so doing, as to the portion of the entry that is being driven, that he shall look after his own safety, and hence the mine operator does not owe him such duty in regard thereto. It is possible that this may be the case not only as to the portion of the entry which is being driven but also as to the portion which the miner is using in driving or assisting in driving such portion or even as to so much of the entry which has not been measured, accepted, and paid for, even though it may be of the required width and height. But if it is a part of the *modus operandi* that the miner may direct the mine boss' attention to the portion he is so using or which has not been measured, accepted, and paid for as calling for care, in which case the mine boss is to look after its safety, it is certainly not the reasonable expectation of the parties that the miner shall thereafter look after its safety. Particularly is this not the case when the mine boss, after having his attention so directed, cares for the safety thereof and assures the miner that it is safe. Where this is the case the duty of the mine operator as to providing a safe place should apply in full force. And in the case we have here, an authority somewhat in point and more like in fact to the case in hand than any I have found is the case of *Kelley v. Fourth of July Min. Co.*, 16 Mont. 481, 484, 41 Pac. 273.

There a miner was engaged in running a tunnel by drilling and blasting from its face. He threw the rock he blasted from the face of the tunnel behind him and it was removed by another man. The dirt and sand had been dropping from the roof behind him. To prevent this the foreman had caused two half sets of timbers to be placed in the tunnel, the miner assisting in the work. The day before the accident the miner under the directions of the foreman put in a stull (an arching of boards) for the same purpose. The foreman was in the habit of examining the work every afternoon and had assured the miner that the roof was safe. The afternoon before the accident the miner had called the foreman's attention to the accumulation of rock, dirt, and debris behind him and the difficulty of crawling over it to get out and the foreman had promised to have it removed but had not done so. The next morning whilst at work throwing back the dirt and rock blasted from the face the afternoon previous the miner heard the timbers creaking and noticed the fine dirt falling from the roof. He made a jump to get out, but was caught by the falling dirt and timbers and was injured. It was held that the defendant was liable. Pemberton, J., said:

"In this case the court instructed the jury that 'it was the duty of the defendant to adopt all reasonable means and precautions to provide a safe place for the plaintiff in which to prosecute his work.' The defendant assigns this

as error. Counsel for the defendant contends that, while this instruction states the law in ordinary cases, it is not applicable to this case. His contention is that the plaintiff was not working in a place, but was working in the creation of a place. The evidence in this case is that the plaintiff was employed, at the time of the accident, in running a tunnel in defendant's mine. He was doing this work under the immediate supervision and direction of John Sheehan, the foreman and manager of the mine. Sheehan was not working in the mine with plaintiff. The plaintiff was not engaged in creating a place, on his own judgment, and at his own risk. He assumed the risks naturally attendant upon driving the tunnel. It was the duty of the defendant to keep that part of the tunnel or place already created safe, by whatever reasonable means were necessary. If the plaintiff had been injured while in the actual work of drilling or blasting in the face of the tunnel he was driving, he may have had no claim on the defendant for damages; for these were risks he assumed as a miner. But he did not assume the risk of defendant's failure to keep that part of the tunnel or place already created reasonably safe and secure. For instance, if a stone or material blasted or dug from the tunnel by plaintiff should have been blown against, or should have fallen upon, him, he would have had no remedy against defendant for any injury sustained thereby. This is a risk belonging to his employment and which he assumed. But he did not, by his employment as a miner in driving the tunnel, assume the risk of the failure of the defendant to take such reasonable precautions as were requisite to prevent the caving and falling of the roof of that part of the tunnel already created, upon him while engaged in this work. Nor did he assume the risk of the failure of the defendant to keep the floor of the tunnel so free from rock and debris as not to materially hinder or obstruct his escape from his place of work, in case of accident, such as occurred in this case, or might occur by premature or unexpected explosions * * * of the risks incident to the work in front of him, and not the risks of the defendant's failure to properly care for that part of the tunnel or place behind him, which he had completed, and turned over to the care and control of the defendant. The authorities cited by the defendant's counsel, we think, are not applicable to the case at bar. The conditions and facts in the cases cited are dissimilar from those in this case. We do not think that the plaintiff, at the time he was injured, was engaged in creating a place, or rendering a dangerous place safe, within the meaning of the cases cited by defendant's counsel."

The defendant relies mainly on the case of *Finalyson v. M. & M. Co.*, 67 Fed. 507, 14 C. C. A. 492, and thinks that it is decisive of this. But I do not think so. It is true that that was an entry case. But there the miner who was killed and for whose death the suit was brought, was employed along with others in making safe a portion of an entry that was known to be dangerous and was killed by reason of its unsafety. Hence it comes within the well-recognized limitation upon the general rule above referred to that where the servant is expressly employed to look after the safety of a certain place or it is the reasonable expectation on his part and that of his master that he shall do so there the general rule does not apply. A case decided by the same court in which the same limitation was applied as to a station in a mine which the miner for whose death the suit was brought was engaged with others in putting in a safe condition is that of *Moon Anchor Consol. Gold Mines v. Hopkins*, 111 Fed. 298, 49 C. C. A. 347. I think these two decisions are sound, but it is to be noted that Judge Caldwell in the one case and Judge Thayer in the other, both able judges, dissented.

Here the nature of decedent's employment was not to make any dangerous place safe. He was engaged in a dangerous work in the sense that all mining is dangerous. But he had nothing to do with putting the roof of the portion of the entry that had been completed in a safe condition and he was not engaged in so doing when killed. What he was doing was using the entry that had been completed, i. e., made of the required width and height, for the purpose of placing the slate which he had removed from that which had been shot down in the car. He was not at work on the portion of entry whose roof fell. It had been completed two days before. Defendant had ample opportunity to inspect it and place it in safe condition. He had inspected it

and had assured decedent through his father that it was safe before he placed himself in danger.

The case of *Citrone v. O'Rourke Eng. Co.*, 188 N. Y. 339, 80 N. E. 1092, 19 L. R. A. (N. S.) 340, is not applicable. There the plaintiff and others were engaged in creating a place and were injured by the unsafety of the place they were creating. The case of *Smith v. North Jellico Coal Co.*, 131 Ky. 196, 114 S. W. 785, 28 L. R. A. (N. S.) 1266, is a mine case, but a room case, and has been much weakened by the later case of *Williams Coal Co. v. Cooper*, 138 Ky. 287, 127 S. W. 1000. No one of the cases cited and relied on is similar or substantially so to this case in its facts. The case of *Deye v. Lodge Tool Co.*, 137 Fed. 480, 70 C. C. A. 64, has no application. It is a case where the place of work of a servant was made unsafe by the negligence of a fellow servant in matter of operation. A similar case to this, in which I delivered the opinion on behalf of the Sixth Circuit Court of Appeals, is that of *Pennsylvania Co. v. Fishack*, 123 Fed. 465, 59 C. C. A. 269.

Point has been made of the fact that the accident took place in that portion of the entry, which though completed, i. e., of the required width and height, had not been measured, accepted and paid for. It remains to consider the significance of this circumstance. There is some contrariety in the evidence as to when the entry is finished. According to plaintiff's witnesses it is finished whenever it is made of the required width and height; and according to defendant's when measured and accepted. The difference is due to the different senses in which the word "finished" is used. The witnesses of the one mean actually finished and those of the other when accepted as finished. Both are right. There is also some contrariety as to whether the miner has to post the portion of the entry which has not been measured and accepted, though the evidence of the defendant to the effect that he has to is not very persuasive. It is not necessary to take issue with it here. For it is apparent from the evidence of both sides that whenever the mine boss' attention was called to any danger in the roof of the entry, whether measured and accepted or not, he was expected to look after its safety. That was what happened as to the roof of the 30 feet and the roof that fell. Lunce's attention was called to the dangerous character of the roof in both places. He inspected each at once when his attention was called thereto. He directed that of the 30 feet to be taken down, that which had been measured and accepted and that which had not been, and pronounced the other safe and told Mink and Clutts, Jr., and decedent through his father to go ahead with their work. * * *

When I charged the jury, my recollection of the evidence was not such that I was clear that it had been established beyond question that the portion of the roof which fell was a part of that which Lunce had undertaken to care for. I had had such difficulty in comprehending the *modus operandi* that what the evidence actually showed on this point had escaped me. Hence I left it to the jury. It is clear from the reading of the evidence that Lunce had undertaken to care for the safety of this portion of the roof as well as that of the 30 feet, though he did no more than examine it and determine as to its safety. * * *

UNITED STATES v. ROCKTESCHELL.

(Circuit Court of Appeals, Ninth Circuit. October 31, 1913.)

No. 2,191.

1. ALIENS (§ 62*) — NATURALIZATION — RESIDENCE IN UNITED STATES — "RESIDED."

Rev. St. § 2170 (U. S. Comp. St. 1901, p. 1333), providing that an alien must have "resided" in the United States continuously for a period of five years to be entitled to admission as a citizen, does not require him to remain physically within the United States during all of that time; but it is sufficient if he has established a residence and at all times there-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

after claims it, although he may at times, as when following the calling of a seaman, be temporarily out of the country.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123–125; Dec. Dig. § 62.*

For other definitions, see Words and Phrases, vol. 7, pp. 6147–6150; vol. 8, p. 7787.]

2. ALIENS (§ 71½ New, vol. 7 Key-No. Series)—NATURALIZATION—SUIT FOR CANCELLATION OF CERTIFICATE—PETITION.

Whether an applicant for admission to citizenship has been a resident of the United States continuously for the preceding five years is within reasonable limits a question of fact, and a petition for cancellation of a certificate of citizenship under Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1911, p. 537), on the ground of want of such previous residence, must show either fraud or that the evidence before the court which granted the certificate was insufficient to warrant the finding of residence.

3. WORDS AND PHRASES—"RESIDE."

It is familiar knowledge that the word "reside" is capable of different meanings, and when employed in a statute must be construed in the light of the context and the purpose of such statute. Generally, however, it signifies nothing more or less than domicile.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6147–6150; vol. 8, p. 7787.]

Appeal from the District Court of the United States for the Northern District of California; Robert S. Bean, Judge.

Proceeding by the United States, under Naturalization Act June 29, 1906, c. 3592, § 15, 34 Stat. 601 (U. S. Comp. St. Supp. 1911, p. 537), for the cancellation of a certificate of citizenship issued to Rudolph Henry Rockteschell. Petition dismissed on demurrer, and petitioner appeals. Affirmed.

John L. McNab, U. S. Atty., of San Francisco, Cal.

H. C. Lucas, of Oakland, Cal., and W. F. Sullivan, of San Francisco, Cal., for appellee.

Before GILBERT, Circuit Judge, and WOLVERTON and DIETRICH, District Judges.

DIETRICH, District Judge. By this proceeding the government seeks a decree setting aside a certificate of naturalization issued to the respondent out of the United States Circuit Court for the District of Massachusetts on the 26th day of June, 1906. The ground relied upon is that, at the time the order of admission was made, the respondent had not resided in the United States continuously for the period of five years. In general terms the petition sets forth that, at the hearing of his application for naturalization, contrary to the fact, he represented that he had been in the United States for more than five years, and there is attached to the petition, as an exhibit, an affidavit made by a special agent, setting forth in detail what are claimed to be the facts touching the actual presence of the respondent in the United States, from 1894, the time when he first came to this country, up to the date of his admission. From this affidavit it appears that he is a seaman, and that during most of the time since he reached the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

age of majority he has followed that calling for a livelihood. It is conceded that he was physically present in the United States continuously from 1894 to 1897, but it is averred that subsequent to that time he has been here only at irregular intervals, and for comparatively short periods of time. There is, however, no contention that since his first arrival, in 1894, he ever claimed a residence or a home, or in fact resided, in any other country.

In the lower court a demurrer, calling into question the sufficiency of the petition, having been sustained, the petition was dismissed, and the appeal is from the judgment of dismissal. Here the cause was submitted without oral argument, with the privilege of filing printed briefs; but, although the time therefor has long since expired, no briefs have been presented. We can therefore only conjecture the precise nature of the government's contention.

[1] As a condition precedent to the right of the respondent to naturalization, it was doubtless necessary for him to show continuous residence in the United States for the period of at least five years; but it is not thought that this requirement is equivalent to, or necessarily implies, continuous physical presence. The certificate of naturalization having been issued three days before the act of June 29, 1906, went into effect, the case is controlled by the provisions of the Revised Statutes, which, however, in so far as they concern the present question, are not materially different from those of the later act. Section 2170 of the Revised Statutes (U. S. Comp. St. 1901, p. 1333) is as follows:

"No alien shall be admitted to become a citizen who has not, for the continued term of five years next preceding his admission, resided within the United States."

[3] It is familiar knowledge that the word "reside" is capable of different meanings, and when employed in a statute must be construed in the light of the context and the purpose of such statute; generally, however, it signifies nothing more or less than domicile. Some light is thrown upon the intent of Congress by the history of the statute. As originally enacted April 14, 1802 (2 Stat. 153, c. 28), the requirement was simply of five years' residence in the United States, and as then construed the term "residence" meant "domicile." In *re an Alien*, Fed. Cas. No. 201a. By the amendment of March 3, 1813 (2 Stat. 811, c. 42), the section was made to read as follows:

"No person who shall arrive in the United States, from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not for the continued term of five years next preceding his admission as aforesaid have resided within the United States, without being at any time during the said five years, out of the territory of the United States."

Through the change thus wrought Congress very clearly evinced its intention of requiring continuous physical presence. But, upon the other hand, the fact that in the revision the clause, "without being at any time during the said five years out of the territory of the United States," was omitted, would seem to indicate a purpose again to abandon this requirement. It has been held that under the present law

continuity of physical presence is not required. In *re* Schneider (C. C.) 164 Fed. 335; *United States v. Cantini* (D. C.) 199 Fed. 857. This we believe to be a correct interpretation both of the new law and of section 2170 of the Revised Statutes. To establish a residence there must doubtless be a concurrence of act and intent; but, when once established, temporary absences from time to time, unaccompanied by an intent to abandon or change the residence, do not operate to interrupt the continuity thereof. There is nothing in the naturalization act, other than the phrase itself, "has resided continuously within the United States," to indicate a purpose upon the part of Congress to require continuous physical presence, and in the practical administration of the law such a construction would entail consequences harsh in the extreme. Within reasonable limits, therefore, it is a question of fact, to be determined in the light of all the attendant circumstances of each particular case, whether the continuity of residence has been broken by temporary absences.

[2] In the present case it must be presumed that there were before the Massachusetts court sufficient facts to warrant the findings. The petition here does not put in issue the correctness of that court's conclusion upon the evidence before it, nor are we advised of the precise nature and extent of the showing upon which the findings were based. Directly it is stated only that:

"The said order and certificate of citizenship was procured from said court upon the representation that said respondent had resided within the United States for the continued term of at least five years immediately preceding the date of his application for citizenship in said court as aforesaid, and continuously since prior to his arriving at the age of eighteen years; whereas in truth and in fact respondent had not resided continuously in the United States for five years, nor continuously since prior to his arriving at the age of eighteen years, but had resided in the United States at the times and in the manner as set forth in the affidavit attached to this petition, and marked 'Exhibit A,' which is hereby referred to and made a part hereof."

But this general averment, involving, as it does, possible inferences of law as well as general conclusions of fact, is insufficient as a charge of perjured testimony or of other fraud. The controlling question is whether the respondent misrepresented or willfully withheld from the court any of the concrete, probative facts. He might very well have fully and fairly disclosed every fact set forth in the special agent's affidavit attached to the petition, and yet at the same time in good faith have represented to and urged upon the court that he had resided in the United States continuously for five years. To be sufficient, the petition must, in harmony with the general rule of pleading fraud, point out specifically in what particular respect the representations were false. This the petitioner has failed to do. Nor do the facts set up in the affidavit necessarily negative the respondent's right to admission. Standing alone and unexplained, it is true, they raise a very substantial doubt of his right; but in the light of other circumstances and details which may have been before the court, and which may have illuminated his motive and intent, that doubt may have been readily dissipated. Besides, it is not for a court in a proceeding of this character to review or set aside findings of the court of original juris-

diction, based upon conflicting evidence, or upon evidence reasonably susceptible to different inferences. In the absence of fraud, it must appear that the issuance of the certificate was illegal—was in some substantial respect against the law. The correctness of a finding of fact, so long as the same is within the bounds of reason, involves no question of law, and cannot be reviewed or disturbed.

Inasmuch, therefore, as the petition does not allege that the respondent deceived the court of original jurisdiction by misrepresenting or withholding any concrete fact, and does not so far disclose the evidence before that court as to enable us to say as a matter of law that it was insufficient to warrant a finding of five years continuous residence, it is insufficient, and the judgment of dismissal was right, and must be affirmed.

GIBSON et al. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. November 6, 1913.)

No. 1,005.

1. POST OFFICE (§ 7*)—POSTMASTERS—SUIT ON BOND DEFENSES.

In an action on the bond of a postmaster to recover for money embezzled by him from registered letters, it is no defense that the senders of the letters were negligent in permitting themselves to be induced to send the same.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 7-14; Dec. Dig. § 7.*]

2. POST OFFICE (§ 7*)—POSTMASTERS—LIABILITY ON BONDS.

A postmaster is liable on his bond, conditioned as required by Rev. St. § 3834 (U. S. Comp. St. 1901, p. 2610), for the faithful discharge of all the duties and trusts imposed on him by law or the regulations of the department, to the United States as bailee for the value of registered letters embezzled from the mails regardless of the liability of the government to the senders or owners of the letters.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 7-14; Dec. Dig. § 7.*]

In Error to the District Court of the United States for the District of New Hampshire; Edgar Aldrich, Judge.

Action at law by the United States against James L. Gibson and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Alexander Murchie, of Concord, N. H. (Hollis & Murchie, of Concord, N. H., of counsel), for plaintiffs in error.

C. W. Hoitt, U. S. Atty., of Nashua, N. H.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. The postmaster's bond upon which the government sues was conditioned as required by Rev. Stats. § 3834 (U. S. Comp. St. 1901, p. 2610). The condition was that the postmaster should "faithfully discharge all the duties and trusts imposed on him either by law or by the regulations of the Post Office Depart-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ment." It ran to the United States of America only, as do all such bonds, and was in the penal sum of \$6,000.

The breach of condition alleged was the embezzlement by the postmaster of two registered letters, each containing \$490 in money, where-by the United States was damnified.

The defendants, who are the sureties on the bond, denied that the plaintiff had been damnified by reason of anything mentioned in the condition.

The jury found, in answer to special questions submitted to them by the court, that the postmaster did convert to his own use two registered letters, specifically described, containing \$490 each. Upon these special verdicts judgment was entered in favor of the government for \$980 and interest.

1. As plaintiffs in error here, the defendants contend that the evidence did not warrant the findings made, and a verdict for them ought to have been directed. There was uncontradicted evidence for the government that the letters, having been registered and mailed, reached the North Conway post office, whereof the postmaster for whom the defendants were sureties had charge, and were there receipted for, one by the postmaster himself, the other by one of his assistants. North Conway was the post office to which the letters were addressed and from which they were to be delivered to the addressees, residents of North Conway. According to the government's evidence, one letter was received as above on April 27th, the other on May 23, 1910, but neither letter was ever delivered to its addressee. The defendants' evidence tended to show that both were deposited in the post office safe to await delivery, and that not only the postmaster, but also three of his clerks, and certain railway mail clerks who visited the office from time to time, had access to this safe. It also tended to show that there were other residents of North Conway having the same family name as the addressees, and that letters addressed as these were might have been delivered to others than the true owners. The defendants therefore argue that the evidence made it no more probable that the postmaster took these letters after their receipt at the office than that they were taken by others having access to the safe, or were misdelivered. But this contention disregards the further evidence tending to show that on June 6, 1910, a post office inspector discovered the postmaster to be heavily short in his accounts and to have taken money on postal orders made by himself in the names of various other persons; that he was thereupon removed and subsequently sent to a federal prison; that the two registered letters came from banks in neighboring places which had been led to mail the letters and the money they inclosed by letters purporting to come to them from the addressees in North Conway and inclosing notes purporting to be signed by those persons; and that the addressees referred to never wrote or signed these letters or notes or had any knowledge of them. Not only was the postmaster the person accountable for the letters after their receipt at the office by the express provisions of the Postal Regulations, but there was evidence for the jury that he was more likely to have been the person who

took them than any of the other persons shown to have had opportunity to take them.

[1] 2. The defendants also complain that certain evidence offered by them was excluded. As to the first exception of this kind (assignment of errors 2), we think the court was clearly right in refusing to let the defendants ask the post office inspector called by the government, in cross-examination, if he had not known of cases in which persons not entitled to registered letters had receipted for them, taken them, and "made away with the funds." The other exception of this kind (assignment of errors 3) complains of a refusal to admit evidence that the banks from whom the letters and money in question came were negligent in mailing them without verifying the signatures upon the papers they had received, purporting to be signatures of the addressees of the letters. In the view we take of this case, one who has intrusted a properly registered letter to the mail is entitled to the benefit of all laws and regulations intended for the protection and security of the mail, without regard to any of the circumstances which may have induced him to mail his letter. Whether the senders of these letters were negligent or not in relying on the genuineness of previous correspondence can have no bearing upon the extent of liability of the sureties, if the postmaster whose fidelity they guaranteed stole the letters. It was not conduct on the bailor's part which violated the terms of the bailment, as in *U. S. v. Atlantic, etc., Co.* (D. C.) 206 Fed. 190.

3. Under Rev. Stats. § 3926, as amended in 1897 (Act Feb. 27, 1897, c. 340, § 1, 29 Stat. 599 [U. S. Comp. St. 1901, p. 2685]) and in 1902 (Act April 21, 1902, c. 563), 32 Stats. 117, the Postmaster General had provided rules under which the sender or owner of registered matter like these letters was to be indemnified for losses thereof in the mails, out of the postal revenues, but in no case to exceed \$25 for any one piece, or its actual value when of less amount. It appeared that the government had paid one of the banks \$50 on account of its loss. Whether or not any payment had been made to the other bank did not appear.

[2] The defendants, besides asking the court to direct a verdict for them on the whole evidence, asked a ruling that their liability, if any, was limited to \$50 in this case. The court refused and ruled instead:

"That the government's recovery was not limited to the sum which the government obligates itself to pay the sender of registered mail in case of loss, and that, being in possession of the funds sent through the mails, it is entitled to recover from the sureties to the full amount."

Of this refusal and ruling, and of the ordering of judgment for an amount exceeding \$50, the defendants complain as error.

There are some official bonds, similarly conditioned, upon which the federal statutes expressly authorize any person injured by a breach to sue in his own name and for his own use. Such are the bonds required of United States marshals. See Rev. Stats. §§ 783, 784 (U. S. Comp. St. 1901, p. 607). There are no such express provisions applying to postmasters' bonds. This suit is in the name of the United States alone, without suggestion that it is at the relation

of, or for the use or benefit of, any other party. Whether the owners of the letters could have sued either in their own names or in that of the United States, as in *Howard v. U. S.*, 184 U. S. 676, 22 Sup. Ct. 543, 46 L. Ed. 754, need not be considered. This is not such a suit, and the government must show a loss or injury due to an interference with rights of its own.

The government had a special property right in these letters and their contents by virtue of its possession of them for the purpose of delivery to their addressees in accordance with the laws applying to registered mail matter and was strictly bailee thereof under the well-known rules of the common law. The breach of duty which deprived it of the letters and their contents gave it, under ordinary rules, a right of action against the postmaster for their value based on the violation of its special property right. *Harrington v. King*, 121 Mass. 269, 271. See, also, 2 Kent, Comm. 585; 2 Beven, Negl. (3d Ed.) 736, 737. That the government was not liable to the owners of the property for the postmaster's embezzlement can make no difference here; the bailee's special property and right to recover in such a case exists whatever the degree of responsibility he has assumed by the terms and conditions of the bailment. And for the loss due to this violation at once of the government's rights and of the condition of the bond, the same right of action accrued at the same time, against the postmaster's sureties as against the postmaster himself.

The general rule as between a bailee and one who has wrongfully taken property from him is, unless the general owner has intervened, that the value of the property taken is the measure of the loss or injury to the bailee, and this he may recover for himself to the extent of the separate value, if any, of his special property, and in trust for the owner as to the remainder.

We see no reason why this rule should not apply against the wrongdoer's sureties in such a case as the present. Should the government be allowed so to recover, it would hold the amount recovered upon an implied trust for the owners of the property. To allow such a recovery would not, in our opinion, be holding the sureties to any liability not clearly within the reasonable contemplation and intention of the parties when the bond was given. This was the view taken by the Court of Appeals for the Eighth Circuit in *National Surety Co. v. U. S.*, 129 Fed. 70, 73, 74, 63 C. C. A. 512, also by Judge A. L. Sanborn in *U. S. v. American Surety Co.* (C. C.) 155 Fed. 941, by Judge Morris in *U. S. v. American Surety Co.* (C. C.) 161 Fed. 149, 151, and by the Court of Appeals for the Fourth Circuit in *U. S. v. American Surety Co.*, 163 Fed. 228, 231, 89 C. C. A. 658, in affirming Judge Morris' decision. It is true that in the two Court of Appeals decisions cited the bonds were letter carriers' bonds and conditioned, not only for the faithful performance of their duties, but for the payment over of all moneys received, to the proper officials. We see nothing in this, however, which could have made any difference in the application of the general rule. In the case in the Eighth Circuit the amounts lost and recovered from the sureties by the government were within the limit of indemnity out of the postal revenues for the loss of registered mail. But in all

the above cases it was held that the government need not prove any actual payment made by it to the owner of the stolen property in order to recover, and no other ruling could have been made if, as we think, the government's loss consisted in its having been deprived of property for which it was entitled to recover.

If, in order to recover the amount of this loss, it is necessary that the government should appear to be actually liable over to the owners of the letter for any amount so recovered, it is true that the government can be held liable only to the extent that its own laws permit. And while it might be said that, for an amount received by it upon an implied trust for the owner of property in its hands as bailee, it has made itself liable in the Court of Claims, under section 145 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1136 [U. S. Comp. St. Supp. 1911, p. 198]), upon an implied contract, we think it has made itself more expressly liable to an owner of property stolen from the mail in cases where it has recovered such property or its value. The Postmaster General is authorized by Rev. Stats. § 4058 (U. S. Comp. St. 1901, p. 2756), to deliver to the owner money or property so stolen, or the proceeds thereof, when he is satisfied that it has been received at the department, upon satisfactory proof of ownership. The Postal Regulations provide, and provided at the time, in pursuance of this section, for the deposit of all moneys recovered, by suit or otherwise, on account of moneys taken from the mail or losses therein, with a department official—for the determination of the proper person or persons to whom such moneys shall be restored—and for payment in accordance with such determination. Postal Laws and Regulations 1913, § 143, p. 81. These provisions date from 1908.

There can be no question that they will apply to any moneys recovered in this case. As to them, the government will have assumed a liability to the owner to which the provisions for indemnity out of the postal revenues for registered mail matter not recovered for have no application. Rev. Stats. § 4058, appears to have been one of the grounds upon which the Court of Appeals for the Fifth Circuit upheld a similar ruling in favor of the government in *American Surety Co. v. U. S.*, 133 Fed. 1019, 66 C. C. A. 679. The District Court was therefore right in refusing to rule that there could be no recovery, or none in excess of \$50, and in entering judgment for the value of the property lost.

The judgment of the District Court is affirmed.

In re WILKES-BARRE LIGHT CO.

WILKES-BARRE LIGHT CO. v. WEST LUMBER CO. et al.

(Circuit Court of Appeals, Third Circuit. November 7, 1913.)

No. 1,760.

BANKRUPTCY (§ 97*)—INVOLUNTARY PROCEEDINGS—EXAMINATION OF BANKRUPT.

Where proceedings in involuntary bankruptcy against a corporation had been at issue on the petition, demurrer, and answers denying insolvency for 18 months without being brought to a hearing, a creditor was not entitled to an order for an examination under Bankr. Act July 1, 1898, c. 541, § 21a, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3430), without a showing of present necessity.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 139; Dec. Dig. § 97.*]

Petition for Review from the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

In the matter of the Wilkes-Barre Light Company, alleged bankrupt. On petition to revise an order of the District Court, and motion to quash the same. Motion denied, and order reversed.

Edmund G. Butler, of Wilkes-Barre, Pa., and J. B. Colahan, 3d, of Philadelphia, Pa., for petitioner.

Geo. J. Llewellyn, of Wilkes-Barre, Pa., for respondents.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. On January 24, 1912, a creditors' petition was filed against the Wilkes-Barre Light Company. Insolvency was averred, and it was also charged that the company had applied to a state court for the appointment of a receiver. The District Court appointed its own receiver on the same day, and the receivership is still in existence, although there are now three receivers, instead of one. On February 14 the company demurred to the petition, assigning five reasons, one of them being the lack of jurisdiction; and on the same day three answers were filed, two by intervening creditors and one by stockholders and bondholders. The answers denied the material averments of the petition, and denied also that one of the petitioning creditors had a provable debt. On February 17 the petitioning creditors, the Light Company, and the intervening creditors agreed—

"That a stipulation be entered into to file in the (District) Court agreeing and requesting the said court to grant a suspension of the proceedings in this case until such time as either the petitioning creditors, or the alleged bankrupt, or those appearing, give 10 days' notice to the other party for the resumption of the proceedings.

"That neither party hereto waives any right of offense or defense now appearing upon the record, or that may arise in the future.

"This agreement and proceedings are for the purpose of harmonizing all conflicting interests and promoting the business of the company, and securing a full enjoyment of its franchise."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The stipulation thus contemplated was filed on March 11, and it adds a request that the court will "permit this stipulation to be filed and [will] consent to the terms thereof"; but the record before us does not show that the court took any formal action thereon. Apparently, however, the stipulation was respected in substance by the parties concerned, although the docket entries show some activity of one kind or another during the period between March 11, 1912, and May 24, 1913. Among the proceedings during this period is a petition by the attorney for certain creditors, under date of July 10, asking for an order upon 10 days' notice directing the company to submit to an examination before the referee under section 21a. The principal reason stated was an averment that the receivers were about to enter into a contract with the city of Wilkes-Barre for municipal lighting, and that these creditors believed the contract would be disadvantageous. The company and the receivers answered the petition, and on September 14 the court in effect dismissed it on the ground that the attorney had not even signed it himself, but that another attorney had signed it for him. Ten months later, on May 24, 1913, the application was renewed, but now upon different grounds, which were thus stated:

"That your petitioner, by its attorney, George J. Llewellyn, requested permission of the present receivers to examine the books of the said bankrupt, which permission was granted, but later your petitioner was informed by its said attorney that the receivers were unable to procure the books which your petitioner requested.

"That stock to the amount of one hundred thousand (\$100,000.00) dollars has been issued, and bonds to the amount of one hundred thousand (\$100,000.00) have also been issued, in the first issue; also that first and refunding six per cent. bonds to the amount of one million (\$1,000,000.00) dollars prior to the time that the petition in bankruptcy was filed.

"That your petitioner believes and expects to be able to prove that all the stock issued has been disposed of, and that all of the first issue of bonds, namely, one hundred thousand (\$100,000.00) dollars has been sold.

"That he is unable to find out how much of the first and refunding six per cent. bonds has been sold, if any.

"That if the funds realized from the stocks and bonds sold had been used in payments of the debts, there would have been enough money to have paid all indebtedness, and left enough for running expenses for a number of years."

The company and the receivers answered this new petition, denying inter alia the court's power to make the order prayed for. The company denied also the averments of the petition concerning the stocks and bonds, and set up various other objections as follows:

"Respondent avers that the petition is absolutely without merit; it does not aver any necessity for, or benefit to be derived from, the examination of the alleged bankrupt, its acts, conduct, and property, and is without jurisdictional averments; the only act complained of, to wit, the contemplated contract with the city, is that of the receivers, and not of the company; the petition is irregular, defective, and without proper affidavit.

"Respondent most respectfully and earnestly represents unto your honor that the present proceedings before your honor, to procure an order to examine the acts, conduct, and property of the alleged bankrupt, is only one of a series of acts had in the proceedings in this case to irritate, inflame, and aggravate animosities, to annoy individuals, and calculated to result in injury to and depreciation and loss of the property of the respondent, and the interests and estates of creditors, bondholders, and stockholders, and your respondent is informed and has reason to believe that this proceeding by this

petition is in the interests of the Wilkes-Barre Company, the old company, engaged in the same business as your respondent, and with whom respondent is in active competition.

"Respondent is further advised and represents unto your honor that the effort of the petition is to procure a preference and payment of their several alleged claims to avoid the expense and annoyance of continuance of these proceedings under this petition."

The record shows nothing further until June 24, when the District Court made an order directing "all parties interested" to appear before the receiver "and then and there submit to an examination under the acts of Congress relating to bankruptcy." On June 26, the court refused to vacate this order, whereupon the company was allowed this petition to revise.

We note in passing the indeterminate language of the order, which is directed generally to "all persons interested," and does not specify the person or persons that are to appear and be examined. This might, perhaps, present difficulties in an effort to enforce the order, but we do not rest our decision upon the uncertainty of the quoted phrase. Neither do we see any need to rest the decision upon *Skubinski v. Bodek*, 172 Fed. 340, 97 C. C. A. 38, 22 Am. Bankr. Rep. 699. On other grounds than were considered in that case, we are of opinion that the order now under review should not have been made. The application therefor did not show an emergency that called for immediate and exceptional action. The bankruptcy petition had been drifting along for nearly 18 months, and (so far as the record discloses) no effort had been made to determine the issues presented by the creditors' petition and the demurrer and the answers thereto. The petition asking for the order of June 24 set up nothing that was not equally relevant upon the issue of the company's insolvency, and that question was already in controversy and undetermined. Of course no adjudication could be entered until the questions raised by the demurrer and the answers should be disposed of in the orderly course of procedure, and in our opinion no reason was presented that justified the interruption of that course. Even if we assume that in some emergencies a District Court may properly go into a preliminary examination of important matters, we are still of opinion that no such situation was presented here. Nothing had been done, and nothing was threatened, that required the unusual remedy of section 21a.

The motion to quash is refused. The order of the District Court under date of July 24, 1913, is reversed, at the cost of the respondents in this proceeding.

FAVORITE MFG. CO. v. PORTLAND MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. November 4, 1913.)

No. 2,354.

TRADE-MARKS AND TRADE-NAMES (§ 92*) — SUIT FOR UNFAIR COMPETITION — SUFFICIENCY OF BILL.

Complainant, which made a water motor for domestic use, manufactured motors for defendant and marked them with defendant's name as manufacturer. On making a contract by which defendant agreed to take 500 motors per month for 5 years, complainant withdrew from the business of selling. *Held*, that a bill alleging only such facts and that defendant had ceased buying under the contract but was selling a motor of identical appearance of its own manufacture did not state a cause of action for unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 102, 103; Dec. Dig. § 92.*

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

Appeal from the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Suit in Equity by the Favorite Manufacturing Company against the Portland Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

C. C. Shepherd, of Columbus, Ohio, for appellant.

Chappell & Earl, of Kalamazoo, Mich., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. The Favorite Company, by its bill of complaint, undertook to state a case of unfair competition against the Portland Company, and prayed an injunction accordingly. The District Court sustained the demurrer of the defendant and dismissed the bill. This appeal presents the question whether the allegations of the bill make a case.

From the argument in this court, and from an inspection of the mechanical structures which were filed as exhibits to the bill, it seems that complainant's grievance, if it had any of the nature of unfair competition, was that defendant had imitated its structure in wholly nonfunctional features. The device was a water motor suitable for operating washing machines or other small household apparatus. Comparison of the two devices gives color to the claim of such imitation to an extent not normally resulting from the rightful selection of a size, shape, color, and detailed configuration appropriate to the device; and it may be that, based upon these resemblances, a pleading could be framed which would call for decision of the question presented by Rushmore v. Badger Co., 198 Fed. 379, 117 C. C. A. 255. Whether, in a proper case, this court would give relief to the "utmost

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

limit" adopted in the Second Circuit, we have never decided. *Coca Cola Co. v. Gay-Ola Co.*, 200 Fed. 720, 724.

We think the present case not an appropriate one for deciding the broad question whether the imitation of such characteristics, unaccompanied by any more express fraud, can make out a case. We say this not only because the bill of complaint fails to allege clearly or carefully the facts which, in any event, would be necessary to establish such a case, but also because it discloses a peculiar situation which negatives the existence of that special equity at the basis of all cases of this class, viz., that the goods offered to the public by defendant are, by their dress or the manner of their offer, so presented that the public will buy them supposing that they are the complainant's output, thus taking away that trade which normally belongs to complainant because of the public belief that the complainant is the manufacturer of these articles. The bill says that the complainant had an established trade and reputation in these water motors; that defendant became interested and bought a few for trial purposes; that these were so satisfactory that October 21, 1909, the Favorite Company agreed to make and sell these motors to the Portland Company, substituting thereon the name of the Portland Company in the place of the Favorite Company as the apparent manufacturer, and leaving them without anything to indicate that they were the output of the Favorite Company; that this contract was in force about a year, and that a large number of motors were put on the market by the Portland Company thereunder; that in September, 1910, a new contract was made by which the Portland Company agreed to buy from the Favorite Company 500 motors each month; and (as we understand the allegation) that the Favorite Company withdrew from the business of selling these motors separately and turned over all its existing trade of that kind to the Portland Company. The exhibits show that not only were these motors, as manufactured by the Favorite Company marked with the name of the Portland Company as if of the manufacturer, but also that they bore prominently the name "Portland" as the name or brand of the article. This contract was for five years.

The bill was filed in September, 1911, and alleges that the Portland Company has "ceased to buy the stipulated number of Favorite motors each month, as provided for in the said contract," but is putting out motors of its own manufacture of identical appearance, whereby the retail dealer is enabled to deceive the ultimate purchaser, etc. It does not allege that the Portland Company wrongfully violated the contract, nor that the Favorite Company had performed on its part; but we may overlook such omission. In any event, it appears that for more than one and perhaps for two years the Favorite Company had joined in putting out these goods as the goods of the Portland Company, and indeed, for all the period after September, 1910, had itself withdrawn from this part of its business and turned it over to the Portland Company. So far as the bill indicates, all the existing trade and customers for this article were justified in supposing that it was the product of the Portland Company, and this belief had been created by not only the acquiescence but the act of the Favorite Company. Under such

circumstances, it is not apparent how there could be any public deception of which the Favorite Company could complain. For this reason, if for no other, the bill fails to state a good case.

It may be that the facts justify additional allegations (1) to emphasize the nonfunctional character of the particulars of imitation, as by showing that shape and size were not specially appropriate to the desired uses, or that the internal changes to escape infringement of patent would normally have caused external changes, and (2) to neutralize that effect of the contract which we have pointed out, as by showing that the appearance of the goods continued to indicate to the public that they were the "Favorite" output, in spite of the apparently contrary inference necessary from the bill in its present form, and read in connection with the exhibits. So, perhaps, the contract situation could be so much more fully stated as to show rights arising thereunder requiring protection by injunction. In one or more of these respects amendments would doubtless have been permitted, if requested, but the record does not indicate that any such opportunity was asked or desired, and complainant did not, in this court, indicate such desire. In this situation, we will not direct a modification of the decree to give permission for amendment, but only that it shall be made expressly (as it probably is in its present shape) without prejudice to the filing of a new bill by complainant upon either of the theories foreshadowed by the present bill. We do not see that laches could be predicated upon the intervening delay.

As so modified, the decree will be affirmed, and the appellee will recover the costs of this court.

SPENCER v. PIKE COUNTY, PA.

(Circuit Court of Appeals, Third Circuit. November 1, 1913.)

No. 1,757.

COUNTIES (§ 120*)—REQUISITES OF CONTRACT—ACCEPTANCE OF OFFER.

The adoption by a board of county commissioners of a resolution "that we make a contract" with a person named for the purchase of a safe and certain fittings for county offices, on terms stated, cannot be considered as an acceptance of an offer previously made by the proposed seller, where he afterwards prepared, and two of the commissioners signed, a written contract for the purchase of the same articles.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 191; Dec. Dig. § 120.*]

In Error to the District Court, of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Action at law by T. E. Spencer against the County of Pike, in the State of Pennsylvania. Judgment for defendant, and plaintiff brings error. Affirmed.

For former opinions, see 183 Fed. 894, and 192 Fed. 11, 112 C. C. A. 433.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Wilton A. Erdman, of Stroudsburg, Pa., and Joseph O'Brien, John P. Kelly and W. J. Fitzgerald, all of Scranton, Pa., for plaintiff in error.

Harry T. Baker, of Milford, Pa., and Samuel B. Price, Cole B. Price, and John H. Price, all of Scranton, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. The plaintiff in the court below brought suit against the county of Pike, state of Pennsylvania, on an alleged contract of sale by the plaintiff to said county of a safe, steel files and vestibule doors for the use of the county, for the sum of \$4,650. The proof of this contract rested upon plaintiff's own testimony that he had made a certain offer to furnish the said articles to the defendant for the price named and upon the terms stated in a certain resolution thereafter adopted by the commissioners of said county. This resolution was as follows:

"Motion by W. H. Clune that we make a contract with T. E. Spencer, of Monticello, N. Y., for a safe for treasurer's office for the price of \$1,250.00, and steel files for the commissioners' vault \$2,200.00, and filled vestibule doors for the commissioners' vault and prothonotary's vault for the sum of \$1,200.00. Total contract price for same being \$4,650.00, and payments for the same being as follows: \$650.00, on delivery of material and completion of work; and \$1,000.00 per year payable in December of each year, with interest at the rate of 6 per cent. per annum until same is paid. The commissioners reserve the right to pay the total amount sooner, if they so desire. The contractor to pay all expenses of delivery and cartage of material. Seconded by H. S. Albright. Mr. Hatton voting no."

It was contended by plaintiff that this resolution was an acceptance of his offer and completed the contract between the parties, and upon the contract as thus alleged suit was brought and the statement of claim filed. The defendant, however, introduced a certain paper writing, drawn up by the plaintiff after the passage of the resolution, in the form of an order upon the plaintiff, signed by two of the commissioners, individually, for the goods mentioned in the resolution, in which order were embodied terms as to payment, and especially an agreement that the partial payments to be paid were to be considered as rent and that the property was not to be transferred from the plaintiff until the full amount of \$4,650 and interest was paid; also a provision that certain notes should be given, and that in default of payment of "said rent," plaintiff might take possession and remove the same without legal process and retain any payments made for the use of the safe. "That nothing but shipment or delivery constitutes an acceptance of this contract." This paper writing concludes as follows:

"It is also hereby expressly agreed and understood that the foregoing embodies all the agreements made between us in any way, hereby waiving all claims or verbal or other agreements of any nature not embodied in this contract."

As we have pointed out, this paper was signed by two of the commissioners. The word "Commissioners" is not attached to their names,

nor is it expressed anywhere in the order that they are acting as commissioners, nor does anything in the order refer to the resolution of the board or to the offer testified to by the plaintiff.

This paper was undoubtedly intended to be the contract between the parties. Its terms differ so widely and importantly from those authorized by the resolution, that the one cannot be considered as an embodiment of the other.

This case has been tried twice. After the first trial, it was brought before us on a writ of error, and it was then decided by this court that, in view of all the evidence, including this paper, the resolution of the board was not to be considered as the acceptance of an offer, but merely the authorization of a contract to be thereafter made upon certain expressly stated terms. It appears from the record of the second trial, which is the case now before us, that the question raised does not differ from that presented in the first trial. The only difference in the testimony is, that the plaintiff, in testifying as to his offer, has embraced all the details contained in the resolution of the board.

We think, however, that this addition to plaintiff's testimony does not alter the legal aspect of the case. The resolution of the board of commissioners does not purport on its face to be the acceptance of a previous offer by the plaintiff, and the other facts in the case, so far from supporting the contention of the plaintiff in that regard, negative the same. The order signed unofficially by the two commissioners, whether the same be regarded as a contract binding upon the commissioners, or not, conclusively shows that the resolution of the board, of December 21, 1908, was not intended as a final acceptance of a previous offer, or as the consummation of the contract with the plaintiff. If, however, the commissioners, signing it in their individual capacity, were authorized thus to bind the board, the order so signed was not the contract sued upon.

Further discussion is rendered unnecessary by the opinion of this court in the former case. 192 Fed. 11, 112 C. C. A. 433.

The judgment below is hereby affirmed.

BOISE CITY, IDAHO, v. BOISE ARTESIAN HOT & COLD WATER CO.,
Limited.

(Circuit Court of Appeals, Ninth Circuit. October 23, 1913.)

No. 1,875.

COURTS (§ 382*)—FEDERAL SUPREME COURT—REVIEW OF DECISIONS—CIRCUIT COURT OF APPEALS—DISPOSITION OF CAUSE.

The Circuit Court of Appeals having sustained a municipal ordinance imposing certain license fees on public service corporations, mandate was stayed and a writ of error from the Supreme Court issued to review the judgment. Thereafter the ordinance was again held valid in another action in the federal District Court, and a writ of error sued out of the Supreme Court, where the two cases were consolidated and finally disposed of by the court holding the ordinance unconstitutional, reversing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the judgment of the District Court, and dismissing the writ of error issued to the Circuit Court of Appeals. *Held*, that the dismissal of such writ reinvested the Circuit Court of Appeals with jurisdiction, and that the court would enter a new judgment in conformity with the determination of the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1019, 1020; Dec. Dig. § 382.*]

In Error to the Circuit Court of the United States for the Central Division of the District of Idaho; William B. Gilbert, Judge.

Action by Boise City, a municipal corporation, to recover certain license fees against the Boise Artesian Hot & Cold Water Company, Limited. A judgment was rendered for defendant, and plaintiff brought error, on which the judgment was reversed, and a writ of error from the United States Supreme Court having been dismissed after that court, in another case with which the writ was consolidated, had held the ordinance under which the action was brought unconstitutional, defendant moves that the judgment of the Circuit Court of Appeals be made to conform to the decision rendered by the United States Supreme Court. Granted.

Charles F. Reddoch, Charles C. Cavanah, John J. Blake, John F. MacLane, and Cavanah, Blake & MacLane, all of Boise, Idaho, for plaintiff in error.

Richard H. Johnson and Richard Z. Johnson, both of Boise, Idaho, for defendant in error.

Before ROSS and MORROW, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error was plaintiff in the court below in an action against the defendant in error, a municipal corporation of the state of Idaho, to recover certain license fees imposed by an ordinance of the city adopted June 7, 1906, for the privilege granted by a prior ordinance to the predecessors in interest of the plaintiff in error to lay and maintain water pipes in the streets and alleys of the city for the furnishing of water to the inhabitants thereof. This court sustained the validity of the ordinance imposing the license fees by its judgment rendered and entered here February 6, 1911. 186 Fed. 705, 108 C. C. A. 523. The mandate was duly stayed, and during such stay a petition for a writ of error from the Supreme Court to review the judgment of this court was allowed May 4, 1911, being a day of the same term of the court, and a supersedeas bond was duly approved and filed.

In February, 1912, in an action in the District Court of the United States for the District of Idaho, the constitutionality of the same ordinance of Boise City in respect to the imposition of license fees was made an issue, and the District Court, following the aforesaid decision of this court, held it valid, from which judgment a writ of error was sued out from the Supreme Court, and the question thus taken there. In that court the two cases mentioned were consolidated and finally

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

disposed of by the Supreme Court June 16, 1913 (230 U. S. 84, 33 Sup. Ct. 997, 57 L. Ed. 1400), resulting in the holding of the ordinance in question unconstitutional and void, in the consequent reversal of the judgment of the District Court of Idaho, and in the dismissal of the writ of error issued to this court. The dismissal of that writ left the judgment of this court rendered and entered February 6, 1911, in force, and this court in control of it, since no mandate has ever been issued, and the writ of error was seasonably taken.

The jurisdiction of this court continuing, it is manifest that a grave wrong would be done to permit a mandate to be sent to the District Court giving effect to the judgment of this court sustaining the validity of an ordinance which was, in a companion suit, adjudged by the Supreme Court to be unconstitutional and void. We conceive it to be our duty to yield to the judgment of that tribunal, to so change our judgment entered herein February 6, 1911, as to affirm the judgment of the District Court in this cause, on the authority of the decision of the Supreme Court, which is hereby done, upon which amended judgment the mandate of this court will be forthwith issued. In this way injustice is avoided and justice done—well within our power, since we still retain our original jurisdiction and control of our judgment.

The motion before us is, in this respect, granted.

M. C. KISER CO. et al. v. GEORGIA COTTON OIL CO. et al.

(Circuit Court of Appeals, Fifth Circuit. October 29, 1913.)

No. 2,556.

BANKRUPTCY (§ 126*)—APPOINTMENT OF TRUSTEE—DISAPPROVAL BY COURT.

Where the referee and judge concur in disapproving the selection of a trustee, made by the creditors as authorized by general orders in bankruptcy No. 13 (89 Fed. vii, 32 C. C. A. xvii), their action will be sustained, unless an abuse of discretion is shown.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 182, 184, 187; Dec. Dig. § 126.*]

Petition to Superintend and Revise Proceedings from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Petition in bankruptcy to superintend and revise an order of the District Court. Petition denied.

John R. L. Smith, of Macon, Ga., for petitioners.

Malcolm D. Jones, of Macon, Ga., for respondent.

Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. General Order in Bankruptcy 13 (89 Fed. vii, 32 C. C. A. xvii) provides that:

"The appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In this case it appears that both the referee and the judge disapproved of the choice of the creditors for trustee. Under the facts as presented, we are not prepared to say that the discretion vested under the above rule was improperly exercised. See Collier on Bankruptcy (8th Ed.), pp. 886-889, and cases there cited.

The petition for a review is denied.

SUPERIOR HAY STACKER MFG. CO. v. DAIN MFG. CO. OF IOWA.

(Circuit Court of Appeals, Eighth Circuit. September 1, 1913.)

No. 3,828.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—HAY STACKER.

The Dain patent, No. 608,653, for a hay stacker, claims 1, 2, 4, and 12, construed, and *held* not anticipated and to disclose patentable invention; also *held* infringed by the structure of the Vroom patent, No. 819,187.

2. PATENTS (§ 167*)—CONSTRUCTION—USE OF WORDS "SUBSTANTIALLY AS DESCRIBED."

That claims of a patent use the words "substantially as described" does not necessarily limit the patentee to the exact construction shown in the drawings and specification.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

For other definitions, see Words and Phrases, vol. 7, p. 6741.]

3. PATENTS (§ 324*)—SUIT FOR INFRINGEMENT—COSTS.

Where the decree in an infringement suit, which incidentally awards costs to the complainant, is affirmed on the merits, it will not be reversed on the question of costs.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 600-606; Dec. Dig. § 324.*]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by the Dain Manufacturing Company of Iowa against the Superior Hay Stacker Manufacturing Company. Decree for complainant, and defendant appeals. Affirmed.

W. H. C. Clarke, of Washington, D. C., for appellant.

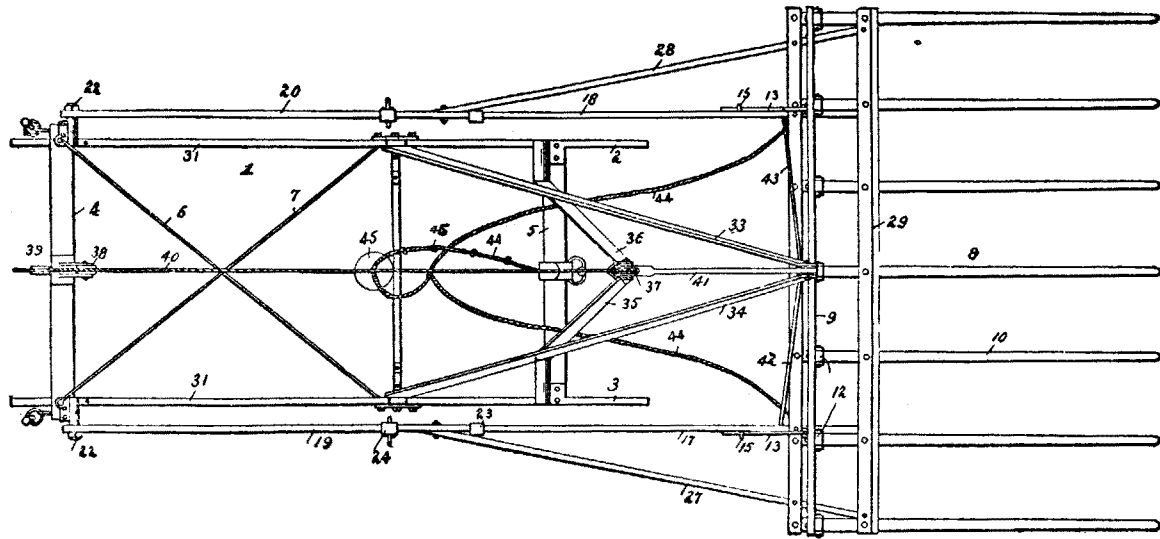
John L. Jackson, of Chicago, Ill. (A. H. Adams, of Chicago, Ill., on the brief), for appellee.

Before SANBORN and CARLAND, Circuit Judges, and WILLARD, District Judge.

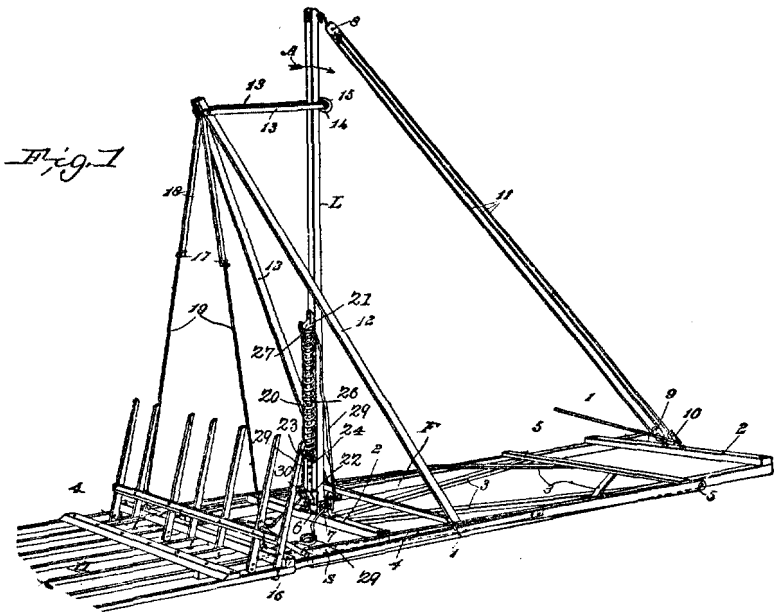
WILLARD, District Judge. [1] The Dain Manufacturing Company, appellee here, brought this suit in the court below to enjoin the appellant, the Superior Hay Stacker Manufacturing Company, from infringing certain claims of patent No. 608,653, issued on August 9, 1898, to the plaintiff for an improvement in hay stackers; the inventor, Joseph Dain, Jr., having assigned his rights in the patent to the plaintiff. The case was referred to a special master to hear the evidence and report his findings and conclusions thereon to the court.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Fig. 2.



The defendant's stacker is shown on this plan.



In the specification of the plaintiff's patent the following passages are found:

"My invention relates to hay stackers, and particularly to that class in which the hay is placed upon a pivoted carrier, which is then raised to an upright position by means of an elevating frame.

"As heretofore constructed a great deal of power has been required to raise the carrier frame during the first part of the operation of raising it from its horizontal position, owing to the fact that in implements of this class horse power is generally used, and the system of levers used to change the direction of the pull has resulted in a loss of power through the decrease of leverage.

"My invention has for its object to provide a stacker in which the power required will be more nearly uniform throughout the entire operation of raising the stacker from a horizontal to a vertical position and in which less power will be required. * * *

"By this means when the carrier frame is in a horizontal position almost a direct vertical pull is secured, which greatly diminishes the power required to lift the frame. * * *

"By the peculiar arrangement of the lifting bars the direction in which the force is transmitted from the lifting rope 40 to the carrier frame is so regulated that during the first part of the lifting operation the power will be exerted almost at right angles to the carrier frame, and at the same time the power will be exerted upon the pulley 37 at about an angle of forty-five degrees, and it will therefore be very effective for lifting purposes. * * *

"The most important feature of my invention consists of the use of two pivoted lifting levers arranged, as described, with their ends connected, whereby the power applied will be transmitted and applied to the carrier frame at an angle most favorable to secure the best results, at the same time providing for the application of such power to such lifting bars at a greater angle than has heretofore been possible in any construction known to me."

The claims here in question are 1, 2, 4, and 12, and they are as follows:

"1. The combination with supporting devices, a carrying frame, and pivoted supports therefor, of pivoted lifting levers connected to each other at their

upper ends, one of said levers being connected to the carrying frame, and mechanism for operating said levers to lift the carrying frame, substantially as described.

"2. The combination with supporting devices, a carrying frame, and pivoted supports therefor, of lifting levers arranged at an angle to each other, the upper ends of said levers being connected, the upper end of one of said levers being connected to the carrying frame, and mechanism for operating said lifting levers, substantially as described."

"4. The combination with supporting devices, a carrying frame, and pivoted supports therefor, of a pivoted lifting lever 33 34, the upper end of which is connected to said carrying frame, lifting lever 35 36 pivoted at its lower end forward of the pivot of said lever 33 34, devices connecting the upper ends of said levers, and rope and pulley mechanism for operating said levers to lift the carrying frame, substantially as described."

"12. The combination with a runner frame, and an extensible and pivotally supported carrier frame, of lifting levers pivotally supported by the runner frame and connected together at their upper ends, devices connecting the upper end of one of said lifting levers to the carrier frame, and rope and pulley mechanism for operating said lifting levers to raise the carrier frame in the arc of a circle, substantially as described."

Although the defendant says in its brief that "the crux of the whole case is in the different derrick mechanisms used by complainant and defendant," yet it attacks the validity of the plaintiff's patent. Therefore it will be necessary to consider that question first.

On October 6, 1885, patent No. 327,852 was issued to Allen for an improvement in hay rickers and loaders. Prior to this time hay stackers had generally been constructed with a stationary upright frame. He was the first to introduce a hinged or pivoted lifting frame or lever, and to do away with the stationary upright frame. Hay stackers of various forms were presented after this date up to the time when the patent in suit was issued to Dain, who was the first to introduce two pivoted lifting frames or levers. That this was something new appears from the testimony of the defendant's expert. He said:

"In the Dain patent in suit the added element for the purpose of lifting the lifting frame 33 34 is a second lifting frame."

After referring to the various patents prior to Dain's, he said:

"None of them have the precise lifting means called for by this claim" (1).

At another place he said:

"Dain having done nothing more than to add to the Allen construction an additional hoisting frame."

That he considered this addition to be an improvement appears also from his testimony. He said:

"That is to say, the Allen stacker would stack hay, and would stack it in the same way that the Dain stacker stacks hay. There is only an improvement in the Dain invention in the manner of applying the power so as to get a more effective application of the power, but the thing done is the same."

He also said:

"It seems to me that in view of the Allen patent the invention in the Dain patent comes down to a very small feature."

After making these statements, he sums up his examination of the prior patents, as follows:

"As regards the subject-matter of claims 1, 2, 4, and 12, I would say that I do not find any single patent in the prior art which has in it all of the

elements specified in these claims, except that as regards claims 1 and 2, the construction called for is found within the terms of these claims in the Boland patent, No. 366,617. I do find that everything called for by these claims 1, 2, 4, and 12 is found in the Blake patent, No. 433,067, as well as a number of others, with the exception of the particular lifting means, and this lifting means is clearly and fully disclosed in the British patents to McLaughlin & Maling."

He considered that the nearest American patents to the construction of claims 1, 2, 4, and 12 were those of Boland, No. 366,617, July 12, 1887, and Blake, No. 433,067, July 29, 1890, and of these he regarded the Blake construction as the closer. It is to be noticed in passing that, while he considers the Dain stacker as a mere improvement upon the Allen stacker, he does not consider the Allen patent the closest approximation to that of Dain. When he refers to the Blake patent as a close approximation to that of Dain, he is evidently referring to claims 6, 7, and 8 of the Dain patent, as appears from other parts of his testimony. The patent to Blake shows a high stationary frame, and only one swinging derrick or lifting frame. Of the patent to Boland defendant's expert says that "the same result is secured that is aimed at in the Dain patent" but he adds:

"The construction shown in the Boland patent is not the same as that shown and described in the Dain patent in suit."

As to this patent it is sufficient to say that we agree, as did the master, with the plaintiff's expert, when he said:

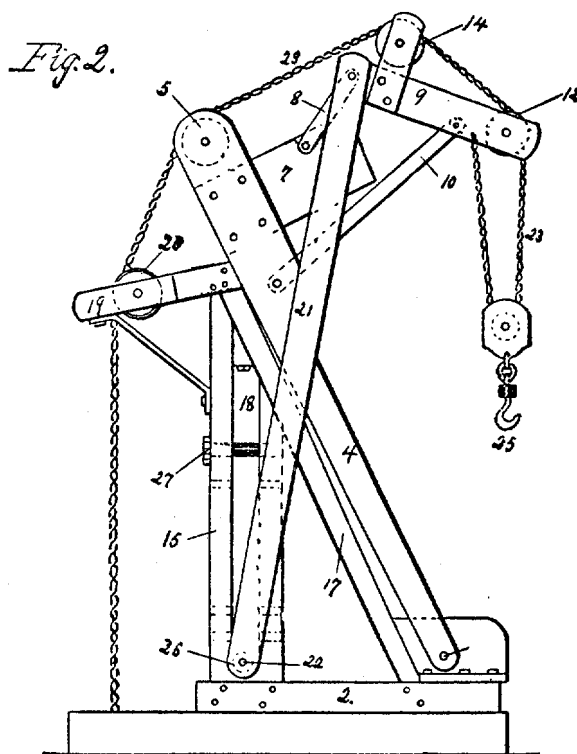
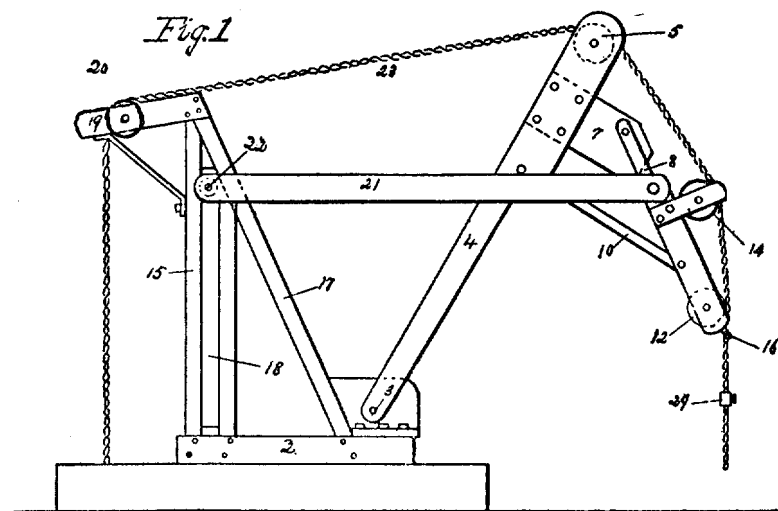
"Certainly to produce the stacker of the Dain patent in suit from the Boland device you would have to throw away about half of the elements of the Boland patent and radically rearrange and redesign the remaining elements, and such rearrangement and redesignment of the Boland structure would, in my opinion, call for a great deal of patentable invention."

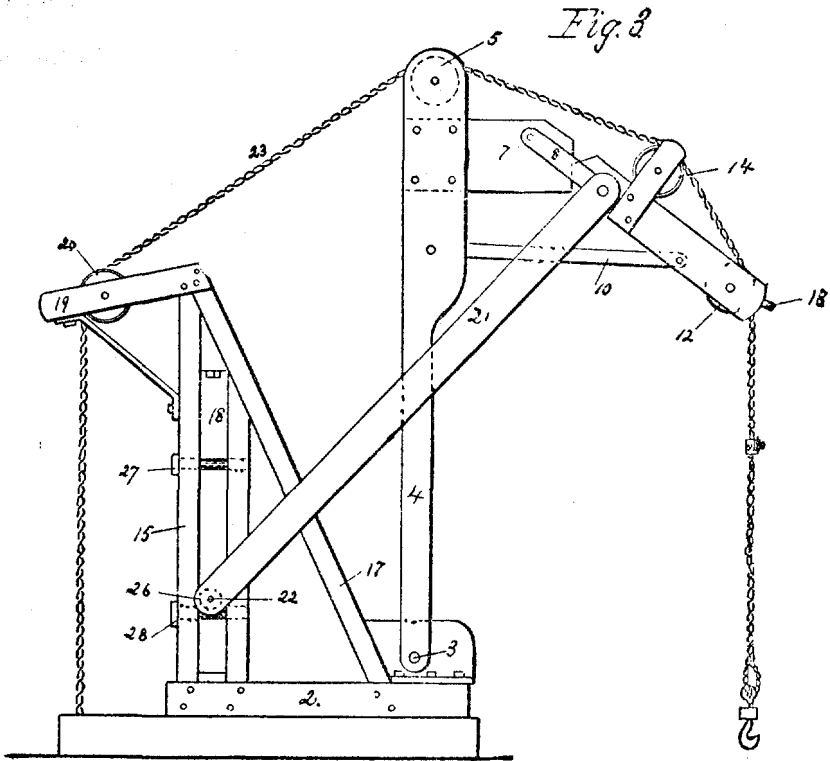
We also agree with what the same expert further said with reference to this patent:

"It shows a combination of elements, some of which elements might have the same names applied to them as are applied to the elements of the Dain combination; but the combination in which these elements are employed in the Boland patent is radically different from the combination in which these elements are employed in the Dain patent. Inasmuch as the two combinations are so radically different, the fact the same names might be given to some of the elements per se of the combination makes no difference whatever as regards novelty of the Dain claims in view of the prior Boland patent."

Defendant claims, however, that although no one of the American patents shows the same lifting means as appear in the Dain patent, yet they are shown in the British patent to McLaughlin & Maling, No. 9,371, July 1, 1887. The defendant's expert considers this "a very close reference and rather better than anything that has been cited in the answer in this suit." It, however, was not discovered by any one until after the taking of the testimony in this action had commenced. The apparatus described in this patent is designed for raising heavy weights from the holds of ships or from mines. There is nothing in the specification to indicate that it can be used as a hay stacker. There are only two movements during its operation. The first is entirely vertical, the second is almost entirely horizontal, and

the second movement does not commence until the first ends. An examination of the drawings of this patent, which are here shown, makes it plain that no mechanic merely skilled in the art, with this patent as a guide, would have ever constructed the Dain hay stacker.





It is to be observed that in this British patent the rope to which the power is applied is not attached to the mast 4, as in the Dain patent it is attached to 35 36, which the mast 4 is said to represent. Nor is it attached to the boom 21, which is said to correspond with 33 34 in the Dain patent. It passes down to the weight itself, and when the power is applied neither the mast 4 nor the boom 21 moves as do 35 36 and 33 34 in the Dain patent. They do not move until the weight has finished its vertical movement, and then the mast is forced against the stationary standard. It is also to be observed that Dain has no such construction as the element 18, in which the lower end of the boom 21 slides.

That the addition of the second lifting frame in the Dain patent was invention sufficiently appears. It is not true, as the defendant claims, that the second lifting frame was merely adding a second bend to the rope which Allen had bent once. It accomplished something more than a mere change in the line of force. The plaintiff correctly says in its brief:

"Obviously, if bends were all that was wanted, as many bends as might be desired could be secured by providing a corresponding number of arms rigidly

connected together and arranged to rotate about the same pivot like the spokes of a wheel, producing in effect a pulley or wheel on a large scale. * * *

"In the Dain construction there are two levers, pivoted at separate points, and connected together at or near their upper ends in such manner that *their relation to each other constantly changes as hoisting progresses*. The power is first applied to that one of said levers which initially stands in a more nearly upright position, so that the power is applied thereto at a more favorable angle. At the same time the connection between the second lever and the carrying frame forms a favorable angle for applying lifting power to said frame. The movement of the two levers in hoisting changes their angular relation to each other, and to the line of pull, so that the favorable angle is maintained throughout the hoisting operation, with the result, as stated in the specification of the patent in suit, that the power required is more nearly uniform throughout the entire operation of raising the load, and at the same time, owing to the fact that the power is applied to the lifting lever at a greater angle than was theretofore practicable, the machine may be operated with less power."

Allen introduced the first movable lifting frame in 1885. After him came Locher, No. 349,804, September 28, 1886; Boland, No. 366,617, July 12, 1887; Smith, No. 424,030, March 25, 1890; Blake, No. 433,067, July 29, 1890; Ham, No. 451,045, April 28, 1891; Smith, No. 464,190, December 1, 1891; Bernard's first patent, No. 478,979, July 19, 1892; Bernard's second patent, No. 482,611, September 13, 1892; Blume, No. 486,751, November 22, 1892; and Allen, No. 497,160, May 9, 1893.

All these men were inventors, and were undoubtedly skilled in the art of designing and constructing hay stackers. The fact that no one of them, having before him the first Allen patent, thought of using two swinging lifting frames, is persuasive and satisfactory evidence that that would not occur to one skilled in the art.

The defendant assigns as error the fact that the master in his decision relied on the testimony of Duffield, after he had held that his evidence was incompetent. This testimony related to the commercial value and utility of the plaintiff's machine. To show that utility, it is not necessary to and we do not consider any of Duffield's testimony. The granting of the patent is *prima facie* evidence of such utility. This *prima facie* evidence is strengthened by the fact that the defendant itself has appropriated the device, and the further fact that one King also appropriated it, and in a suit brought by this plaintiff has been enjoined from using his infringing structure. We conclude therefore that claims 1, 2, 4, and 12 are valid.

The next question is: Are they infringed by the defendant's machine? There are two differences in the construction of the two hay stackers. Instead of using two bars 35 and 36 as his lifting frame, Vroom uses a single bar L. It is admitted, however, by the defendant that this is an immaterial difference.

The other difference is that the two lifting levers are not, as the defendant claims, connected at their upper ends. All the claims in suit indicate that the two lifting frames in the plaintiff's machine are connected at their upper ends.

As is seen by reference to the diagram in the Vroom patent, the roller 15 slides on the bar *L*, as the rope is pulled and the hay fork raised. It reaches the top of the bar as the fork continues its ascent and remains there for a very considerable portion of the time in which the stacker is being operated, according to the plaintiff's expert, during the last one-third of the time.

The claim of the defendant is that the plaintiff is limited to the precise construction shown in the patent, and that any device which does not show the lifting frames connected at that part of their upper portions at which they appear to be connected in the diagrams accompanying the plaintiff's patent is not an infringement. This claim cannot be sustained.

There was no action taken in the Patent Office which limited Dain to a connection at the mathematical extremities of the two frames.

Moreover, such a connection was not essential to the operation of his stacker.

What did he then mean when he said that the frames were connected at their upper ends? If the upper end means the top of the frame and nothing less, then rod 41 should have been in some way fastened to the tops of the extremities of the frames, so as to leave every part of the frame below it. That so impracticable a construction was never contemplated is indicated by the drawings which show rod 41 between the two bars and *near* the top.

If Vroom, with the same length of Dain's inclined frame 33 3/4, had made his lever *L* half an inch longer than Dain's vertical frame 35 36, and then attached the rod 41 half an inch below the top of the lever *L*, his construction would, without any doubt at all, have been considered a palpable evasion of Dain's patent. It is clear that the words "connected at their upper ends" do not mean at their mathematical extremities. If the attachment is so near the end that the machine gets all the benefit of Dain's invention, infringement is made out. That the defendant's structure does secure all the advantages of Dain's invention is made plain by the evidence.

[2] The fact that the claims in suit use the words "substantially as described" does not, under the circumstances of this case, limit the plaintiff to the exact construction shown in the diagrams and specification. *United States v. Society, etc.*, 224 U. S. 309, 328, 32 Sup. Ct. 479, 56 L. Ed. 778; *O. H. Jewell Filter Co. v. Jackson*, 140 Fed. 340, 72 C. C. A. 304 (8th Cir.).

It is said by the defendant that Dain improved upon Allen's device, and that Vroom improved upon Allen's device. The fact is, however, that Vroom, knowing of Dain's device, as was admitted on the trial, improved not upon Allen's structure, but upon Dain's. That this improvement upon Dain's machine was itself patentable constitutes no defense to the charge of infringement of Dain's patent.

Plaintiff introduced evidence relating to claims 6, 7, and 8, but prior to the argument before the master withdrew these claims. Neither the master nor the court below passed upon them, and the defendant does not now ask this court to do so; but he says that they are broad

claims, that claims 1, 2, 4, and 12 are narrow ones, and therefore must be strictly limited. Claims 6, 7, and 8 are not, however, broad claims. They all include the element of an extensible carrier which element is not found in claims 1, 2, and 4.

[3] The defendant assigns as error the allowance by the court below of full costs to the plaintiff. He bases this assignment upon the contention that claims 6, 7, and 8 were eliminated, and that in view of the provisions of Revised Statutes, § 4922 (U. S. Comp. St. 1901, p. 3396), relating to disclaimers, the plaintiff is not entitled to costs. That section, however, has no application to this case, because there has been no adjudication with regard to claims 6, 7, and 8, and it does not yet appear that Dain was not the inventor of the devices described in those claims. The court below having allowed costs, this court upon affirming the decree on its merits, will not reverse it on the question of costs. *Du Bois v. Kirk*, 158 U. S. 58, 67, 15 Sup. Ct. 729, 39 L. Ed. 895.

The decree of the court below is affirmed.

MONASH YOUNKER CO. v. NATIONAL STEAM SPECIALTY CO.

(Circuit Court of Appeals, Seventh Circuit. April 15, 1913.)

No. 1,930.

PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — RELIEF-VALVE FOR STEAM RADIATORS.

The Brissenden patent, No. 952,414, for an automatic relief-valve for steam radiators in which the proper adjustment of the parts is indicated by the escape of steam when the valve seat is displaced, in view of the prior art cannot be given a broad construction, but must be limited to the peculiar arrangement of the parts shown, and as so limited is not infringed by the device of the Leuthesser patent, No. 944,338, in which a stem indicates displacement, operating mechanically, without the aid of steam pressure.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Suit in equity by the National Steam Specialty Company against the Monash Younker Company. Decree for complainant, and defendant appeals. Reversed.

Samuel W. Banning, of Chicago, Ill. (Thomas A. Banning, of Chicago, Ill., of counsel), for appellant.

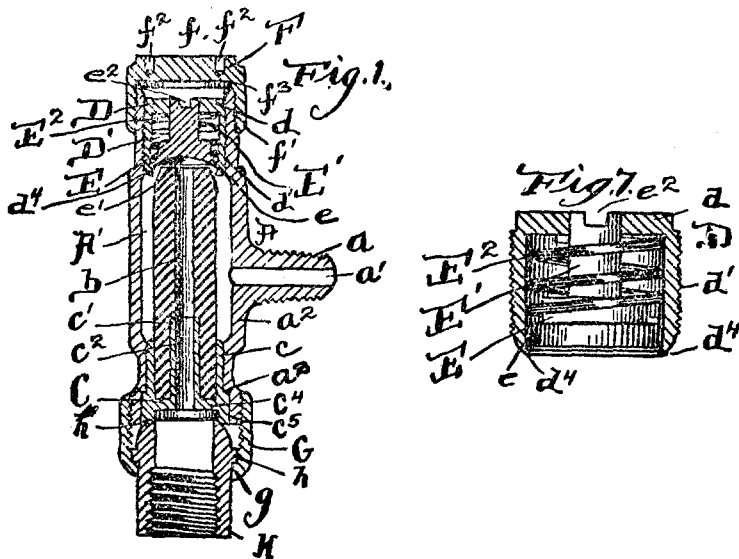
Charles C. Bulkley, of Chicago, Ill., for appellee.

Before BAKER and KOHLSAAT, Circuit Judges, and CARPENTER, District Judge.

KOHLSAAT, Circuit Judge. The District Court held claims 1, 2, 5, 7, 13, 14, 15, 16, 17, and 18 of patent No. 952,414, granted to W. W. Brissenden on March 15, 1910, on application filed July 22, 1904,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The Leuthesser valve is fairly described in Figs. 1 and 7 of the drawings of that patent herewith reproduced:



Both valves are well known in the art as to their principles of operation. They are so arranged as to permit of the expulsion of air from the coils or heating system, and prevent the escape of steam by the intervention of an automatic thermostatic member coacting with a valve-seat; this being one of the well-known means to effect that end. As will be seen, the general construction of the valves is similar. Complainant's counsel in his brief states:

"The invention of Brissenden described and claimed in the patent resides in the combination and arrangement of parts by means of which a signal or indication is given whenever the valve-seat is overadjusted, that is, brought down too close to the end of the expansible member."

He further says:

"The invention of Brissenden did not therefore reside alone in the provision of means of any sort or kind for giving a signal, indicating overscrewing, although that was novel in a radiator valve, but does consist in accomplishing the result of giving a signal or indication of overscrewing of the yielding valve-seat in relation to an expansible valve member, without altering or changing the predetermined tension of the spring in the adjustable plug acting upon the yielding valve-seat."

Except for some differences of a minor character, it may be said in a general way that the several indicating devices of Brissenden and Leuthesser differ from each other mainly in that the former signals by the escape of steam from a vent arranged for that purpose, while in the latter the warning is given by the protruding of a stem from the top of the adjustable hollow plug, also arranged for that purpose. With reference to the Brissenden drawings above set out, the specification says:

"The adjustable valve-seat *C* is, therefore, preferably constructed as follows: The seat is composed preferably of an externally threaded body portion

c provided with a chamber *c*¹ having a shoulder or ledge *c*² formed around the lower edge of the body. The upper end of said valve-seatbody can be provided with a portion *c*³ whereby it can be screwed into and out of the valve casing by means of a screw driver or other tool. The valve-seat as a whole includes a plate *c*⁴ having a concave lower face and having also a number of lugs, *c*⁵ projecting upwardly around its edge or perimeter. Said plate is of a size to fit the chamber *c*¹, but loosely enough to permit leakage around its edges, and thence upwardly through the opening or indicating device *x*, when the said plate is raised from its seat or resting place on the ledge *c*². Normally, said plate is maintained in place upon said ledge *c*² by means of a spring *c*⁶ interposed between the crown or upper wall of the chamber *c*¹ and the convex or upper surfaces of said plate. In this way, said plate can rise from its seat or resting place; and at such time the lugs *c*⁵ which are provided with straight or vertical bearing faces prevent the plate from binding against the side walls of the chamber in which it is located. In use, the valve-seat *C* thus constructed is screwed down in the casing *A* until it arrives at a point where the upper end of the expansible valve-member *B* will just engage the concave face of the plate *c*⁴, when steam at the proper temperature enters the valve. Obviously, however, should the steam be above the normal or desired temperature, the expansible valve-member *B* will then expand longitudinally and in such manner as to raise the plate *c*⁴ from its annular seat or resting place. In this way, the valve-seat is practically provided with a yielding face, whereby abnormal or undue expansion on the part of the expansible composition is prevented from doing any harm whatever to the valve as a whole; and particularly from causing the expansible composition to crack, buckle, crush or otherwise become unfit for further use.

"It is obvious that, in adjusting the plug-like valve-seat *C*, and in case the same is adjusted too near the expansible valve-member, the steam will, when the said valve-member expands, escape upwardly through the said plug-like valve-seat, thereby indicating that accurate adjustment of the valve-seat has not, as yet, been attained."

The patentee further says:

"The opening in the top of the plug *C* serves as an indicating device for telling when the valve-seat is displaced. When the cap *D* is off, and when the valve is being adjusted for use, the escape of steam through the opening *X* will serve to indicate to the user or the steam fitter the location of the valve-seat. In this way, the exact or proper adjustment can be obtained even after the valve is fully connected up in the system, and even when the steam is turned on."

He claims broadly any suitable means whereby the displacement of the valve-seat is audibly or visibly indicated. Each of the claims sued on contains the claim in substance: "means whereby displacement of said seat is indicated."

"The improvement of Brissenden," says counsel, "consists in a hollow adjustable plug carrying the yielding valve-seat and the spring within it, in combination with an expansible valve member; so that the adjustment of the plug in position does not change or alter the tension of the spring, these parts so co-operating when the plug is overscrewed in relation to the expansible member as to give a signal."

Defendant's device has the hollow adjustable plug carrying the slidably mounted valve-seat backed by a coil spring, also within the plug, the valve-seat provided with an upward extending indicating stem, the adjustable plug provided with a notch whereby a screw-driver may be used to advance the plug and consequently the valve-seat, upon the expansible member until the two contact. Further driving of the plug

will elevate the indicating stem which in turn dislodges the screw-driver and prevents too great an advance of the plug carrying the valve-seat, while it serves to indicate displacement, thus mechanically showing that contact between the seat and the expansible member has been effected, and this, too, without regard to whether steam is introduced in the valve-space or not, although there must be something to expand or otherwise extend the expansible member into such contact, being generally a distance of about one-half of an inch.

Complainant claims this protruding stem as the equivalent of its indicating device, wherein the dislodged valve permits the escape of steam in order to indicate that the contact between the co-operating valve parts is dangerously tense, so that, by the use of the screw-driver, the pressure of the plug carrying the seat may be relieved. In defendant's device, further advance of the plug and seat is necessarily prevented and the same information is given.

"An adjuster," says defendant's expert, "through the indicating stem of defendant's valve is able to determine to what position to set the adjustable member in order to leave a clearance or furnish a contact between the yieldable member and the expansible member, and this without using any device or medium outside of the valve structure."

He further says the allowance to be made for expansion can be safely estimated.

The use of steam as an indicator is not new. In Van Auken patent, No. 476,844, granted June 14, 1892, for valves used in connection with steam-heating systems, escaping steam would indicate the incomplete adjustment of the expansible member in its seat. This, however, is not there claimed as an element of the combination. The same, in substance, may be said of the Dixon patent, No. 504,972, granted September 12, 1893, for a radiator valve. These both have means for showing nonclosure of the valve parts. In Schollay patent, No. 313,892, granted March 17, 1885, for a radiator valve, the shutting off of the escape of steam indicates overadjustment of the adjustable members. Whitman patent, No. 478,489, granted July 5, 1892, and Duer patent, No. 673,319, granted April 30, 1901, for air and vacuum valve for radiators, are practically like Van Auken in this respect.

Prior to the time when complainant began the manufacture of the Brissenden valve, it had been using a valve-seat on which the plug was solid, save for an opening through its center. This was used in place of the chambered plug of Brissenden, and the hole or opening was intended to indicate, by the escape of steam, or absence of such escape therefrom, whether or not proper adjustment has been effected between the plug and the expansible member. Thus, as above stated, it was no new thing to employ steam in indicating the relative condition of the valve parts. Nor was it new, broadly, to indicate by mechanical means the relation of the expansible valve and its seat to each other. This is shown in the English patent to Jeffery, No. 12,513 of 1894, on application filed June 28, 1894, by the backing away of a nut, i. e., the nut on the threaded stem from the end of the casing. This device very much resembles that of defendant. Although it pertains to steam-traps, it has the same function as a radiator-valve. This backing away of

the nut would indicate that valve and seat members are in contact with each other. This device requires the assistance of manual intervention in the initial displacement of the nut. However, it shows a mechanical means for indicating the displacement of the valve parts.

It will be seen that Jeffery united his protecting spring and adjustment indicated in the spring-seat. With regard to the so-called protecting device, i. e., the spring, it is found in many of the prior art patents: In the Grounell, 1889, British patent, it is located beneath the expansible member. It is similarly located in the Dixon, 1893, patent; in the Roesch, 1904, patent; and others. Its location is a matter of convenience; its use, almost as old as the need for it. The claims in suit contain certain novel features, as the tilting base of the seat and co-operation with the steam exit aperture—elements not found in defendant's valve, and elements which, therefore, need not be here considered. Whether it presents patentable subject-matter and arrangement need not, under our view of the case, be here decided. The art is one which has been well covered. From the foregoing comparisons, it is evident that complainant's patent is not basic, or to be construed broadly. Whatever of invention it possesses, resides in its peculiar arrangement of parts. As to it, defendant's indicating elements are not equivalents. In granting to Leuthesser his patent, No. 944,338, aforesaid, the examiner was evidently of the opinion that the granting of a patent should be limited to a device for, or a method of, providing automatic indicators, and not to the idea. In this we concur. Complainant may not, by the insertion of the phrase, "Means whereby displacement of said seat is indicated," pre-empt the whole field of indicating devices for steam-radiator valves of the character here involved. It surely was never the purpose of the patent statutes to stifle research and discovery and consequent advance in the domain of any one of the useful arts. Thus limited, it is apparent that the two devices are not comparable as equivalents.

The decree of the District Court is therefore reversed, with directions to vacate its decree and dismiss the bill for want of equity.

ROSE MFG. CO. v. E. A. WHITEHOUSE MFG. CO. et al.
(Circuit Court of Appeals, Third Circuit. November 1, 1913.)
No. 1,739.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—LAMP BRACKET FOR VEHICLES.

The Rosenbluth patent, No. 883,973, for a lamp bracket for vehicles, designed for use on automobiles, claims 7, 8, and 10, *held* not infringed.

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—LAMP BRACKET FOR VEHICLES.

The Hughes patent, No. 962,220, for a lamp bracket for vehicles, claims 5 and 6, *held* void for lack of invention.

3. PATENTS (§ 328*)—VALIDITY—DESIGNS FOR VEHICLE NUMBER-PLATE SUPPORTS.

The Rosenbluth design patents No. 41,388 and No. 41,389, for designs for vehicle number-plate supports, are void as being for articles which are mechanical and functional and not ornamental.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the District Court of the United States for the District of New Jersey; Joseph Cross, Judge.

Suit in equity by the Rose Manufacturing Company against the E. A. Whitehouse Manufacturing Company and Le Compte Manufacturing Company. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 201 Fed. 926.

Arthur E. Paige, of Philadelphia, Pa., for appellant.

Besson, Alexander & Stevens, of Hoboken, N. J. (Charles A. Munn, T. Hart Anderson, and Orson D. Munn, all of New York City, of counsel), for appellees.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

PER CURIAM. This is an appeal from a decree dismissing the bill in equity, in which the appellees, defendants in the court below, were charged with infringing certain letters patent of the United States.

[1-3] The bill of complaint charged that the defendants were infringing four separate and distinct letters patent, two mechanical patents and two design patents; said patents being: Rosenbluth, No. 883,973, April 7, 1908; Hughes, No. 962,220, June 21, 1910; Rosenbluth design patent, No. 41,388, May 16, 1911; Rosenbluth design patent, No. 41,389, May 16, 1911.

The defendants were charged with conjointly embodying the alleged inventions of the several letters patent in the alleged infringing articles manufactured by them. Both of the mechanical patents, No. 883,973 and No. 962,220, relate to brackets arranged to support a lamp in detachable relation to a vehicle body, such as are adapted more especially for use on automobiles, to support and illuminate the number or license placed thereon. The design patents, No. 41,388 and No. 41,389, are stated to be for new and original ornamental designs for vehicle number-plate supports. The decree of the court below holds that claims 7, 8, and 10, the only ones involved of patent No. 883,973, were not infringed by the defendants; that claims 5 and 6 of patent No. 962,220 are invalid, because of the absence of patentable invention in their subject-matter; and that the design letters patent are for mechanical and functional features, and not ornamental, and therefore invalid.

A careful consideration of the patents in suit, of the record before us, and of the elaborate oral and printed arguments submitted by counsel on both sides, satisfies us that there was no error in the decree of the court below, and the clear and convincing opinion of Judge Cross (201 Fed. 926) relieves us of the necessity of restating the grounds for that decree.

The decree of the court below is therefore affirmed.

ADAMSON v. SHALER et al.

(District Court, E. D. Wisconsin. November 10, 1913.)

PATENTS (§ 310*)—INFRINGEMENT—PLEADING—COUNTERCLAIM.

The provision of new equity rule 30 (201 Fed. v. 118 C. C. A. v) that a defendant may set out in his answer "any set-off or counterclaim against the plaintiff which might be the subject-matter of an independent suit in equity against him" does not authorize the defendant, in an infringement suit, to set up as a counterclaim a cause of action for infringement of another patent, wholly unrelated to the subject-matter of the bill.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*]

In Equity. Suit by Cecil F. Adamson against Clarence A. Shaler and others. On motion to strike out counterclaim. Sustained.

Complainant filed his bill charging infringement of letters patent. Defendant has incorporated in his answer two counterclaims; the first alleging unfair competition in trade, the second, a cause of action for infringement of letters patent—a separate suit not connected with the subject-matter nor transactions comprehended within complainant's bill. To the first of these counterclaims complainant has replied, and he now moves to strike out the second.

Percy B. Hills, of Washington, D. C., and Arthur L. Morsell, of Milwaukee, Wis., for complainant.

Erwin & Wheeler, of Milwaukee, Wis., for defendants.

GEIGER, District Judge. Rule 30 of the new equity rules (201 Fed. v. 118 C. C. A. v) deals with the form, contents, and effect of answers in so far as they are or may be directly responsive to the averments of the bill, and also provides that:

"The answer must state in short and simple form any *counterclaim arising out of the transaction* which is the subject-matter of the suit, and may, without cross-bill set out any set-off or counterclaim against the plaintiff which might be the subject-matter of an independent suit in equity against him, and such set-off or counterclaim so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims."

The cases of Terry Steam Turbine Co. v. B. F. Sturtevant Co. (D. C.) 204 Fed. 103, and Marconi Wireless Telegraph Co. v. National Electric Signaling Co. (D. C.) 206 Fed. 295, illustrate the diversity of opinion which has arisen respecting the scope of the rule. In the former, Judge Dodge, declaring the evident purpose of rule 30 to be the abolition of cross-bills, and requiring everything to be done by way of answer only, and that the term "counterclaim" must refer to such matter as properly constitutes a counterclaim in equity, says:

"The terms 'counterclaim' and 'set-off' have often been used interchangeably; but, since rule 30 uses both, it must mean by 'counterclaim' any claim, not such as to constitute a set-off, which, in equity, a defendant might assert against the plaintiff, in the same suit. As will hardly be disputed, the rule has been that no cross-claim can be thus asserted, unless its subject-matter grows out of, and the relief sought depends upon, the subject-matter of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plaintiff's bill. These conditions existing whether the cross-claim be in tort or contract, and whether for liquidated or unliquidated damages, the defendant may obtain affirmative relief against the plaintiff in the same suit; or, in the words of rule 30, the court can pronounce a final judgment in the same suit both on the original and cross-claims. Cross-claims of this kind only have been what are recognized as 'counterclaims' in equity. The term appears to have come into general use through the Codes of Procedure adopted in many states. In them, speaking generally, 'counterclaim' is expressly defined as a cross-claim of the kind above described."

After referring to the provisions of the New York Code defining a counterclaim to be cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action (and the provisions of the Wisconsin and other Codes are similar) he proceeds:

"To make 'counterclaim' include all cross-claims upon which the defendant might sue the plaintiff in equity, even if having no connection, however remote, with the plaintiff's cause of action, is to permit two original bills in the same suit, which is certainly in violation of well-settled principles. See *Stuart v. Hayden*, 72 Fed. 402, 410, 18 C. C. A. 618; *Id.*, 169 U. S. 1, 18 Sup. Ct. 274, 42 L. Ed. 639. Had so radical a change in these principles been intended by rule 30, the reasonable supposition is that it would have been unmistakably declared.

"It is said that rule 30 does unmistakably declare such an intention in the words 'which might be the subject of an independent suit in equity against him' (i. e., the plaintiff), and by the provision 'shall have the same effect as a cross-suit.' But the words and the provision relied on relate, as they stand in the rule, not to cross-claims in general, but to counterclaims in equity only. So used, it seems to me that they are more probably to be understood as a requirement that affirmative relief sought upon a counterclaim must be within the equitable jurisdiction of the court."

I adopt these views and the conclusion that the language of the rule must be limited to the accomplishment of the evident purpose. When we consider the results which would follow permitting a defendant to set up by way of counterclaim causes of action wholly unrelated to the subject-matter of the bill, the soundness of such views becomes manifest. One of these results would be—if the broad construction be not again limited to specific cases, such as patent cases where diversity of citizenship is immaterial—to indirectly enlarge the statutory jurisdiction. For example, in a suit brought by a citizen of Illinois in this district to foreclose a mortgage, the defendant citizen of Wisconsin could set up by way of counterclaim an equitable cause of action for specific performance of a contract in no way connected with the subject-matter of the bill. In this way he would invoke the federal jurisdiction, whereas he could not in the first instance do so, being a resident of this district. True, it may be said that the rule can be given the broad construction with the limitation that in the supposed and other cases it should not apply because of the obstacles interposed by the statutes controlling the grant and exercise of federal jurisdiction. But as indicated, this requires us to assume the adoption of a broad comprehensive rule which, in its practical workings, can have very limited application.

But another consideration is quite persuasive against the adoption of the broad construction. It may be conceded that the new rules as a whole aim to simplify proceedings, and, as is evident, have features

of modern codes of civil procedure in which distinctions between actions at law and proceedings in equity are abolished. The new rule No. 26 (201 Fed. v, 118 C. C. A. v), permitting joinder by complainants of any number of causes of action cognizable in equity in one bill, subject only to convenience of trial, is cited as evidencing adoption of not only the letter but the spirit of many of the Codes. But the construction claimed for rule 30 (and in support whereof the liberality of rule 26 is cited) brings us far beyond any effort made in code provisions respecting the scope of answers in equitable actions. Now, if the scope of rule 30 may be ascertained by a reference to other rules, it seems to me that rule 31 (198 Fed. xxvii, 115 C. C. A. xxvii), relating to replies and the formation of an issue, is significant. If it were intended by rules 26 and 30 to enlarge the scope of equitable procedure by permitting answers to incorporate causes of action not related nor germane to the subject of the bill, then rule 31 would naturally have the necessary provisions to enable a plaintiff to obtain such affirmative relief as, were the counterclaiming defendant proceeding by original bill, the complainant could obtain, formerly by cross-bill, now by counterclaim. For example, in the case already referred to, a citizen of Illinois, suing a citizen of Wisconsin, upon a cause of action for foreclosure, the latter might, under the broad construction claimed for rule 30, set up by counterclaim a cause of action for specific performance of a contract wholly unrelated to the subject-matter of the bill. Must the plaintiff, because of the limitations of rule 31 forego, for instance, his right to relief by way of reformation which he could formerly have asserted through cross-bill? Is there any way whereby a plaintiff through a "reply" to such counterclaim can obtain affirmative relief? It would seem not; the effect of the rule is plainly to determine the point when and how an issue for trial upon the merits is created.

Thus, if rule 30 be given the broad construction permitting a defendant in effect to file an original bill by way of counterclaim, we would have a system whereunder the defendant could answer fully all of complainant's original causes of action, but complainant could in no event assert his right to affirmative relief upon a defendant's original cause of action, set out by way of counterclaim. If the rules be considered in the light of the former practice which was foundationed upon the principle that complainant's bill determines the *scope* of the *exercise of jurisdiction*, there appears to be no reason for giving to rule 30 any larger office than that requisite to bring about the change so obviously indicated; i. e., that of incorporating in an answer: (1) The matters formerly included in answers proper; (2) matters formerly the subject of auxiliary or cross-remedies through cross-bills.

The conclusion is that the motion to strike out the counterclaim be granted.

MILTON CHEMICAL CO. v. JORDAN MARSH CO.

(District Court, D. Massachusetts. October 28, 1913.)

No. 421.

PATENTS (§ 328*)—NOVELTY—CLEANING AND POLISHING APPARATUS.

The Burns patent, No. 991,131, for a cleaning and polishing apparatus, consisting of a fibrous material having its surface treated with a drying oil and also a nonspontaneously combustible element, is void for lack of patentable novelty.

In Equity. Suit by the Milton Chemical Company against the Jordan Marsh Company. On final hearing. Decree for defendant.

Ellis Spear, Jr., of Boston, Mass., for complainant.

Daniel A. Rollins, of Boston, Mass., and Charles W. Hills, of Chicago, Ill., for defendant.

DODGE, Circuit Judge. The plaintiff owns United States patent 991,131, issued May 2, 1911, to Peter S. Burns, for a cleaning and polishing apparatus. Its bill charges infringement by the defendant. The defenses set up are want of patentable novelty, anticipation, and noninfringement.

The patent has one claim only, as follows:

"A cleaning and polishing apparatus, containing a fibrous absorbent cleaning and polishing material, having its surface fibers rendered sufficiently oily with a drying oil to absorb finely subdivided dirt in the process of cleaning, without liability to soil or render oily the object being cleaned, and impregnated with a controlling amount of non-spontaneously combustible ingredients, rendering the impregnated oily fibrous material non-spontaneously combustible as a whole."

What the invention claimed seeks to effect is stated in the preceding specification to be to provide an apparatus capable of absorbing dirt, dust, etc., taking it up, and holding it within itself, yet in such a way that the more or less oily and otherwise inflammable body will not spontaneously ignite, as its dense nature would make it liable to do.

This is to be accomplished, according to the specification, by using fibrous material having an oily dust-absorbing surface containing a non-combustible element, or otherwise having a non-combustible character.

The preferable way to accomplish it is stated to be to impregnate the fibrous material with a compound of rape-seed oil, or other heavy, absorbent, drying or semi-drying oil (which would be spontaneously combustible), and a considerably larger proportion (so as to be "controlling" according to the claim) of some non-spontaneously combustible oil. The drying or semi-drying oil is to be mixed with the larger proportion of non-spontaneously combustible oil, and the fibrous material is to be impregnated with the mixture.

The patent discloses no method of treating the surface fibers of the material any differently from its other fibers. If the whole material is treated with the mixture, of course the surface fibers will be treated

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

with it. Nor does the patent disclose any other method of rendering the surface fibers oily enough to absorb the dirt, and not oily enough to soil the object being cleaned, except the obvious one of using enough oil to produce this result, but not too much. In all this it can hardly be claimed that there is any invention displayed.

No other "non-spontaneously combustible ingredient" is anywhere indicated in the patent, except an oil having that character. The defendant's fibrous material is impregnated with a mixture of oils having respective qualities and in respective proportions which, for all material purposes, may be regarded as the same as those mentioned in the patent; and if the patent is valid, I should regard the defendant's apparatus as infringing it.

But beyond the matters above mentioned, which I have regarded as displaying no invention, all that the claim covers is the use, in the mixture wherewith the fibrous material is to be impregnated, of such a proportion of non-spontaneously combustible oil as will be controlling with regard to the proportion of drying or semi-drying oil used, and will thus avoid the liability to spontaneous combustion of the impregnated material.

I think the evidence shows (1) that when the patent was applied for the fact that spontaneous combustion could be avoided by a mixture of oils such as the patent describes was and had been for a long time a matter of general knowledge, among oil men and chemists; (2) that various furniture polishes, composed of similar mixtures and so composed for the purpose of avoiding spontaneous combustion, had long been known and used; (3) that the use of such mixtures in cleaning or polishing by impregnating rags, cotton waste, or other fibrous material with them, was old and well known. In view of all this, I am unable to see that the patent claims anything that was not old or well known.

The plaintiff says that the completed mop of the patent is a "commercially permanent" article, while there is no proof that any of the various forms of fibrous material before used were so; also that the reason of this permanency lay in the co-action of the two kinds of oil, whereby, besides being safeguarded against spontaneous combustion, the drying oil in the surface fibers was kept by the co-action of the non-drying oil upon it, while dry, in a continuously "tacky" state, and thus more effective for absorbing dirt. Except in the provision that a drying oil is to be one ingredient, I find no hint of all this in the patent; nor do I see why this would not be true of the various fibrous materials previously used, when impregnated with the mixtures previously used containing the drying oil as one ingredient. The fibrous materials thus impregnated being safe against spontaneous combustion, I do not see how it can be said that they were not permanent so long as any one chose to keep them, and it will hardly be claimed that there was invention in making them of such size or shape that they could be more conveniently kept or used.

Being unable, for the above reasons, to find any patentable novelty in the patent, I must enter a decree dismissing the bill, with costs.

In re CASWELL-MASSEY CO.

In re LAMSON CONSOL. STORE SERVICE CO.

(District Court, S. D. New York. November 2, 1910.)

No. 10,285.

BANKRUPTCY (§ 318*)—PROVABLE CLAIMS—RENT FOR STORE SERVICE APPARATUS.

The rule governing the amount due for rent under an ordinary lease of real estate after eviction or surrender accepted by the landlord may not apply to a claim under a contract for the installation of a store service apparatus which must be specially adapted to the premises and most of which if taken out cannot be used again, and where the rent for the term is practically the value of the property; but in such case it is competent for the parties to provide that in case of default the unaccrued rent for the remainder of the term shall become due and payable at once, and, on the bankruptcy of the tenant after such a default, a claim for such rent may be proved as a fixed liability.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 481, 482; Dec. Dig. § 318.*]

In the matter of the Caswell-Massey Company, bankrupt. In re claim of the Lamson Consolidated Store Service Company. Referred to Referee.

The following is the opinion of the referee in the Matter of the Kugler Syndicate, Bankrupt:

This is a motion to reduce a claim filed by the Lamson Consolidated Store Service Company for \$717.85 to \$96.

The Lamson Consolidated Store Service Company on August 2, 1899, entered into an agreement with the Kugler Syndicate by which the Lamson Company agreed to install in the Kugler Syndicate store an apparatus for conveying cash, parcels, and similar things from one part of the store to another, and to lease it to the Kugler Syndicate for five years, and by which the Kugler Syndicate agreed to use the apparatus in its store for five years and to pay an annual rental therefor in quarterly installments in advance. The lease contained the following provision: "If any installment of said rental shall remain unpaid for thirty days after it becomes due, the entire rental to the end of the lease shall become at once due and payable." A quarterly payment of rent became due December 1, 1900, but has not been paid. On January 31, 1901, an involuntary petition in bankruptcy was filed against the Kugler Syndicate, and subsequently the Kugler Syndicate was adjudged a bankrupt. The Lamson Company claims that the quarterly payment due December 1, 1900, having remained unpaid for 30 days, on December 31, 1900, the entire balance for the unexpired term of the lease, being \$717.85, became due and payable. It is admitted that at the time of the bankruptcy \$96 was due, and the objecting creditors claim that that is the only amount for which proof can be allowed.

The general rule is that unaccrued rent is not provable in bankruptcy. *Lowell on Bankruptcy*, § 169, and cases cited.

Bankruptcy acts as a termination of the lease, and unaccrued rent, if called a debt, is one depending on contingencies which cannot be valued. *Re Ellis* (D. C.) 98 Fed. 967, 3 Am. Bankr. Rep. 564.

The general rule at common law is that, if a lease be surrendered and the surrender accepted, or if the tenant be evicted, the liability for unaccrued rent ceases, but a specific covenant in a lease that upon nonpayment of rent the landlord can take possession and relet, if possible, for the account of the lessee, and that the lessee shall remain liable for any deficiency, or for the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

whole rent, if no reletting takes place, is valid. In such a case a surrender or eviction extinguishes the technical liability for rent as such, but the amount unpaid is recoverable as damages. *Hall v. Gould*, 13 N. Y. 127; *Morgan v. Smith*, 70 N. Y. 537; *Underhill v. Collins*, 132 N. Y. 269, 30 N. E. 576.

If a lease contains such a covenant, which does not specifically fix the amount of damages but simply authorizes the landlord to relet for the account of the lessee, that gives rise to a contingent liability not provable in bankruptcy (*Re Ells*, 98 Fed. 967, 3 Am. Bankr. Rep. 564); but it is said in that case that a covenant in a lease might be worded expressly to authorize a re-entry in case of default and require the lessee in such case to pay at once stipulated damages (*Re Ells* [D. C.] 98 Fed. 967, 3 Am. Bankr. Rep. 564).

The question presented upon this motion is, I think, a close and difficult one; but my conclusion is that in this case the Lamson Company is entitled to prove for the full amount \$717.85. The parties have made a specific contract, which they had a right to do. On the 31st of December a sum equivalent to the total amount of unaccrued rent became due. It was then a fixed liability, evidenced by an instrument in writing, and it was absolutely owing at the time of the filing of the petition, which brings the case precisely within the language of section 63 of the Bankrupt Act. I do not think that there was anything unreasonable in such an agreement, or that the provision is to be construed as a penalty. The evidence shows that the amount paid under such a five years' lease is about the same as would be paid for an outright purchase of the property, that the apparatus has to be specially fitted and adapted to each store in which it is put, and would have almost no value when taken out by the Lamson Company. Not much of the material could be used again. A storekeeper naturally prefers to pay for such an apparatus in the form of rent or installments, rather than to buy it outright for cash. Obviously, if such an apparatus were installed in a store under such a lease, and the lessee should go into bankruptcy in a short time, the Lamson Company would obtain no adequate compensation for furnishing the apparatus. I think it was competent for the parties to provide for the contingency of insolvency by a special covenant in the lease. They have done so in this case, and I think the effect of it is to permit the Lamson Company in this case to prove a claim for the whole balance of the rent.

The case is quite analogous to that of rent payable in advance. A suit for rent in advance can be brought immediately after the date fixed for its payment. Eviction during the period covered by the rent sued for, or any other fact which would bar a recovery for ordinary rent, is no defense. *Giles v. Comstock*, 4 N. Y. 270, 53 Am. Dec. 374; *Learned v. Ryder*, 61 Barb. (N. Y.) 552; *MacKellar v. Sigler*, 47 How. Prac. (N. Y.) 20; *Gugel v. Isaacs*, 21 App. Div. 503, 48 N. Y. Supp. 594, affirmed 162 N. Y. 636, 57 N. E. 1111.

In view of these authorities, it must follow that rent payable in advance before bankruptcy is provable as a fixed liability in bankruptcy, although the time covered by the rent had not expired at the adjudication. This was held in effect by Mr. Referee Dexter and the decision approved by Judge Brown in *Re Dielman & Lincks*.

My conclusion is that the claim should be allowed as filed.

Dated May 13, 1901.

Geo. C. Holt, Referee.

Adolph M. Schwarz, of New York City (E. Merriam Baggs, of New York City, of counsel), for claimant.

Charles P. Northrop, of New York City, for trustee.

HOLT, District Judge. I think that the rule governing the amount due for rent under an ordinary lease of real estate after eviction or surrender accepted by the landlord may not apply to a claim under a contract relating to the installation and use of a store service apparatus, like that which is the subject of this motion. Land is not substantially injured by its use, and on the termination of an ordinary lease of real estate the landlord takes back the land in substantially its

original condition. In the matter of the Kugler Syndicate, which was before me as referee some years ago, in which the claimant had installed a similar store service apparatus under a lease substantially similar to those executed in this case, it appeared in evidence that the apparatus in question had to be especially adapted to the premises in which it was placed, that when taken out most of it could not be used again, and that the total amount of the rental for the five years was about the price which was charged when an actual purchase was made. Under those circumstances, I held that the so-called lease was substantially an arrangement for payment by installments; that the contract, which provided that, in case of default for a certain number of days, the whole rental should become due, was one which the parties had a right to make; and that, the default having occurred, the liability became fixed, and the claimant was entitled to prove for the full amount. It does not appear in this case whether the same facts exist. I think that, if the property, when it was removed from the bankrupt's store and the possession of it resumed by the Lamson Company, was substantially worth as much as it was when put in, the reasoning of the referee would be correct, and that the rule in respect to the termination of rent after the resumption of possession of real estate would apply; but, if the facts in this case are similar to those in the matter of the Kugler Syndicate, I think it would not apply.

My conclusion is that the case should be sent back to the referee to take further evidence as to the facts in the case.

In re MILLER BROS. GROCERY CO.

In re LAMSON CO.

(District Court, N. D. Ohio, W. D. May 29, 1913.)

BANKRUPTCY (§ 316*)—CLAIMS—"FIXED LIABILITY."

Claimant's assignor furnished a cable cash carrier system to the bankrupt under a lease for \$1,750, with a credit of \$100 thereon for systems returned, and providing for payment of \$250 a year during the seven-year term of the lease, to be paid quarterly, in advance, on the 1st days of March, June, September, and December. The lease also provided that, if any installment of rent should remain unpaid for 60 days, the entire rent owing under the lease should become due without demand, and that on breach by the lessee of any of the covenants, or in case it became a bankrupt, the balance of the rental for the entire term should be at once due and payable, with interest on demand on the part of the lessor, and that the latter at any time might enter the premises, take possession of the system, and terminate all rights or interest of the lessee. The installment due March 1, 1912, was never paid, and on May 16th thereafter a petition in bankruptcy was filed against the lessee. Before claimant filed its proof of claim it took possession of the system and filed for the full amount of the rent, less the \$100 credit and \$31.65 paid on account of the first quarter's rent prior to March 1, 1912. *Held*, that since the lessee was in default for and was owing the installment, which should have been paid on March 1st, when bankruptcy intervened, and such debt remained unpaid for more than 60 days, it had become definitely liable for the whole amount of the rent,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and hence such amount was a "fixed liability" within the Bankruptcy Act, absolutely owing, for which claimant was entitled to prove.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 474-477; Dec. Dig. § 316.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Miller Bros. Grocery Company. On petition to review a referee's order disallowing the claim of the Lamson Company. Petition granted, and claim allowed.

L. B. Hall, of Toledo, Ohio, for trustee.

Fritsche, Kruse & Winchester, of Toledo, Ohio, for Lamson Co.

KILLITS, District Judge. This matter is before the court on petition to review the order of the referee disallowing the claim of the Lamson Company. On the 15th of November, 1911, the Lamson Consolidated Store Service Company, predecessor of the claimant, and to whom its rights under the lease hereinafter referred to have been transferred, leased in writing an installment of the cable cash carrier system to the bankrupt for the sum of \$1,750, with a credit of \$100 thereon for the systems returned, and upon terms providing that the rental sum of \$250 per annum during the continuance of the seven-year term of the lease should be paid in quarterly installments in advance, beginning on the 1st days of March, June, September, and December. The lease further provided:

"If any installment of rental shall remain unpaid for 60 days after it becomes due, the entire rental owing under this lease shall become at once payable *without demand*. * * * These presents are upon this condition: That in case of a breach by lessee of any of the covenants or agreements herein, or in case the lessee becomes bankrupt, the balance of the rental for the entire term of this lease shall be considered at once due and payable *without notice or demand on the part of the lessor*. And it is further provided that the lessor may, at any time after such breach of this lease occurs, enter the premises and take possession of said system, and thereby terminate all right or interest of the lessee in said system."

The installment of the rental sum due on the 1st day of March, 1912, was never paid, and on May 16 thereafter, an expiration of 77 days, the petition in bankruptcy in this case was filed. Some time in August, and prior to the 28th, on which date claimant filed its proof of claim, possession had been taken by the lessor of the cash carrier system. The proof of claim is for \$1,618.35, being the full amount of the rental, less the aforesaid credit of \$100 and \$31.65 paid on account of the first quarter's rent, prior to the 1st of March, 1912.

Exceptions were filed by the trustee, on the ground that there was nothing owing to the claimant at the time of the filing of the petition in bankruptcy, and that the claim is not a fixed liability absolutely owing by the bankrupt at the time of the filing of the petition. These exceptions were sustained by the referee, substantially on the authority of the case of Lamson Consolidated Store Service Company v. Bowland (decided by the Circuit Court of Appeals of this Circuit) 114 Fed. 639, 52 C. C. A. 335, and Wilson v. Pennsylvania Trust Company, 114 Fed. 742, 52 C. C. A. 374.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This court is of the opinion that the exceptions of the trustee are not well founded. In the first place, by the plain terms of the lease, when the petition in bankruptcy was filed, March 16, 1912, at least the bankrupt was in default for and was owing the rental installment of \$250, which should have been paid March 1, and by the plain terms of the lease, if they are to be given effect, because the bankrupt had left this debt unpaid for more than 60 days, it had become definitely liable to the lessor for the whole amount of the rental sum, which is confessedly the amount of claimant's proof.

The differences material here to be noticed between the contract considered by the Circuit Court of Appeals in the Bowland Case, *supra*, and the case at bar, are indicated by the underscoring in the above recitation of the terms of the present lease. The Bowland lease contained no provisions waiving demand on default in payment of rent, or demand declaring the accrual of the whole rental sum because of such default. Another very material difference in fact between the Bowland Case and the instant case is that in the former the bankruptcy petition was filed at a time when there was no default in the payment of rental under the lease, having occurred before the date when a new advance payment should have been made, and it seems that in the Bowland Case the claimant was undertaking to demand the whole amount of the rental sum under that provision of the lease which made the institution of bankruptcy proceedings effect a determination. Speaking of that provision in the Bowland lease which is identical with the first provision quoted by us from the present lease, except that the latter has, in addition, the underscored words waiving demand, Judge Lurton said:

"It is entirely competent to contract that the consequence of a default in the payment of an installment of interest for the use of money, or of rent for the use of property, shall be the precipitancy of the maturity of the principal of the money loaned, or of future installments for the rental of the property in respect to which default has been made."

With this statement of what is undoubtedly the law, it seems to us that it becomes immediately plain that the fact of an undoubted default of more than 60 days, added to the clear provision of the lease that a demand establishing such default need not be made, vested in the claimant a "fixed liability [against bankrupt] * * * absolutely owing at the time of the filing of the petition," under section 63 of the Bankruptcy Act.

Speaking again of the Bowland Case, Judge Lurton, after recognizing that a re-entry might be made after default of rent, if demand is duly made, proceeds:

"Of course, it was competent to provide for a forfeiture without demand; but the contract in question contains no stipulation to that effect. Inasmuch as the agreement does not provide in express terms that the liability of the lessee should continue after the re-entry of the lessor, we must conclude that no liability for future rents was intended."

However, in the case before us, it is seen that the lease provides for a forfeiture without demand, and if we may assume that the fact that the lessor took possession of the system before presenting its claim

has any effect on the latter, such result does not lessen the claim of the lessor, which had been definitely fixed as a liability against the bankrupt before the bankruptcy petition was filed, and the situation, therefore, is just the reverse of that in the Bowland Case, and is the situation which Judge Lurton says may be competently provided for in the contract.

A court should not find itself too closely controlled in circumstances of this character by the authorities which deal with leased property which remains unabated in usefulness after seizure or re-entry by the lessor. The lessor of realty after re-entry may enjoy a fair measure of the usufruct thereof as that provided in the rental contract; but, as the evidence shows in this case, property of this sort, having been cut and fitted and otherwise adapted to the special need of the business and the business premises of the particular lessee, may be, as it is claimed without dispute is the fact here, little more than junk on the hands of the lessor. If the provision for retaking is not allowed to operate without affecting the demand for future installments of rent, it might very well happen, as seems to be the case here, that the lessor, having gone to special effort in adapting a system to the special needs of a particular store equipment, might not receive, in cash rental and the value of the junked system retaken, sufficient monetary return to reach his outlay. There also seems good reason why it is to the lessor's interest that a system of this sort, meeting competition by others of the same class, should not be permitted to become the subject of unrestricted sale or installation. At any rate, the bargain, as we are now allowing it to be enforced, is just as the bankrupt made it, and is one which is supportable in law. As we have hinted, a controlling difference in fact between the instant case and that of Bowland, in addition to the changes in the contract, is that here the claim does not depend on the fact of bankruptcy, but ripened, without demand, to the claimant, as a fixed liability on May 1, or 16 days before the filing of the petition.

This case, in our judgment, is to be classed with that of *In re Pittsburg Drug Co.* (D. C.) 164 Fed. 482, rather than the Bowland Case. Judge Holt, of the Southern District of New York, in the case of *In re Caswell-Massey Co.*, 208 Fed. 571, from the record shown us, in passing upon the claim of the Lamson Consolidated Store Service Company against the bankrupt, has rendered a decision on the same lines occupied by us in the foregoing, and in so doing reviewed, with approval, his own decision as referee, upon a similar state of facts in the Matter of the Kugler Syndicate, Bankrupt, in the District Court for the Southern District of New York, rendered May 13, 1901.

It follows that the petition for review should be allowed, and the claim of the Lamson Company should be allowed in the sum of \$1,-618.35.

CURTIS v. PHELPS et al.

(District Court, N. D. New York. November 3, 1913.)

ABATEMENT AND REVIVAL (§ 53*)—ACTION AGAINST DIRECTORS OF NATIONAL BANK—SURVIVAL.

There is an implied contract on the part of the directors of a national bank to faithfully perform their duties as directors, and if by their misconduct or negligence damage results to the creditors or stockholders, a cause of action arises which may be enforced by a receiver. Such a cause of action is contractual, and survives against the representatives of a deceased director.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 251, 252; Dec. Dig. § 53.*]

At Law. Action by Rensselaer L. Curtis, as receiver of the First National Bank of New Berlin, against Almer H. Phelps and others. On application for order bringing in and substituting as party defendant the personal representative of defendant Chapin, who died since the commencement of the action. Granted.

Geo. W. O'Brien, of Syracuse, N. Y., for complainant.

Percy J. Thomas, of New Berlin, N. Y., and H. C. Stratton, of Norwich, N. Y., for Ida F. Chapin, personal representative.

RAY, District Judge. There is an implied contract and undertaking on the part of the directors of a national bank to properly and faithfully perform their duties as directors, and if by misconduct or negligence they fail to perform such duty and damage results to the creditors of the bank, or the stockholders, a cause of action arises which may be enforced by the receiver in behalf of the creditors and stockholders. Such a cause of action is contractual, and arises out of the contractual relation of the parties, and is not in tort. It is equally true that an action to recover a penalty imposed by statute, or a forfeiture incurred, is in tort, and in the absence of some provision of law preserving the right or cause of action against the personal representative, same would abate with the death of the defendant.

As I read the complaint in this action it is intended to set up and plead a cause or causes of action against the defendants here of the character first mentioned; that is, a cause of action based on the non-performance or the negligent performance of the implied contract of the defendants to see that the assets of the First National Bank of New Berlin, of which bank they were directors, were used in the manner and for the purposes prescribed by the national banking act, whereby damages to the creditors, depositors, and stockholders resulted. Such a breach of the contractual duty of directors may arise from acts or omissions, some of which would subject them to a penalty under the national banking act, and if the action is to enforce and collect the penalty it would not survive the death of the wrong-doer; but if the action is based on the breach of implied contract, the cause of action does survive. The remedy of enforcing the penalty in such case would not be exclusive. I think this case is within and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 208 F.—37

covered by *Allen v. Luke et al.* (C. C.) 141 Fed. 694, and *Boyd et al. v. Schneider et al.*, 131 Fed. 223, 65 C. C. A. 209. In *Allen v. Luke*, supra, it is held:

"A receiver of a national bank may maintain a suit against the directors in behalf of creditors and stockholders to recover sums alleged to have been lost to the bank through the misconduct or negligence of defendants, and it is not a necessary condition precedent that violations of the banking act should have been previously adjudged in a suit brought by the comptroller. * * * A cause of action against a director of a national bank to recover for money lost to the bank through his negligence or misconduct survives against his executors."

In *Boyd et al. v. Schneider et al.*, supra, it is held:

"Where several depositors of a national bank had claims against a number of the bank's directors, arising out of their failure to take steps to prevent the bank's assets being improperly loaned, and none of such depositors could, by separate suits at law, recover that to which he was entitled, such depositors were entitled to maintain a single suit against such directors in equity. * * * An action by depositors against directors of an insolvent national bank to recover damages for breach of the directors' implied contract to see that the bank's assets were used in the manner prescribed by the national bank act is an action on contract, and survives against representatives of deceased directors."

I am of the opinion, therefore, that under the allegations of the bill of complaint the cause of action therein set out survives and that the motion to revive, continue, and substitute, or bring in, must be granted. In *Stephens v. Overstolz* (C. C.) 43 Fed. 465, it is held:

"An act of Congress imposing a legal liability on the directors of a national bank for certain things which they may do, which shall result in an injury to the bank, its stockholders, or creditors, and making them liable for the amount of the damage, is a remedial and not a penal statute, and therefore an action under it survives against the estate of a director. Where a bank director makes a wrongful loan of money, from which loss occurs, it is no defense to an action by the receiver of the bank against the director's estate that the insolvency of the person to whom the loan was made was not discovered until after the death of the director and the appointment of the receiver."

Motion granted.

In re F. W. HALL & SONS.

(District Court, W. D. Missouri, S. W. D. March 17, 1913.)

No. 298.

1. BANKRUPTCY (§ 225*)—PROCEEDINGS BEFORE REFEREE—WAIVER OF OBJECTION.

In a bankruptcy proceeding, where the administrator of the estate of a decedent, who claimed the property as the individual property of his intestate, had appeared generally, without attacking the jurisdiction, in response to an order of the referee to show cause, had pleaded to the merits, and went to trial upon the issues, without questioning the jurisdiction, he acquiesced in the form of procedure, and cannot, after an adverse decision, contend that the referee should have proceeded against him by action.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 384; Dec. Dig. § 225.*]

2. BANKRUPTCY (§ 151*)—PROPERTY OF BANKRUPT—HOLDING OUT AS PARTNERS.

Where H. acquired property 10 days before his death, and turned it over to his sons, to be handled by them under the firm name of H. & Sons, and his heirs made no claim thereto until the bankruptcy of the firm, the administrator cannot, after the bankruptcy, claim the property as individual property, since the acts of the decedent and his heirs amounted to a standing declaration to those dealing with the firm that the property belonged to it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 193; Dec. Dig. § 151.*]

In Bankruptcy. On objections by the administrator of F. W. Hall, deceased, to the decision of the referee in bankruptcy proceedings against F. W. Hall & Sons, a copartnership composed of John F. Hall, Samuel J. Hall, and David B. Hall. Decision of referee sustained.

H. W. Timmonds, of Lamar, Mo., for trustee.

R. M. Sheppard, of Joplin, Mo., for administrator.

POPE, District Judge. [1] The first point made against the decision of the referee is that he was without jurisdiction to deal in a summary way with the controversy between the trustee and the administrator of the estate of F. W. Hall, but that any such controversy should have been determined by a suit brought in the ordinary way. Whatever force this contention might have had in the presence of an objection to the referee's jurisdiction at the outset, the objection must be considered as waived by the course pursued by the administrator. To the order to show cause issued by the referee the administrator appeared generally, without making any question upon the jurisdiction of the referee, pleaded to the merits, and prayed that he might be discharged and permitted to retain possession of the property as the administrator of said F. W. Hall. He went to trial upon the case made by the pleadings, and raised no question as to the jurisdiction of the referee until this petition for review from the referee's decision was filed. Under this state of the record the case is within *Bryan v. Bernheimer*, 181 U. S. 188, 197, 21 Sup. Ct. 557, 45 L. Ed. 814, wherein it is held upon the same condition of the record that the adverse party must be deemed to have acquiesced in the form of procedure adopted, and cannot be heard after an adverse decision to raise a question of jurisdiction.

[2] Upon the merits of the present case, a careful consideration of the record leads to a concurrence in the referee's conclusions and in much of the reasoning by which the conclusions are reached. So much of the stock as was bought after the death of F. W. Hall manifestly did not belong to his estate. As to the portion which F. W. Hall had acquired and turned over within ten days before his death to his sons, to be administered by them under the firm name of F. W. Hall & Sons, the conclusion to be announced is hardly less clear. The act of F. W. Hall in intrusting this to a firm thus entitled was a standing declaration to creditors of such firm, both before and after

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his death, that it was an asset of the business and one upon which they might extend credit. His administrator succeeded to no higher ground than was occupied by the deceased. Since the latter was satisfied to have the stock, as it existed in September, 1910, controlled by an entity known as F. W. Hall & Sons, and since his heirs at law were satisfied to have this arrangement continued until the very day before a proceeding in bankruptcy, drawing, during the intervening 16 months, from the business for their support, it would savor of great injustice at such late date to permit an administrator to seize and hold what his intestate and what the beneficiaries for whom he is acting have effectively said by their conduct belonged to the business and not to the estate; especially where, as here, the result would be to leave creditors who have sold upon the appearances of the business absolutely without remedy.

EASTFIELD S. S. CO. v. McKEON.

(District Court, S. D. Alabama, S. D. October 17, 1913.)

No. 1,070.

1. DAMAGES (§ 67*)—RIGHT TO INTEREST—UNLIQUIDATED DEMANDS.

The allowance of interest on damages is not an absolute right, but a matter of discretion.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 135, 136; Dec. Dig. § 67.*]

2. DAMAGES (§ 2*)—WHAT LAW GOVERNS—BREACH OF CONTRACT—RATE OF INTEREST.

Where interest is allowed for breach of contract, the rate which governs is usually that of the place of performance, which, if in a foreign country, must be proved like any other fact.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 2; Dec. Dig. § 2.*]

In Admiralty. Suit by the Eastfield Steamship Company against J. T. McKeon. On exceptions to report of special commissioner. Overruled.

For prior opinion, see 186 Fed. 357.

Convers & Kirlin, of New York City, and Bestor & Young, of Mobile, Ala., for libelant.

Hanaw & Pillans, of Mobile, Ala., for respondent.

TOULMIN, District Judge. A decree for libelant for damages resulting from breach of charter party was entered on June 7, 1913, and an order of reference on that date made to Richard Jones, as special commissioner, to ascertain and report the full amount of such damages. The charter party covered a period of 24 months, from a certain date in 1901 to 1903, and the suit was begun in 1904. The long delay in bringing the suit to a termination was caused first by one party and the other in about equal proportions. The special commissioner disallowed interest on the amount of damages found due, and the libelant excepts to the report in that respect only.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] 1. Interest is not allowable on a demand which is unliquidated. *Stephens v. Phoenix Bridge Co.*, 139 Fed. 248-250, 71 C. C. A. 374. Moreover, allowance of interest is a matter of discretion. *Penn. Steel Co. v. N. Y. City Ry. Co.*, 198 Fed. 778-780, 117 C. C. A. 560. In cases of pure damages, interest is in the discretion of the court. *Bethell v. Mellor & Rittenhouse Co.* (D. C.) 135 Fed. 445; *The Scotland*, 118 U. S. 507, 6 Sup. Ct. 1174, 30 L. Ed. 153. "The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or a jury." See authorities *supra*.

[2] 2. "Where interest is given for breach of contract, the general rule is that the rate recoverable is according to the law of the place of performance, irrespective of the law of the place where the contract was entered into, or the jurisdiction in which the suit is brought." *Sloss-Sheffield Steel & Iron Co. v. Tacony Iron Co.* (C. C.) 183 Fed. 645, case affirmed in 188 Fed. 896, 110 C. C. A. 530; 16 Am. & Eng. Encyc. of Law (2d Ed.) 1090. If interest is given in this case, the rate recoverable is according to the law of the place where the charter hire was to be paid; that is, where the contract for its payment was to be performed—London, England. *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424; *Scotland v. Hill*, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261. There can be no question that the demand sued on in this case was, at the time suit was brought, an unliquidated demand—a demand not ascertained in amount, not determined, remaining unassessed or unsettled, as liquidated damages. The court does not judicially know the rate of interest in England. It must be proved, like any other matter of fact. *Thompson v. Monrow*, 2 Cal. 99, 56 Am. Dec. 318; *Liverpool Steam Co. v. Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788. There was no evidence introduced or offered as to the rate of interest of Great Britain.

The court finds no error in the ruling and finding of the special commissioner. The exceptions to the report are overruled, and the report confirmed.

WESTERN UNION TELEGRAPH CO. v. LOUISVILLE & N. R. CO.

(five cases).

(District Court, E. D. Tennessee, N. D. January 6, 1913.)

Nos. 1,658, 1,659, 1,661, 1,662, 1,664.

REMOVAL OF CAUSES (§ 120*)—REMAND—COSTS.

Under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1098) § 37 (U. S. Comp. St. Supp. 1911, p. 146), which provides that on remanding a cause the court "shall make such order as to costs as shall be just" the court may properly allow a docket fee of \$10 for plaintiff's attorney.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 253; Dec. Dig. § 120.*]

In Equity. Five suits by the Western Union Telegraph Company against the Louisville & Nashville Railroad Company. On defendant's motion to retax costs. Motion denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Shields, Cates & Mountcastle, of Knoxville, Tenn., for plaintiff.
J. B. Wright and J. G. Johnson, both of Knoxville, Tenn., for defendant.

SANFORD, District Judge. These cases having been remanded to the State Court for want of jurisdiction and the costs awarded against the defendant, the clerk has taxed as part of the costs ten dollars docket fee in each case, and the defendant moves to retax the costs so as to disallow these items.

It was held by Judge Baker, Circuit Judge Woods concurring, in *Smith v. Telegraph Co.* (C. C.) 81 Fed. 242, that twenty dollars docket fee for plaintiff's attorneys could not be taxed under R. S. § 824 (U. S. Comp. St. 1901, p. 632). I agree with this view. However, R. S. § 823 (U. S. Comp. St. 1901, p. 632), impliedly provides that other compensation may be taxed and allowed attorneys "in cases otherwise expressly provided by law." And section 5 of the Act of March 3, 1875 (18 Stat. 472, c. 137 [U. S. Comp. St. 1901, p. 511]), brought forward into section 37 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1098 [U. S. Comp. St. Supp. 1911, p. 146]), provides that a Federal Court on remanding a suit to the State Court "shall make such order as to costs as shall be just."

In *Josslyn v. Phillips* (C. C.) 27 Fed. 481, it was held by Brown, District Judge (afterwards Mr. Justice Brown) that under this provision of the Act of 1875 the Federal Court on remanding a case for want of jurisdiction could allow the fee ordinarily awarded on the final disposition of the cause, namely, a docket fee of twenty dollars.

And in *Pellett v. Great Northern Ry. Co.* (C. C.) 105 Fed. 194, and *Riser v. Southern Ry. Co.* (C. C.) 116 Fed. 1014, it was held, after reviewing the conflicting decisions in the *Smith* and *Josslyn* cases, that under the provisions of the Act of 1875 the Federal Court might, and should, on remanding a case for want of jurisdiction, allow a docket fee of ten dollars, by analogy to the fee allowed under R. S. § 824, in cases at law when judgment is rendered without a jury. And it is to be noted that in the *Smith* case, while this was not done, the authority of the court to allow an attorney's fee was impliedly recognized, but the allowance not made chiefly because of the fact, as appears from the opinion, that the prevailing practice in the Seventh Circuit had been the other way. So far as I am advised no uniform practice has been established in this respect in this District or Circuit. However, after careful consideration of all the foregoing cases, I conclude that the sounder view is that expressed in the opinions in the *Pellett* and *Riser* cases, and that the docket fee of ten dollars should accordingly be allowed.

An order will accordingly be entered in each of these cases overruling the defendant's motion to retax the costs.

THE GRAND MANAN (four cases).

(District Court, D. Maine. October 15, 1913.)

Nos. 215, 244, 245, 248.

1. NAVIGABLE WATERS (§ 23*)—OBSTRUCTION OF CHANNEL BY ANCHORED VESSEL—CONSTRUCTION OF STATUTE.

Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543), providing that "it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft," is not an absolute prohibition of the anchorage of vessels in navigable channels, but is intended to prevent their anchoring in such a way as to monopolize such channel, and is not violated where sufficient passageway is left for other vessels.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 64; Dec. Dig. § 23.*]

2. COLLISION (§ 69*)—MOVING AND ANCHORED VESSELS—FAULT—ANCHORAGE IN CHANNEL.

A collision occurred at night in the St. Croix river, a tidewater stream between Maine and New Brunswick, between a steamer passing up and a dredge employed in deepening the channel under a contract with the United States, which had remained in its working position, where it was held by four spuds and also by bow and stern anchors up and down stream attached to wire hawsers from 325 to 600 feet long; the position of the anchors being shown by timber buoys lying flat on the surface and unlighted. The dredge was lying near the American side of the channel, with two scows alongside on the channel side, but leaving at that stage of the tide sufficient width of channel toward the Canadian side for the steamer to have passed at a distance of 150 to 200 feet. It was a bright moonlight night in summer, with a light breeze, and the steamer, which made frequent trips on the river, had passed down an hour or two before. The tide was ebb and set toward the American shore. The dredge and scows were properly lighted. The dredging contract required the buoys to be lighted when so placed as to "endanger or to obstruct navigation." *Held*, that the position of the dredge and scows was not such as to "prevent or obstruct the passage of other vessels" in violation of Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543), nor were her anchor buoys an obstruction, and that she was otherwise free from fault; that under the rule that a moving vessel is, *prima facie*, in fault for a collision with an anchored vessel the evidence did not exonerate the steamer, which must be held solely in fault.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 87-90; Dec. Dig. § 69.*]

In Admiralty. Suits for collision by the Bay State Dredging Company, Limited, owner of Dredge No. 4, and by Frank Silver and others, against the steamer Grand Manan; the Grand Manan Steamboat Company, claimant. Libel by Daniel F. Warren, administrator of estate of James H. Carey, deceased, against the Grand Manan Steamboat Company, and cross-libel by the Grand Manan Steamboat Company against the Bay State Dredging Company, Limited. Decree for libelants, and cross-libel dismissed.

Blodgett, Jones, Burnham & Bingham and T. F. McAnarney, all of Boston, Mass., for libelants Bay State Dredging Co., Limited, Silver and others, and Warren.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Benjamin Thompson, of Portland, Me., Edward S. Dodge, of Boston, Mass., and George J. Clarke, of St. Stephen, N. B., for cross-libelant Grand Manan Steamboat Co.

HALE, District Judge. On the evening of June 26, 1912, the steamer Grand Manan, owned by the Grand Manan Steamboat Company, a New Brunswick corporation, came into collision with the steam dredge known as No. 4, while moored in the St. Croix River, between the state of Maine and the province of New Brunswick. The dredge is owned by the Bay State Dredging Company. In No. 215 the owner of the dredge seeks to recover for her damage sustained by reason of said collision. The libel in 244 presents the case of the crew of the dredge, who seek to recover for loss of personal effects. In 245 Daniel F. Warren, administrator, seeks to recover, under the Maine statute, for the loss of life of Capt. James H. Carey, the engineer and mate of the dredge. No. 248 is the cross-libel of the Grand Manan Steamboat Company against the Bay State Dredging Company, to recover damages sustained by the steamer in consequence of the collision.

The steamer Grand Manan is a wooden, screw, steam vessel, of about 180 tons burden net, drawing 10 feet aft, and 7 feet forward; carrying a crew of 10 men all told. She had fore and aft compound engines, giving her a speed of 10 knots.

The dredge is a wooden vessel, 80 feet long, about 33 feet wide, drawing about 5 feet forward, and 4 feet aft; $8\frac{1}{2}$ feet high, measuring from the bottom to the top of her hull.

On the evening in question, the steamer Grand Manan was carrying an excursion party for a moonlight sail down the St. Croix river to St. Andrews, and return. On her return trip upriver, at about 20 minutes past 11, she collided with the dredge, striking nearly head on, about eight feet from the starboard corner of the dredge, cutting in for a distance of about eight feet on deck, and through five or six streaks below the water line. The dredge sank within a few moments, holding the stem of the steamer in or near the breach caused by the impact; her A frame, or boom, caught in the bow of the steamer. The Grand Manan came clear of the dredge about $3\frac{1}{2}$ hours later, when the tide had reached low water. The scows were not damaged. At the time of the collision, the wind was light, from the north, blowing downriver; the tide between $2\frac{1}{2}$ and $3\frac{1}{2}$ hours ebb, running about three knots an hour, several points across the fore and aft line of the dredge, toward the American shore. The atmosphere was clear; the sky bright, starlight and moonlight.

The libelant contends that, as the collision took place when the dredge was properly anchored where she had a right to be, on a clear, bright night, when objects were visible at a long distance, the presumption is in her favor, and against the steamer, that, under the provisions of law, it was the steamer's duty to keep clear of an anchored vessel, and that a moving vessel colliding with a dredge at anchor must exonerate herself by showing that it was not in her power to prevent the collision by any practicable precautions.

The claimant contends that the dredge was at fault, in that she was anchored in a narrow portion of the channel of the St. Croix river, in such a manner as to prevent and obstruct the passage of other vessels in the navigable channel; that her fault in anchoring, and remaining at anchor in the night in the locality selected by her without compelling necessity for such selection, was a violation, not only of the general maritime law, but also of the statute law of the United States, as contained in the provisions of section 15 of Act of Congress of March 3, 1899, c. 425 (30 Stat. 1152 [U. S. Comp. St. 1901, p. 3543]); that the dredge was therefore at anchor in an unlawful situation, and the burden of proof is upon her to show that the collision did not occur by reason of her exposed and unlawful situation, but did occur by reason of the negligent conduct of the steamer. The claimant also charges the dredge with other faults; especially with placing a hawser in the waters of the St. Croix river, or permitting it to escape into the water, and to be in the vicinity of the lower anchor buoy of the dredge, that, while in the vicinity of the lower anchor buoy, the hawser in question fouled the propeller of the Grand Manan while she was proceeding upriver, making the steamer unmanageable, and that the collision was caused solely by the fault of the dredge.

In the consideration of the case, it is evident that much depends upon the court's finding on the question whether, at the time of the collision, the dredge and scows were at fault in lying anchored in a narrow channel, as alleged by the claimant, thus preventing and obstructing the passage of the steamer and other vessels. This question should receive the first attention of the court; as certain other questions may be affected by this finding.

I. (a) What, then, was the position of the dredge upon the evening in question? Was she at fault in that she was anchored in the narrow channel of the St. Croix river?

The St. Croix river is a tidal stream. The bottom is of a shifting character, quite largely of sawdust formation. The tides rise and fall about 21 feet; their velocity, as well as the direction of their set, varies at different stages. At high water the river is navigable for deep draft vessels. On the evening of June 26, 1912, the libelant was operating the dredge under a contract with the United States government for the improvement of the river. The contract under which the work was carried on contained, among other things, the usual provisions that the contractor assumes responsibility for the safety of his employes, plant, and materials, and for damage done to or by them from any source; that the contractor shall keep proper lights each night between sunset and sunrise on all the floating plant connected with the work; upon the ranges and stakes in connection with it when necessary; upon all buoys large enough, and so situated as to endanger or to obstruct navigation, and shall be responsible for damages resulting from neglect in this matter; that the contractor shall be required to conduct the work in such a manner as to obstruct navigation as little as possible, and at the completion of the work shall remove his plant, including ranges, buoys, and piles placed

by him in navigable waters; that in case the dredge is so placed by the contractor as to obstruct the channel and impede the passage of vessels, it shall promptly be moved so as to afford a practicable passage.

It appears to have been the intention of the government to excavate a channel about 200 feet in width, through that part of the river which was then used, for navigation. Upon this work the dredge had been employed since May 16, and was held in position by the use of four spuds, one at each corner, each spud about 16 inches square and about 72 feet long. In addition to the spuds, the dredge had also as a bow mooring an anchor of about 950 pounds weight, to which she was connected by a three-quarter inch steel cable, running downstream a distance of about 325 feet, and a similar anchor at the stern, also connected by a steel cable, running upstream about 600 feet. The location of each anchor was indicated on the surface by an anchor buoy about 27 feet long, and 18 inches in diameter. These buoys floated flat upon the water, were without lights, and were connected with the anchors by wire ropes. The dredge was equipped with the usual clam-shell buckets, with which the material forming the bottom of the river was raised, and thus deposited into scows made fast alongside of the dredge. These scows, when loaded, were towed to a dumping ground near the mouth of the river. On the evening of the injury, the scows were lying tandem on the port side of the dredge, toward the Canadian shore of the river, loaded with dredged sawdust. The after scow was 65 feet long, 20 feet wide, and 6 feet deep; the other was 80 feet long, 28 feet wide, 9 feet deep, and projected about half its length ahead of the dredge. The scows were fastened to the dredge by lines at the bow and stern. They were at work at a point in the river just above the location known as "The Narrows," about one-eighth of a mile above the Whitlock Mill light, and nearly on a line between that light and the Black Buoy. The bow of the dredge, in which her crane and buckets were located, was headed downriver. On June 26th no change had been made in the position of the dredge at any time when she was not in operation, and no suggestion of a change had been made by the harbor master, or by any local authority. She had been allowed to remain through the night in the position she was in at the close of the day. Steamers and other vessels bound to and from Calais or St. Stephens sometimes passed up and down on the flood and ebb tides through that part of the river where the dredge was located. In the vicinity of the dredge, on the Canadian side, there were 12 feet of water at mean low tide, where the channel had been dredged; and, under the dredge and abreast of her, on the American side, the evidence shows from $6\frac{1}{2}$ to 9 feet at mean low water. The location of the dredge, and of the buoys, were determined by the government inspector. At the time of the collision, the starboard side of the dredge was within 35 feet of the American side of the channel then being dredged to a width of 200 feet; her port side was 134 feet from the edge of the new channel on the Canadian side. The dredge and scows were then on the American side, the dredging having been

completed on the Canadian side. It was about $2\frac{1}{2}$ to $3\frac{1}{2}$ hours' ebb tide on a high course tide; there were then at least 14 feet of water above mean low tide; and the Grand Manan drew about 10 feet. The evidence convinces me that at that time of the tide the steamer could have gone 150 to 200 feet on the Canadian side of the scows. It was a clear, bright night; the position of the dredge and scows, and of the buoys, was well known to the master of the steamer, who had made regular passages upon the river, and had come down the river a few hours before. Capt. Coleman, the harbor master, had never complained of the position of the dredge or scows; he says he found no trouble in navigating by the dredge, and knew of no one who did; that in following the regular channel of the river at any stage of the tide, a steamer would leave the dredge and scows, as they were anchored that night, about 125 or 150 feet to port; that "the dredge was anchored to the western edge of the channel"; that the "old channel," to which he often refers, was the channel vessels were accustomed to use before dredging operations were commenced. Capt. Littlefield testified that the channel where vessels passed and repassed was on the port side of the dredge. A preponderance of the evidence induces me to believe that the vessel was lying in the cut which was intended to become a regular part of the channel of the river, when the work of excavation had been completed. She was, as Capt. Coleman says, on the western edge of the channel.

[1] The general maritime law has always recognized it to be unlawful for a vessel to anchor, without necessity, in an exposed position in a channel, or anywhere in the path of commerce in such a way as to leave an insufficient passageway for vessels properly navigating in the vicinity. The act of March 3, 1899, provides:

"It shall not be lawful to tie up or anchor vessels, or other craft, in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft."

This act seems to be declaratory of the general maritime law upon the subject.

In *The Caldý*, 153 Fed. 837, 840, 83 C. C. A. 19, 22, the Circuit Court of Appeals for the Fourth Circuit said:

"We do not think the Congress intended by Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543), to absolutely forbid anchoring in navigable waters, except only at such places as the location of the vessel would necessarily prevent the passage of other vessels, or obstruct them in passing to such an extent as to make the effort to do so a dangerous manœuvre. If a vessel anchors at a point in a channel where, notwithstanding such anchorage, other vessels, navigated with the care the situation requires, can safely pass, then she has neither violated the statute, nor rendered herself liable under the general rules applicable to navigation, even though to a certain extent she has obstructed the channel."

In *The Europe*, 190 Fed. 475, 479, 111 C. C. A. 307, 311, the Circuit Court of Appeals for the Ninth Circuit held that a vessel might lawfully lie at anchor in the nighttime in the deep channel of a navigable river, if not so placed as to prevent or obstruct the passage of other vessels in violation of the act of Congress prohibiting such obstruction. The court said:

"We also hold that the words 'prevent or obstruct' in this statute are positive words, indicative of limited restraint and of legislative intent to not interfere with the right use of waterways by imposing an absolute or unreasonable prohibition."

[2] In *The D. H. Miller*, 76 Fed. 877, 22 C. C. A. 597, the court in this circuit passed upon the general maritime question, although before the passage of the act of 1899. The court held a dredge to be without fault for lying overnight in her working position, so long as her location did not seriously embarrass the movements of the steamer which collided with her. In *the Job H. Jackson*, 144 Fed. 896, 900, the District Court for the Eastern District of Virginia held that the trend of interpretation of the act of 1899 was to give it a liberal meaning; that its purpose was not to prevent vessels from ever anchoring in navigable channels, but from doing so in such a manner as to obstruct such channels, or render navigation difficult. In *Kent v. Eastern Dredging Co.*, 193 Fed. 808, the court in this district had before it the case of a drill boat, moored with its center over the line of the most easterly cut made by her in her excavations. She was thus lying in a position somewhat similar to that in which the dredge lay in the case at bar. It was not even suggested by counsel that the dredge was anchored in violation of the act of March 3, 1899. In the late case of *The R. G. Townsend* (C. C. A.) 205 Fed. 514, the steamer had dragged her anchor on account of the breaking down of her machinery, and had drifted into the channel; she was held to be free from fault; and no suggestion was made that she was within the mischief of the act of 1899. In *the City of Birmingham*, 138 Fed. 555, 71 C. C. A. 115, a steamer, 320 feet long, while proceeding up the Savannah river, in the early morning, collided with a dredge anchored about 200 feet south of the center line of the channel, but within the regular channel. The lower court held the steamer solely at fault, but the Court of Appeals held the dredge also at fault, and that the precautions taken by a vessel anchoring in a dangerous position should be commensurate with the perils assumed; that the dredge must show some controlling reason for monopolizing the navigable waters of the channel. In that case, the dredge was light, and could easily have been moved. The court found that when its five lines were taut the dredge "occupied practically the entire channel." The case states the law clearly and fully with reference to a vessel anchored in the midst of a channel, and bases its decision upon the broad principles of maritime law declared by courts both before and after the passage of the law of 1899. In *The Bailey Gatzert*, 179 Fed. 44, 102 C. C. A. 612, the Circuit Court of Appeals for the Ninth Circuit had before it the case of a steamer which, while descending the Willamette river on a foggy morning, collided with a dredge anchored in a channel 200 feet wide. The dredge was held not to have violated the act of March 3, 1899, for the reason that plenty of room was left in the channel for the passage of vessels up and down the river, although the river carries a large commerce, and vessels engaged in transportation are to be expected at all points, and at all hours. The court indicates the spirit as well as the letter

of the act to be the prevention of vessels from anchoring in such a way as to monopolize navigable channels. The test generally applied by the courts is whether the vessel is so anchored as to leave a sufficient passageway for others. It is this reasonable rule that should be applied to the facts in the case at bar. I have found that the dredge was in the cut at the westerly side of the channel; clearly she was not monopolizing the navigable waters of the channel. Her position on the edge of an excavated channel was not unlike that of the dredge in the Virginia Ehrman, 97 U. S. 309, 315, 24 L. Ed. 890. A fair preponderance of the evidence leads me to the conclusion that the dredge and scows were free from fault in their location at the time of the collision. They were not within the mischief, or the spirit of the act of March 3, 1899.

(b) The claimant also charges the dredge with fault, in that proper lights were not maintained, and exhibited upon her, nor upon the scows and lower anchor buoy. The claimant refers to the act of June 7, 1897 (c. 4, 30 Stats. 98 [U. S. Comp. St. 1901, p. 2879]), which provides that a vessel under 150 feet long, while at anchor, shall carry forward, where it can best be seen, and at a height not exceeding 20 feet above her hull, a white light, in a lantern so constructed as to show a clear, uniform, and unbroken light, visible all around the horizon for a distance of at least one mile. The evidence shows that the dredge had a brightly burning, white, masthead light; that it also had a large, lighted lantern in the engine room on the forward end, shining through the window; that the dredge and scows were visible for a long distance in the moonlight; and were seen as soon as the steamer rounded the point below. Capt. Littlefield, of the dredge, testifies that each scow had a white light on each end. It is urged on behalf of the steamer that the absence of lights upon the dredge and scows contributed to the injury in several important particulars. I do not think this contention is sustained by the evidence. If there was any defect in the lighting of the dredge and scows, I am satisfied by a preponderance of the evidence that such defect or default did not contribute to the injury. There was nothing to prevent an approaching vessel from seeing them in time to avoid a collision.

(c) There was no light upon the lower anchor buoy; and there was a general provision in the contract that proper lights should be kept upon all buoys so situated as to endanger or obstruct navigation. It is contended by the claimant that the lower anchor buoy was an obstruction to navigation, and a light upon it would have tended to prevent the collision. Capt. Coleman, the harbor master, says that a light upon the lower anchor buoy would have made it much easier to locate the buoy; that there were shadows on the river which made some difficulty, and were embarrassing to those "not familiar with them"; but it does not appear that he had ever asked to have the buoy lighted, or that any government inspector had made such request. While the claimant insists that "the anchor buoy was one of the deceptive matters that the captain of the steamer had to guard against," I cannot find enough in the record to justify me in finding that the anchor buoy was an obstruction to navigation, and that it contributed to the colli-

sion. On the other hand, the whole testimony satisfies me to the contrary. The unlighted anchor buoy was not, in my opinion, an obstruction to navigation, and did not contribute to the collision.

(d) It is contended, too, on the part of the claimant, that the anchor watch on the part of the dredge was incompetent. Sughrue, the night watchman, was on duty on the dredge at the time of the collision. His hours of duty were from 6 p. m. to 6 a. m.; he had been up and fully dressed from 6 o'clock in the evening to the time of the injury. Immediately after the collision, he was seen by the crew of the dredge with his cap on, and with a lantern in his hand. He had seen the steamer pass down by the dredge earlier in the evening; and at about 11 o'clock he heard her coming up river; he testifies he believed her to be the Grand Manan; but noticing that it was a bright night, and that the lights of the dredge and scows were burning brightly, he returned to the engine room for about 10 to 15 minutes and cleaned out one fire; he then came up on the port side with the lantern in his hand, walked forward, and saw the Grand Manan 100 feet away, coming towards the dredge at such an angle as to pass by, he thought, close on the starboard side. When the crash came, he called the crew of the dredge, consisting of eight men—first going on top of the house and calling Capt. Carey by name. He found the operating door open, and heard a sound inside Capt. Carey's room. He awakened the other members of the crew by knocking upon their doors, and calling out that the dredge was sinking. He is corroborated by some of the crew. The efforts he made to awaken the men caused him to be too late to get into his room and thus save his personal effects. After he had got out upon the scow with the others, and saw that Capt. Carey was missing, he called out Capt. Carey's name several times. Those in charge of the Grand Manan could see the dredge and scows and their lights, as soon as she rounded the point. They had passed down by the dredge 1½ hours before, and must be assumed to have known her position. In view of these facts, I cannot hold that the failure of the anchor watch to warn the steamer as she approached the dredge was a fault conducing to the collision. On the other hand, a preponderance of the evidence leads me to the opposite conclusion.

(e) The claimant contends that those in charge of the dredge should have slackened the anchor cables, or released her spuds or moorings in order to avoid the collision. The evidence tends to show that lifting the spuds of the dredge would have taken at least an hour. The use of spuds is necessary in the daytime to hold the dredge to the cut; and at night to withstand the cross currents. Under the circumstances of the case, the operation of lifting the spuds was not a maneuver which the law requires. In *The D. H. Miller*, 76 Fed. 877, 879, 22 C. C. A. 597, 599, in speaking for the court, Judge Putnam comments on the contention made in that case that the dredge was in fault for not raising her spuds when she saw the probability of a collision. He says:

"This was not a maneuver of such a customary nature, or so clear as to its probable effect, that we can say the barge was in fault in that respect under the rule in *extremis*."

I think the same may be said in the case at bar.

II. The dredge, then, being free from fault in reference to her situation, the burden is upon the steamer to exonerate herself from blame by showing it was not in her power to prevent the collision by any practicable precautions. The D. H. Miller, 76 Fed. 877, 879, 22 C. C. A. 597. In Marsden on Collisions at Sea (3d Ed.) pp. 35, 501, the rule is thus stated:

"A vessel under way is bound to keep clear of another at anchor." "A vessel under headway, in the daytime, or on a clear night, which runs into another at anchor, or stationary in the water, is *prima facie* at fault."

In *The Virginia Ehrman*, 97 U. S. 309, 314 (24 L. Ed. 890), speaking for the Supreme Court, Judge Clifford announced the rule:

"Vessels in motion are required to keep out of the way of a vessel at anchor, if the latter is without fault, unless it appears that the collision was the result of inevitable accident; the rule being that the vessel in motion must exonerate herself from blame by showing it was not in her power to prevent the collision by adopting any practicable precautions."

Does the testimony in the case at bar exonerate the steamer in motion from blame for the collision with the dredge at anchor? The claimant seeks to show that the collision was caused by the fact that one of the hawsers on board of the dredge was negligently allowed by the libellant to get adrift, that in the vicinity of the lower anchor buoy of the dredge the hawser fouled the propeller of the *Grand Manan* while she was proceeding upriver, making her unmanageable, and resulting in the collision, and that thus the injury was caused solely by the fault of the dredge. No direct proofs are offered that any hawser got adrift in the river before the collision; but the claimant asks the court to draw the inference from the testimony that the hawser was blown off the house of the dredge in the afternoon of the day of the injury, or that in some way it was allowed to drift from the dredge; that this hawser was carried downriver to the lower anchor buoy, and there became entangled in the propeller of the steamer; that, after passing the lower anchor buoy, the steamer became unmanageable in consequence of the hawser having fouled her propeller; that, by reason of such fouling, she fell off to port against a port wheel, so that her rudder had little, if any, effect upon her steering; and, as a direct result of such fouling, the collision occurred.

The claimant supports this contention by proofs tending to show that:

- (1) When the *Grand Manan* was in the vicinity of the dredge's bow mooring, and less than 500 feet below the dredge, her engines were observed to slow down, and at practically the same time difficulty with her steering was noticed.

- (2) Just before the collision her engines could not be reversed; after the collision they could not be operated ahead or astern until the following afternoon, when the hawser had been removed from her shaft; and, after such removal, the engines were in practically their ordinary condition.

- (3) Certain photographs, taken the afternoon following the collision, as soon as the tide had ebbed sufficiently to expose the propeller,

show conclusively that the hawser was taken on while the engines were in headgear.

The evidence offered on behalf of the claimant tends to sustain the above three propositions. Some of this evidence is of much probative value, and tends to show that at the time of the collision the steamer was in first-class condition; that she was a good handling steamer; that on the night in question, if she had responded as she ordinarily did, the change of wheel which the captain gave her would have carried her on to the Canadian side of the dredge; that no slowing down of the steamer was noticed until she was headed directly for the port corner of the dredge; and up to that time there had been no trouble with the wheel; that the whole trouble happened in a short time; that the steamer's wheel was put to port as hard as it could be; that she did not respond, but kept falling off to port. The mate testifies that when the steamer was close to the dredge's anchor buoy, he thought there was going to be trouble; that she tended to swing off, and he did not think she was minding her wheel. The claimant introduces a large body of testimony tending to show that the hawser was picked up by a fan of the steamer's propeller while her engines were in headgear; that the freezing of her engines was the inevitable result and the direct cause of the injury; that the influence of the hawser on the steamer's navigation was first shown by her slowing down, and was immediately followed by her rudder becoming practically useless. It is contended that all the testimony relating to the conduct of the steamer, after she came up to the anchor buoy, leads to the conclusion that the bight of the dredge's hawser fouled one of the fans of the steamer's propeller, while her engines were in headgear, and while a considerable part of the hawser was leading upstream; that the winding of the hawser tended to draw the stern of the steamer to starboard, and cause her bow to fall off to port; and it continued in that way until the leading part of the hawser was abaft the steamer's beam; then the steamer continued on practically a straight course; the final effect of winding the hawser on to the steamer's propeller shaft operated to draw it in so hard that it was compressed between the stern bearing and hub of the propeller; as a result the steamer's engines were frozen, and the collision inevitably followed; a short time after the collision occurred, the steamer was found to have this hawser around her shaft, and at that time her engines could not be forced, nor thrown over the center by the use of a pinch bar. The slowing down of the steamer's engines, and the trouble with the steering, was first experienced near the lower anchor buoy; just before the collision the steamer's engines could not be reversed, and after the collision they could not be worked ahead or astern until the following afternoon, when the hawser had been removed from the propeller; the engineer was in the engine room at his post; when the steamer struck the dredge's lower anchor buoy, a scraping and bumping was felt, and the buoy jumped 12 or 15 feet in the air, almost directly astern of the steamer, and difficulty was at once experienced in steering; the engines began to slow down, and the steamer became unmanageable. In behalf of the steamer, it is

urged that all these facts can be accounted for in only one way—that the hawser in the steamer's propeller created the difficulty, and caused the injury.

The learned proctors for the claimant lay great stress upon the testimony from photographs tending to show that the hawser was taken on to the propeller shaft while the engines were in headgear, and while the steamer must have been going ahead; and it is urged that the manner in which the hawser was taken on to the propeller is not theory, but is the only conclusion that can be drawn from the evidence, corroborated as it is by the conduct of the libelant and its men after the collision. Waters, the first officer of the steamer, testifies that he thinks the steamer picked the hawser up just before she came to the lower anchor buoy; that he did not come to this conclusion until quite a while after the collision; but he kept thinking about it, and how the hawser rolled on to the hub, and he thought the steamer picked it up when she was going ahead, just before she came to the buoy; that he did not know how it was picked up, but since seeing the photographs, he thinks it was picked up below the anchor buoy; that he never thought it was fastened to the buoy, and did not know what it was fastened to; that on examination of the photographs, he could tell from the bight being on the forward part of the blade and leading to the port side of the shaft, and beneath all the turns, he could see it went on first. He is positive there was not an eye on either one of the blades; that it looked to him as if the engines were going ahead, because the two ends coming down from the leading parts of the bight were underneath the whole of the turns as near as he could see; that the other turns were wound over them, and from what he saw the rope was apparently pretty well under the turns, and very much mixed up. Several photographs were introduced, and a great body of testimony was taken on this subject. Capt. Coleman, Capt. McDuffy, and other reliable witnesses are convinced by the photographs that the propeller was in headgear at the time the hawser was taken on. Capt. Mulcahy, a well-qualified expert, testified from the photographs that the wheel was in headgear when the hawser was taken on, because the loop was over the forward side of the fan. Other experts agree with him. The claimant urges that when Capt. Lewis and others, in behalf of the dredge, went down to see the dredge and examine the steamer, they did not then claim that the claimant's position as to the manner in which the hawser was taken up was not true, but that later the dredging company set up the contention that the hawser was washed off the dredge while the two vessels were together, and picked up while the engines were reversed.

The libelant's testimony tends to show that the hawser, found in the propeller of the Grand Manan and produced in court, was a six-inch Manilla hawser, and had a bridle at each end; that all the hawsers in use by the dredge are accounted for substantially as follows: The only six-inch hawsers owned by the libelant in connection with the work on the St. Croix river were four Manilla hawsers; one of these was taken away upon a tug, but was returned before the collision; three of them, just previous to the injury, were coiled up on the house

of the dredge, and none had been in use since June 3d; two six-inch hawsers were coiled, one on top of the other, upon the house of the dredge aft the big hatch. Some of the crew of the dredge swear that the hawsers on the house, including the six-inch hawser with the five-inch line on top, were seen there daily up to the time of the collision. Capt. Littlefield testifies that as late as 4 o'clock in the afternoon of the day of the collision he saw the six-inch hawser on the house, with the small five-inch piece on top. Several members of the crew testify that this particular hawser was the one found in the propeller of the Grand Manan, and produced in court; that it is recognizable, among other things, by its unusual weight, the parceling, and the bridling; that the dredge sank quickly, and in sinking tilted down to starboard at the forward end; that this particular six-inch hawser was the first one covered with water; that the current was about three knots an hour; and the point of impact of the steamer about eight feet from the starboard corner. Thompson, a member of the crew, testifies that this six-inch hawser, with the five-inch piece on top, was seen by him to wash off the dredge as she sank, and as the water came up over the starboard corner of the house; that it drifted off the house, first in a coil, and then opening up in the current; that it passed the A frame and out by the Grand Manan; that later other lines floated, but did not float off the dredge. Thompson's testimony was tested by a severe cross-examination; it did not seem to me to be impaired by the test. He was corroborated by Anderson, and by some other members of the crew. This testimony is attacked with great force by the learned counsel for the claimant. It is contended by the claimant that the identification of the six-inch hawser as the particular one brought from Boston was imperfect and unreliable.

The libelant offers evidence tending to show that while the dredge and steamer were together after the accident, certain witnesses heard the main engine of the Grand Manan throb, and her propeller turn, and saw the engineer work his engine; that the engine did actually work, and that white wheel water was seen at the stern of the steamer; that the steamer was seen to back out for a short distance. All this testimony with regard to the actual working of the engine and the turning of the propeller was submitted to a most severe and critical attack. Testimony is offered by the libelant that all the hawsers on the dredge were recovered the day after the dredge sank, except this particular six-inch hawser with the five-inch piece on top, which had been on the starboard side forward, and was seen to float overboard toward the steamer.

The dredge offers testimony that the trouble with the steering of the steamer did not begin at the anchor buoy, or above it, but was observed some 400 feet downstream, below the anchor buoy, and for several minutes before the collision, while the steamer was upon the sawdust beds, which extend from the Canadian shore to within 125 feet of the American shore opposite Hill's Point; that the cause of the steamer's bad steering was that she there smelt bottom; that Capt. Ingersoll testified at first that when he began to observe the steamer's failure to answer her helm, she had not got up to the anchor buoy,

but was on the sawdust beds below. Capt. Coleman testified that if the vessel's engines were stopped when she was going through the water at five or six knots, she would not go over twice her length. There is some testimony from passengers tending to show that the vessel's engines did not stop, but that the throb of the main engine was heard up to the time of the crash, which could not have happened if the hawser had been in the propeller.

In behalf of the dredge it is urged, too, that it is not necessary to attribute the collision to the presence of the hawser in the propeller; but the whole testimony on the part of the steamer and those in charge shows faults which were undoubtedly the direct cause of the collision. It is not denied that navigation on the St. Croix river is at all times difficult, especially so in the night, at the location where the collision occurred, where the tide sets diagonally towards the American shore, turning sharply to starboard going upstream, where shifting sawdust beds cover the bottom, and where these difficulties are overcome only by the precaution of competent navigators. It is pointed out that Capt. Ingersoll said he had not been on the river at night before during that season, and only two or three times the year before; that on the evening in question he was the only officer in the pilot house, and was performing the double duty of officer in charge and helmsman; that he had with him a certain Mr. Maxwell, who chartered the steamer, and that two ladies were also there; that while approaching the scene of the accident, he was in conversation with these three passengers, notwithstanding the statute of the United States and the regulations of the Department of Commerce and Labor prohibiting the same, and that a copy of these regulations was posted in the steamer's pilot house. On the other hand, the captain says that he was paying no attention to the passengers at the time of the collision. It is contended, too, on the part of the dredge that the ebb current was running diagonally towards the American shore at the rate of three knots an hour, which caught the steamer coming around Hill's Point on the starboard bow; that the normal steam pressure of the steamer is 115 pounds, but that during the evening in question she had on only 80 to 90 pounds, which is sufficient to propel the steamer only at about half speed, and that this amount of pressure lessened the ability to handle her; that from three to five minutes before the collision the steamer was seen to slow down gradually, and not to mind her helm; and that at the time those on board believed she was smelling the bottom. It appears from the testimony of Capt. Coleman and others that the course that Capt. Ingersoll was steering near Hill's Point would bring him upon the sawdust beds on the Canadian side, whereas the deeper water rounding Hill's Point is on the American side.

It is contended that if the Grand Manan smelled bottom upon the sawdust beds, with the tide $2\frac{1}{2}$ hours' ebb, running three knots or more per hour towards the American shore, with her already reduced speed and her greatest depth at the stern, she would slow down still more and turn to port, and refuse to answer her helm; that it was the duty of Capt. Ingersoll to have the steamer under perfect control in the position in which he was placed; that his failure to do so should

be construed strictly against him, and against the claimant; that under the decisions of this court he must be presumed to have full knowledge of the condition of the tide, current, bottom, and the exact position of the dredge and scows; that after the steamer refused to go to starboard, and seemed to be yawing to port, he should have put his helm to starboard and gone to port, upon the American side of the dredge. It must be said of this last contention that the evidence is contradictory relating to the water upon the American side, and whether it would have been safe for the steamer to have gone upon that side; but it is at least true that the captain did not try to starboard his helm, and does not know whether the engines would have responded if he had undertaken to do so.

It is further urged by the libellant that Capt. Ingersoll could clearly see the dredge and scows on the bright moonlight night, and that their position should have been well known to him, as the steamer had passed up and down the river many times when the work was going on, and the same evening she had passed by on the Canadian side about 100 or 150 feet away. The dredge charges also that the steamer had an incompetent engine department; that from the testimony of the passengers and others the engineer was not attending to his duty on the night in question, and for a part of the time was not in the engine room, but was talking with friends outside who were on the excursion, that he was not paying strict attention to his business, and that the Grand Manan did not have proper lookouts.

Evidence is offered on behalf of the libellant from experts who testified with regard to the photographs, and who concluded from their examination, that for a bight of the hawser to be on in the way it was, the propeller must have been in reverse gear. Capt. Coleman, an expert called by the claimant, when recalled on direct examination, testifies that just one thing makes him think the wheel was in headgear, and that is the position of the loop over the forward side of the fan; but he says further:

"It would be possible for this loop to be so in reverse gear; I think you can get them on most any shape you want to."

The evidence is very voluminous; a sharp contention is made upon every point in the case. I have been assisted in coming to a conclusion by the fact that I have seen all the witnesses, heard their testimony, and have myself taken part in the examination during the progress of the trial.

Having found that on the evening in question the dredge was not in fault in respect to her location at the time of the collision, or in respect to the other charges against her—it appearing that no claim is made that the collision was the result of inevitable accident—the court is compelled to follow the rule that a vessel in motion must exonerate herself from blame by showing it was not in her power to prevent the collision by any practicable precautions. After an examination of all the evidence, I am forced to the conclusion that the steamer has not so exonerated herself from blame. I am of the opinion that she has not shown that the hawser in question became entangled in the pro-

pellor shaft before the collision, and was the cause of the captain's failure to steer the vessel and avoid the dredge. On the other hand, I am of the opinion that there is a fair preponderance of the evidence that the hawser was on the deck of the dredge at the time of the collision, and became entangled in the propeller shaft after the collision. I cannot come to the conclusion that certain direct testimony upon this point was false and perjured. While the testimony of the photographs is interesting, and has required much study, I cannot hold this testimony to be controlling, against the positive, direct testimony that the hawser in question was upon the dredge at the time of the collision. It is unnecessary to point out the exact fault of the steamer which caused the collision. On a clear, bright night she ran into a dredge at anchor. She has not, by satisfactory proofs, exonerated herself from fault. She must, then, be charged with fault.

III. No. 244, Frank Silver et al. v. The Steamer Grand Manan.

The several libelants are shown to have been members of the crew of dredge No. 4. The testimony shows the presence of these libelants upon the dredge at the time of the injury. It is contended on the part of the claimant that their contributory negligence is proved. Upon an examination of the testimony, I cannot sustain this contention. Upon all the evidence in the case I find they are entitled to recover. This case, with the others, will be referred to an assessor. Upon the coming in of his report, the court will pass upon all further questions.

IV. No. 245. Daniel F. Warren, Adm'r of Estate of James H. Carey v. Grand Manan Steamboat Company.

This action is brought by the administrator under the Maine statutes to recover for the death of James H. Carey, resulting from the collision. The suit is for the benefit of the widow and two minor children. Capt. Carey was in charge of dredge No. 4 on the night of the collision. Without reciting the testimony, I am satisfied by a preponderance of the evidence that his death was immediate, and was the proximate result of the collision. Under the statute, the libelant is entitled to compensation not exceeding \$5,000, with reference to pecuniary injuries resulting from his death to the persons for whose benefit the action is brought. It is not proven that the libelant's intestate was at fault, in that he was guilty of contributory negligence. No evidence has been offered touching the pecuniary injuries. This case will also go to an assessor. Upon the coming in of his report, the court will act upon such further questions as may arise.

V. No. 248. Grand Manan Steamboat Company v. Bay State Dredging Company, Ltd.

The court finds for the respondent, and orders that the libel be dismissed, with costs for the respondent.

No. 215, Bay State Dredging Company, Limited, v. Steamer Grand Manan; No. 244, Frank Silver et al. v. Steamer Grand Manan; No. 245, Daniel F. Warren, Adm'r, v. Grand Manan Steamboat Company. In each of these cases the court holds the steamer to be solely at fault for the collision, and finds for the libelant. Fritz H. Jordan is appointed assessor. Upon the coming in of his report, the court will pass upon such further questions as may arise.

H. A. & L. D. HOLLAND CO. v. NORTHERN PAC. RY. CO.

(District Court, E. D. Washington, N. D. May 31, 1913.)

No. 1,580.

1. PUBLIC LANDS (§ 92*)—RIGHT OF WAY OVER PUBLIC LANDS—CONSTRUCTION OF GRANT.

Under Act July 2, 1864, c. 217, 13 Stat. 365, granting to the Northern Pacific Railroad Company right of way 400 feet wide over the public lands "for the construction of a railroad and telegraph," it acquired the land embraced in such right of way for railroad purposes only, and had no power to dedicate the entire right of way, so acquired over a government subdivision of land, as a public street, reserving to itself only the right to operate its tracks over the street; and its power in that regard was not enlarged by the fact that it acquired title to the remainder of the section under the subsidy grant contained in the same act, the two grants being separate and distinct.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282; Dec. Dig. § 92.*]

2. DEDICATION (§ 19*)—BY DEED—CONSTRUCTION OF PLAT.

A railroad company, as owner of a tract of land over which its line was built and on which was its station and side tracks, platted the same as an addition to a town. The plat showed the tracks and a strip of land lying on both sides 225 feet in width and designated as "Railroad Street." The dedicatory language of the plat was as follows: "The streets shown by said plat are dedicated to be used by the public until lawfully vacated, except that strip of land 225.7 feet in width designated as 'Railroad Street,' which is reserved for the tracks and use of said railroad company." *Held*, that the plat did not constitute a dedication of such strip as a public street, although it showed lots fronting thereon.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.*]

3. DEDICATION (§ 20*)—COMMON-LAW DEDICATION—ACQUIESCENCE IN PUBLIC USE.

The temporary use of unoccupied portions of a railroad right of way by the public or adjoining owners for street purposes *held* not to constitute a common-law dedication of the land as a street by the railroad company, where as fast as required it was occupied by the company and its lessees with structures used in connection with its railroad business.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 17-30; Dec. Dig. § 20.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1908-1917; vol. 8, pp. 7629, 7630.]

4. DEDICATION (§ 21*)—BY ESTOPPEL—SALE OF LOTS.

The sale of lots in accordance with a plat which showed them fronting on a strip of land occupied by railroad tracks *held* not to constitute a dedication of such strip as a street by estoppel, where by the dedicatory language of the plat it was expressly reserved for railroad purposes.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 50-54; Dec. Dig. § 21.*]

In Equity. Suits by the H. A. & L. D. Holland Company, by George Turner and wife, by H. J. Shinn and wife, and by W. H. Kiernan and wife, against the Northern Pacific Railway Company. Decrees for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Turner & Geraghty and Post, Avery & Higgins, all of Spokane, Wash., for plaintiffs.

Cannon, Ferris & Swan and Graves, Kizer & Graves, all of Spokane, Wash., for defendant.

RUDKIN, District Judge. These several bills were filed by the owners of certain lots abutting on Railroad street in the city of Spokane to restrain the Northern Pacific Railway Company from elevating its tracks in Railroad street in front of their property and for other appropriate relief. By consent of parties the suits were consolidated for the purposes of trial, and the record made at the hearing discloses substantially the following facts:

By the first section of the Act of Congress of July 2, 1864 (13 Stat. 365, c. 217), the Northern Pacific Railroad Company was created a corporation and was empowered to construct and maintain a continuous railroad and telegraph line from a point on Lake Superior to some point on Puget Sound. By the second and third sections of the act it was provided, among other things, as follows:

"Sec. 2. And be it further enacted, that the right of way through the public lands be, and the same is hereby, granted to said Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations; and the right of way shall be exempt from taxation within the territories of the United States. * * *

"Sec. 3. That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office."

The railroad company signified its acceptance as provided in the act, and on the 4th day of October, 1880, the line of the road was definitely fixed through the north half of section 19, township 25 north, of range 43 east of the Willamette meridian, and a plat thereof filed in the office of the Commissioner of the General Land Office. At that time the United States had full title to the north half of section 19, and the same was not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption and other claims or rights. On the 20th day of January, 1881, the company, through its agent and general su-

perintendent, filed a town plat of Railroad addition to Spokane Falls, which embraced the half section in question. The line of road as definitely located ran in an easterly and westerly direction through the center of this plat. The tract of land thus platted is four blocks in width, extending from Sprague avenue on the north to Third avenue on the south, and approximately ten blocks in length, extending from Washington street on the east to Cedar street on the west. There is a strip of land on the plat designated as "Railroad street," 225.7 feet in width and extending through the plat from east to west. The main line of the railroad was indicated on this plat, with two side tracks two blocks in length on either side near the depot, which was situated on Lincoln street, about the center of the plat east and west, and about the center of Railroad street. The dedicatory language of the plat reads as follows:

"The streets shown by said plat are dedicated to be used by the public until lawfully vacated, except that strip of land 225.7 feet in width designated as 'Railroad Street,' which is reserved for the tracks and use of said railway company."

In the latter part of the year 1881 the railroad was constructed along the line of definite location about the center of Railroad street, with two short side tracks near the depot, as indicated on the plat of Railroad addition, and little further use was made of the street by the railroad company until after the town was destroyed by fire in the year 1889. At the time the plat was filed the town contained a population of from 300 to 500, at the time of the fire in 1889 a population of from 12,000 to 15,000, and at the time of the trial a population estimated at 125,000. Prior to the fire the business portion of the town was located almost wholly, if not entirely, north of Railroad street. Soon after the construction of the railroad a number of buildings were erected upon the tier of lots facing Railroad street on the south and fronting on the railroad track, including one or more hotels, lodging houses, saloons, restaurants, barber shops, etc. The location of these buildings with reference to the lot lines on Railroad street does not very clearly appear from the testimony. Upon the tier of lots facing Railroad street on the north were a few residences, some of which at least fronted upon Railroad street. In the early history of the town Howard street was practically the only cross-street open to public travel, and those having business with the railroad company from the town passed south on Howard street to its intersection with Railroad street, and thence westerly along Railroad street to the depot, a distance of about two blocks. Those residing or having business places fronting on Railroad street used the street for the purpose of ingress and egress to and from their residences or places of business. Railroad street was thus used by the general public, and by whomsoever wished to pass over it, from the year 1881 until the year 1889 for a distance of five or six blocks, and I might add in passing that other vacant property in the vicinity was used for the like purpose and in substantially the same manner. Since the year 1889 the street has been used but little, except by those having business directly with the railroad company in loading or unloading freight. Since that time

the tier of lots on the south side of the street has been built up almost solid, principally with warehouses and wholesale houses, although some retail business is transacted by houses having a frontage on the cross-streets. A side track runs along in front of these business houses a few feet distant therefrom, and the buildings usually have a platform in front extending to the side track for the purpose of receiving freight.

Commencing in the year 1891 the railroad company began to lease the northerly 100 feet of Railroad street for wholesale and warehouse purposes, and at the present time the greater part of the northerly 100 feet of the street through this addition is occupied by brick buildings from two to four stories in height, constructed at a cost of many thousand dollars. So far as the record discloses the public authorities of the city of Spokane have never asserted any rights in Railroad street, or exercised any control or supervision over it. On the contrary, they have levied special assessments against the property in the so-called street for street improvements from time to time, and the railroad right of way has always been taxed for state, county, and municipal purposes. Portions of the northerly 100 feet of the street have been occupied and blockaded by buildings, for a period of more than 20 years, without any protest on the part of the city, and with only an occasional protest on the part of an abutting property owner, who took no legal steps to protect his rights in the street, if any such he had. That portion of Railroad street not occupied by buildings is, at the present time, very largely occupied by railroad tracks, as will appear from an inspection of the numerous photographs and plats received in evidence. There are upwards of 100 train movements daily at the different street crossings in the city of Spokane, and at some of these crossings public travel is impeded and human life endangered to a greater or less extent. Under these circumstances, on the 6th day of February, 1912, the city of Spokane by ordinance directed and ordered the Northern Pacific Railway Company (successor in interest to the Northern Pacific Railroad Company) to separate its grade from the street grades of the city between Sprague avenue and Division street on the east and Sixth avenue on the west (which includes the entire distance through Railroad addition). This the railroad company proposes to accomplish by a dirt fill approximately 15 feet in height and 85 feet in width, sustained by retaining walls of concrete or stone masonry on either side. To prevent the elevation of the tracks and the obstruction of Railroad street in this manner in front of their several lots, the plaintiffs have instituted these suits as already stated.

Under the foregoing facts the plaintiffs contend that Railroad street is a public highway—first, by statutory dedication; second, by common-law dedication; and, third, by estoppel. The defendant, on the other hand, contends that there has been no dedication, either common-law or statutory, and, furthermore, that its predecessor in interest could not lawfully make such a dedication under the implied limitations contained in the grant of its right of way from the federal government. The legal status of this strip of land is therefore the principal question in the case. If it is a public street, it is conceded that the municipality could not give it over to the exclusive use and occu-

pation of the railway company, and such would be the necessary effect of elevating the tracks according to the plan above outlined. *State ex rel. Schade Brewing Co. v. Superior Court*, 62 Wash. 96, 113 Pac. 576. If, on the other hand, it is the private right of way of the railway company it may lawfully elevate its tracks therein against the will and protest of abutting property owners, and if they suffer injury therefrom they have their right of action at law. The latter is their only remedy, for the damages are entirely too remote, uncertain, and speculative to warrant a court of equity in granting injunctive relief in advance of the change.

[1] If there has been no dedication of this strip of land called Railroad street to the use of the public, the power of the railroad company to make such a dedication is not necessarily involved in these cases; but nevertheless the nature of the company's right of way acquired under the act of Congress, and the limitations upon its use imposed by Congress, may well be taken into consideration in determining the ultimate question at issue, viz., the question of dedication or no dedication. In *Northern Pacific Railroad Co. v. Smith*, 171 U. S. 260, 275, 18 Sup. Ct. 794, 799 (43 L. Ed. 157), the court said:

"By granting a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance."

The doctrine of that case was reaffirmed in *Northern Pacific Railway Co. v. Townsend*, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044; the court declaring that neither courts nor juries, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad, and title to it has vested in whomsoever chooses to convey the same. The court further said:

"Manifestly the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. * * * Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress as forming the basis of an adverse possession which may ripen into a title good as against the railroad company."

At the same time it was not denied that the right of way granted through the public domain within a state was amenable to the police power of the state, the court saying:

"Congress must have assumed, when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But

such limitations are in no sense analogous to claims of adverse ownership for private use."

If the authority of the railroad company to dispose of any part of its right of way of its own volition is measured by what it may be compelled to do under the police power of the state—and in my opinion its authority is thus restricted—the company was without authority to devote its entire right of way across the prairie for a distance of ten blocks to the use of the public for a public street, reserving to itself only the right to operate its tracks over the street. It seems manifest that under the laws of the state the entire right of way of the railroad company could not be condemned for a public street, leaving to the company only the limited right to operate its trains therein, thus converting what is to all intents and purposes a fee-simple title into a mere license from municipal authorities. *North Coast R. Co. v. Northern Pac. R. Co.*, 48 Wash. 529, 94 Pac. 112, falls far short of supporting any such doctrine.

I am therefore of opinion that it was without the power of the company to dedicate its entire right of way as a public street, and that such a dedication would be utterly void, if attempted. Nor can I agree with counsel that the railway company holds its right of way through odd sections by any other or different tenure from that by which it holds its right of way in even sections, or that it has any greater authority to dispose of the one part than of the other. The act of 1864 contains two separate and distinct grants, the one of the right of way, and the other of land in aid of the construction of the road, and the one grant is not dependent upon or merged in the other. *Railroad Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578.

[2] The grant of the right of way is an entirety, and is held throughout by the same tenure and subject to the same limitations. The statutory dedication made by the railroad company is consistent with this view. There is no magic in the use of the word "street." The entire plat, including the dedication, must be construed together, and when so construed it plainly appears that the strip of land, ill-advisedly designated as a street, was in fact excepted from the dedication and reserved for the tracks and use of the railway company. It is no doubt true that the use of a strip of land as a mere right of way for a railroad is not entirely incompatible with the use of the same strip of land as a public street; but at the same time its use for other legitimate railroad purposes would be. Furthermore, such common user is so impracticable and so hazardous that a court should not readily presume that it was authorized or intended.

[3] The use made of this strip of land from 1881 to 1889 was but natural under the circumstances, and was wholly insufficient of itself to constitute a common-law dedication. The law on that subject is very clearly and concisely stated in the headnotes to *Hogue v. City of Albina*, 10 L. R. A. 673, prepared by Mr. Justice Bean, now of the district of Oregon.

"In order to constitute a dedication by parol, there must be some acts proved evidencing a clear intention to dedicate the land to the public use.

"Where it is sought to establish a dedication by parol, there must be some acts proved evidencing a clear intention to dedicate the land to the public use.

"Where it is sought to establish a dedication by the sale of lots with reference to a map or plat, the extent of such dedication is to be determined from the consideration of the whole map, the object being to ascertain the intention of the donor, the cardinal rule of construction being to give effect to the intention of the party as manifested by his acts.

"A dedication of land to the public use is not presumed, but must appear by acts and declarations of the owner of such a public and deliberate character as clearly show an intention on his part to surrender his land for the use of the public, and the burden of proof is upon the party asserting such dedication.

"In order to constitute a common-law dedication, the owner's acts and declarations must be deliberate, unequivocal, and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the public use.

"When the owner of land lays out a town and records a plat thereof, on which streets are dedicated to the public, and it is sought to establish another and different dedication by the acts and conduct of the owner, in exhibiting to intending purchasers another map prepared on the same day, and selling lots by reference to the second plat, such second plat, to have this effect, must be essentially different from the recorded one, showing on its face an intention on the part of the owner to make an additional dedication."

[4] The sale of lots with reference to the plat in question does not create an estoppel; for, while the plat showed Railroad Street, it also showed plainly that it was not a street in fact, but was excepted and reserved for the tracks and use of the railway company. Indeed, it would be far easier to raise an estoppel against the property owners who have stood by during all these years while permanent and lasting improvements were under way at great expense on property which they now lay claim to as a public street.

It was suggested in argument that the grade separation ordinance is void, because in conflict with the Public Service Commission Act of 1911 (Laws Wash. 1911, c. 117). That question is now pending before the Supreme Court of the state, and I will not discuss it, as I do not deem it of vital importance here. I might suggest, however, that a change in railroad grades through a city will often unavoidably necessitate a change in the grades of the streets as well, and to confer jurisdiction upon a state board over the one would in a measure confer jurisdiction over the other; and to confer jurisdiction upon a state board over the streets of a city would be so far inconsistent with our preconceived notions of local self-government that the statute should not be given that construction, if any other construction is permissible.

To discuss the questions of evidence presented in argument, or to attempt a further review of the authorities cited, would extend this opinion to an inordinate length, with no corresponding benefits. I will only add in conclusion that, after a full and painstaking consideration of the case, I am convinced that the bills are without substantial equity, and they are accordingly dismissed.

LITTLE et al. v. TANNER, Atty. Gen. of State of Washington, et al.

(District Court, E. D. Washington, N. D. July 24, 1913.)

No. 1,706.

1. COURTS (§ 303*)—JURISDICTION OF FEDERAL COURTS—"SUIT AGAINST STATE."

A suit against state officers to restrain the enforcement of a state statute which violates the Constitution of the United States is not a suit against the state, within the meaning of the eleventh constitutional amendment, and is within the jurisdiction of a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 844, 844½; Dec. Dig. § 303.*]

For other definitions, see Words and Phrases, vol. 7, p. 6778; vol. 8, p. 7809.]

2. COURTS (§ 343*)—PARTIES—JOINDER OF PLAINTIFFS.

Under new equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix), which provides that, when a question is one of common or general interest to many persons, constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole, persons, each of whom is injuriously affected by a state statute alleged to be unconstitutional, may join in a suit to enjoin its enforcement.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 915, 916, 919, 920; Dec. Dig. § 343.*]

3. INJUNCTION (§ 114*)—PARTIES—JOINDER OF DEFENDANTS.

The Attorney General of Washington and the prosecuting attorney of a county are so far charged under the statutes with the execution of the criminal laws as to make them proper parties defendant to a suit to enjoin the enforcement of a state statute, the violation of which is punishable as a criminal offense.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202-220; Dec. Dig. § 114.*]

4. INJUNCTION (§ 85*)—SUIT TO ENJOIN ENFORCEMENT OF CRIMINAL STATUTE.

A court of equity has jurisdiction of a suit to enjoin the enforcement of a statute which affects property rights, although its violation is punishable as a criminal offense.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156; Dec. Dig. § 85.*]

5. CONSTITUTIONAL LAW (§ 230*)—LICENSES (§ 7*)—EQUAL PROTECTION OF LAWS—TRADING STAMP ACT.

Act Wash. March 20, 1913 (Laws Wash. 1913, c. 134), which requires all persons, firms, or companies using trading stamps to pay a license tax of \$6,000 per year, is void as in violation of the equality clause of the fourteenth constitutional amendment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. § 230;* Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. § 7.*]

In Equity. Suit by John T. Little, August Stahlberg, Lawrence Ryan and William T. Oathout, partners as Ryan & Oathout, Joseph Schaick, George D. Purves, Harold L. Blake, Adolph Rensch, William B. Stone, Albert J. Ziv, William E. Thompson, Abraham H. Goldberg, Ed. Schimmel, Marie C. J. Bille, Carrie M. Noerenberg, Lena M. Royce, the Pearl Laundry Company, Charles E. Marr, Sam Langert and Sidney Kellner, copartners, Louis K. Lefevre and Elza K. Pearson, copartners, against W. V. Tanner, as Attorney General

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the State of Washington, George H. Crandall, Prosecuting Attorney of Spokane County, and E. W. Evenson, County Treasurer of Spokane County, Wash. On motion for preliminary injunction, and motions by defendants to quash and to dismiss bill. Motions to quash and dismiss denied. Motion for injunction granted.

Cohn & Rosenhaupt, of Spokane, Wash., Hughes, McMicken, Dvelling & Ramsey, of Seattle, Wash., and Stroock & Stroock and Frank T. Wolcott, all of New York City, for plaintiffs.

W. V. Tanner, Atty. Gen., of Olympia, Wash., J. T. S. Lyle, Asst. Atty. Gen., of Olympia, Wash., George H. Crandall, Pros. Atty., of Spokane, Wash. (D. V. Halverstadt, of Seattle, Wash., of counsel), for defendants.

Before GILBERT, Circuit Judge, and WOLVERTON and RUDKIN, District Judges.

RUDKIN, District Judge. The act of the Legislature of the state of Washington, approved March 20, 1913, entitled "An act relating to the use and furnishing of stamps, coupons, tickets, certificates, cards, or other similar device, for or with the sale of goods, wares and merchandise, and providing a penalty for violation thereof," provides and declares as follows:

"Section 1. Every person, firm or corporation who shall use, and every person, firm or corporation who shall furnish to any other person, firm or corporation to use, in, with or for the sale of any goods, wares or merchandise, any stamps, coupons, tickets, certificates, cards, or other similar devices which shall entitle the purchaser receiving the same with such sale of goods, wares or merchandise to procure from any person, firm, or corporation any goods, wares, or merchandise, free of charge or for less than the retail market price thereof, upon the production of any number of said stamps, coupons, tickets, certificates, cards, or other similar devices, shall before so furnishing, selling, or using the same obtain a separate license from the auditor of each county wherein such furnishing or selling or using shall take place for each and every store or place of business in that county, owned or conducted by such person, firm or corporation from which such furnishing or selling, or in which such using, shall take place.

"Sec. 2. In order to obtain such license the person, firm, or corporation applying therefor shall pay to the county treasurer of the county for which such license is sought the sum of six thousand dollars, and upon such payment being made to the county treasurer he shall issue his receipt therefor which shall be presented to the auditor of the same county, who shall upon the presentation thereof issue to the person, firm, or corporation making such payment a license to furnish or sell, or a license to use, for one year, the stamps, coupons, tickets, certificates, cards, or other similar devices mentioned in section 1 of this act. Such license shall contain the name of the grantee thereof, the date of its issue, the date of its expiration, the town or city in which and the location at which the same shall be used, and such license shall be used at no place other than that mentioned therein.

"Sec. 3. No person, firm, or corporation shall furnish or sell to any other person, firm, or corporation to use, in, with, or for the sale of any goods, wares, or merchandise, any such stamps, coupons, tickets, certificates, cards, or other similar devices for use in any town, city or county in this state other than that in which such furnishing or selling shall take place.

"Sec. 4. Any person, firm, or corporation violating any of the provisions of this act shall be guilty of a gross misdemeanor."

Laws of 1913, c. 134.

"Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence,

shall be punished by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both."

Remington & Ballinger's Annotated Codes and Statutes of Washington, § 2267.

The plaintiffs are retail merchants residing in the city of Spokane, and use in their several lines of business stamps, coupons, tickets, certificates, and other devices which entitle the purchasers of goods, wares, or merchandise to procure from the vendor, or from some other person, firm, or corporation, goods, wares, or merchandise free of cost, as a premium or discount on the amount of their cash purchases. Such methods are now very commonly resorted to by merchants for the purpose of advertising and increasing the volume of their business. The nature of the different devices used, and the manner of their redemption, is not material here, as they are all admittedly controlled by the same general principles of law. The present suit was instituted to restrain the Attorney General of the state, the prosecuting attorney of Spokane county, and the county treasurer of Spokane county from enforcing the provisions of the above act as against the plaintiffs and all other persons similarly situated. The jurisdiction of this court is invoked on the ground that the act is violative of the Constitution of the United States and particularly of the fourteenth amendment, in that it deprives the plaintiffs of their property without due process of law, and denies to them the equal protection of the law. Equity jurisdiction is invoked to avoid a multiplicity of suits, and to prevent irreparable loss and injury to the business and property of the plaintiffs. The defendants appeared specially and interposed a motion to quash on the ground that this is in effect a suit against the state, and the court is therefore without jurisdiction, followed later by a motion to dismiss on the grounds (1) that there is a misjoinder of parties plaintiff, (2) that there is a misjoinder of parties defendant, (3) that several causes of action have been improperly united, (4) that the amended bill of complaint does not state facts sufficient to warrant the court in granting any relief whatever to the plaintiffs, (5) that the plaintiffs have a plain, speedy, and adequate remedy at law, and (6) that the court has no jurisdiction over the persons of the defendants or the subject-matter of the action.

[1] 1. The motion to quash and the sixth ground of the motion to dismiss are based on the assumption that this is a suit against the state. But assuming for the present that the act is violative of the Constitution of the United States, this assumption has no foundation in law. The Supreme Court of the United States has repeatedly held that a suit against state officers to restrain the enforcement or execution of a state statute which violates the Constitution of the United States is not a suit against the state, within the intent and meaning of the eleventh amendment. *Ex parte Young*, 209 U. S. 123, 159, 28 Sup. Ct. 441, 454 (52 L. Ed. 714, 13 L. R. A. [N. S.] 932, 14 Ann. Cas. 764), and cases there cited.

In the *Young Case*, the court said:

"The act to be enforced is alleged to be unconstitutional, and, if it be so, the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one

which does not affect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the state to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character, and is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

[2] 2. The objection to the joinder of the plaintiffs and the uniting of the several causes of action is apparently based on the theory that each plaintiff has a separate, distinct, and independent cause of action against the defendants, and that the several plaintiffs may not join in the same suit or unite their several causes of action in the same bill. Equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix) provides as follows:

"When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

This case would seem to fall within the spirit and equity of that rule.

[3] 3. What is meant by a misjoinder of parties defendant is not apparent. If there is any objection on that score, it would seem to be on the ground that no cause of action is stated against some of the defendants, and this much has been suggested in behalf of the Attorney General of the state. It is made the duty of the Attorney General:

"(1) To appear for and represent the state before the Supreme Court in all cases in which the state is interested; * * * (4) to consult and advise the several prosecuting attorneys in matters relating to the duties of their office, and when, in his judgment, the interests of the state require, he shall attend the trial of any person accused of a crime, and assist in the prosecution." Remington and Ballinger's Annotated Codes and Statutes of Washington, § 112.

"The prosecuting attorney of each county shall have authority, and it shall be his duty, subject to the supervisory control and direction of the Attorney General, to appear for and represent the state and the county of which he is prosecuting attorney, in all criminal and civil actions and proceedings in such county in which the state or such county is a party." Id. § 116.

Under these statutory provisions the Attorney General of the state is so far charged with the enforcement and administration of the criminal laws as to make him a proper, though perhaps not a necessary, party to a proceeding of this kind.

That the prosecuting attorney is charged with the enforcement of the criminal laws of the state is self-evident. Indeed, this is his principal duty. Furthermore, it appears from the correspondence and affidavits on file that that officer has threatened to enforce the provisions of the act in question against these plaintiffs in Spokane county, unless they take out a license or cease the use of so-called trading stamps or other similar devices.

It does not appear that the county treasurer is charged with any duty in connection with the enforcement of this act except to receive and receipt for moneys voluntarily paid to him. Why he should be

enjoined from so doing is not entirely clear to us; but these questions do not go to the merits of the controversy, and will be considered on the final hearing.

[4] 4. The remaining grounds of the motion to dismiss, namely, that the bill does not state facts sufficient to entitle the plaintiffs to the relief sought, and that they have a plain, speedy, and adequate remedy at law, may be considered together. It is no doubt true as a general rule that a court of equity has no jurisdiction to enjoin criminal proceedings; but there are well-recognized exceptions to that rule. As said by the court in *Dobbins v. Los Angeles*, 195 U. S. 223, 241, 25 Sup. Ct. 18, 22 (49 L. Ed. 169):

"It is well settled that, where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a decree of a court of equity."

See, also, *Ex parte Young*, *supra*.

We are of opinion that this case falls within the exception to the general rule. While in form this is a suit to enjoin the enforcement of a criminal statute, it is in legal effect a suit to enjoin the exaction of an illegal license fee or the imposition of an illegal tax. And:

"It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the state had chosen to assert its power to enforce such law by indictment or other criminal proceeding." *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 218, 23 Sup. Ct. 498, 500 (47 L. Ed. 778).

When we consider the real object of this suit, the vast numbers affected by it, the severity of the penalties imposed, the unauthorized interference with legitimate business methods, and that goods now in original packages containing stamps and other devices are rendered practically valueless, the case seems to call peculiarly for the intervention of a court of equity. The motion to quash and the motion to dismiss are accordingly overruled.

[5] 5. The only remaining question in the case is the validity of the legislative act under consideration. The court is fully satisfied from a bare inspection of the act, without more, and without considering the affidavits on file, that it is and was intended to be prohibitive of the business methods against which it is directed. It is plainly manifest that no merchant could afford to pay the sum of \$6,000 annually for the mere privilege of giving away trading stamps or allowing discounts on his cash sales. But if this were the only objection to the act it may be that the courts would be powerless to enjoin its execution. The power of taxation rests upon necessity, and is inherent in every independent state. It is as extensive as the range of subjects over which the government extends; it is absolute and unlimited, in the absence of constitutional limitations and restraints, and carries with it the power to embarrass and destroy. *Postal Telegraph Co. v. Charleston*, 153 U. S. 699, 14 Sup. Ct. 1094, 38 L. Ed. 871; *McCray v. United States*, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; *Kehrer v. Stewart*, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663.

There is one limitation upon the power of the states in this regard, however, aside from the implied limitation that they may not tax the property or instrumentalities of the federal government, and that is the declaration of the fourteenth amendment that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. In speaking of this provision in *Barbier v. Connolly*, 113 U. S. 27, 31, 5 Sup. Ct. 357, 359 (28 L. Ed. 923), the court said:

"The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the distribution of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

It may be urged that the state may classify the subjects of taxation, but in the language of Mr. Justice Harlan, in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 560, 22 Sup. Ct. 431, 439 (46 L. Ed. 679):

"The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection'"—citing *Gulf, Colorado & Santa Fé Railway v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92.

Is there any just basis for the classification here attempted? We discover none. The legality of what is generally known as the trading stamp business has been very generally affirmed by the courts. See *State v. Shugart*, 138 Ala. 86, 35 South. 28, 100 Am. St. Rep. 17; *Ex parte Drexel*, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 878; *Hewin v. Atlanta*, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795, 2 Ann. Cas. 296; *Commonwealth v. Sisson*, 178 Mass. 578, 60 N. E. 385; *Long v. State*, 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425, 28 Am. St. Rep. 268; *State v. Ramseyer*, 73 N. H. 31, 58 Atl.

958, 6 Ann. Cas. 445; *City of Winston v. Beeson*, 135 N. C. 271, 47 S. E. 457, 65 L. R. A. 167; *State v. Dodge*, 76 Vt. 197, 56 Atl. 983, 1 Ann. Cas. 47; *Young v. Commonwealth*, 101 Va. 853, 45 S. E. 327; *State v. Dalton*, 22 R. I. 77, 46 Atl. 234, 48 L. R. A. 775, 84 Am. St. Rep. 818; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465, as well as in numerous federal cases. But inasmuch as the Supreme Court of the state of Washington has declared that an act prohibiting the use of trading stamps is in violation of the Constitution of that state, we accept its decision as final and conclusive here. *Leonard v. Bassindale*, 46 Wash. 301, 89 Pac. 879.

The use of trading stamps and similar devices is neither more nor less than a legitimate system of advertising, and those who employ that system are entitled to the protection of the Constitution of the United States. As well might the Legislature classify separately those who advertise in the columns of the daily papers, by bill boards, or by electrical signs, and impose a tax upon them to the exclusion of others engaged in the same business or calling, who do not so advertise. The attempted classification is purely arbitrary, is a manifest attempt on the part of the Legislature to accomplish by indirection what the Supreme Court of the state has declared it cannot accomplish directly, and is in violation of the equality clause of the federal Constitution. What we have here said is limited to merchants using trading stamps in connection with their business, for such are the only parties before the court.

Let the interlocutory injunction issue as prayed.

UNITED STATES v. RINDGE et al.

(District Court, S. D. California, S. D. October 27, 1913.)

1. HIGHWAYS (§ 5*)—PRIVATE ROADS—RIGHTS OF PUBLIC.

Where certain roads were built across a ranch after 1883 by settlers to reach their claims on public land and were used by occasional hunters and pleasure seekers, and the ranch owner never consented to their use by the public, the fact that they were used at some times by persons not settlers, without objection from the owner, was insufficient to make them public highways.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 6, 7; Dec. Dig. § 5.*]

2. HIGHWAYS (§ 2*)—PUBLIC HIGHWAYS—USER.

Pol. Code Cal. § 2618, declares that public highways are roads, streets, alleys, etc., laid out or erected as such by the public or, if laid out or erected by others, dedicated or abandoned to the public or made such in actions for the partition of real property, and section 2621 declares that no road or traveled way, used by one or more persons over another's land, shall become a public highway by use or until so declared by the board of supervisors or by dedication by the owner of the land affected. *Held* that, under such provisions, a road over another's land cannot become a public highway by user.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 3; Dec. Dig. § 2.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. HIGHWAYS (§ 1*)—ESTABLISHMENT—ABANDONMENT—DEDICATION.

Unless a highway is established by public authority, there must be an abandonment or dedication thereof to the public by the landowner, and, though this need not be by express grant nor evidenced by writing, there must be evidence showing an intention to abandon or dedicate the land to the use of the public or proved facts from which such intention may be fairly deduced.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

4. DEDICATION (§ 20*)—ABANDONMENT TO PUBLIC USE—EVIDENCE.

Occasional and irregular travel across a ranch by land claimants and hunters was not evidence of an abandonment or dedication of the land covered by the trails to public use for highway purposes by the owner, nor was it evidence of adverse use necessary to establish a presumption of dedication.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 17-30; Dec. Dig. § 20.*]

5. HIGHWAYS (§ 155*)—PUBLIC HIGHWAYS—INTEREST OF UNITED STATES.

Where certain crossroads through a ranch privately owned were not highways, and there was no access by such ways from the public domain to a beach road, the United States had no interest in the question whether the beach road was a public highway.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 432-436; Dec. Dig. § 155.*]

6. HIGHWAYS (§ 99*)—ESTABLISHMENT—MAINTENANCE—JURISDICTION—STATE OR FEDERAL AUTHORITY.

The establishment and maintenance of highways as such over privately owned lands is a matter primarily for the control of state authorities, in which the federal government is not interested.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 323-330; Dec. Dig. § 99.*]

7. HIGHWAYS (§ 155*)—OBSTRUCTION—INJUNCTION—RIGHT TO SUE.

A private owner of land has no right to enjoin the obstruction of a road unless he can show access thereto over some lawful way, and the federal government has no other or greater rights.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 432-436; Dec. Dig. § 155.*]

8. HIGHWAYS (§ 1*)—WAY OF NECESSITY.

Ways of necessity are essentially private ways and not public highways.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

9. PUBLIC LANDS (§ 114*)—PATENT—WAY OF NECESSITY—IMPLIED RESERVATION.

In the absence of a reservation in a grant of public land, there is no implied reservation of a right of way over the land granted to afford access by the public to other land belonging to the government.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 314-322; Dec. Dig. § 114.*]

10. EASEMENTS (§ 18*)—WAY OF NECESSITY.

Ordinarily a way of necessity arises when the owner of a tract of land conveys a portion thereof to another and there is no access from a public highway to the land conveyed except over the grantor's remaining land or that of a stranger, or when the owner sells a portion of his land and the part remaining is inaccessible except over the land sold or that of a stranger, and such right does not arise where the claimed way is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

merely more convenient or desirable than some other way because of the mountainous character of the country, etc.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50-55; Dec. Dig. § 18.*]

11. EASEMENTS (§ 18*)—WAY OF NECESSITY—TIME OF NECESSITY.

In order to establish a right to a way of necessity, the necessity must exist at the time of the grant and as to the whole tract conveyed or reserved, since neither a grantee nor grantor can subsequently subdivide his land and sell off a portion in such a manner as to create a way of necessity in favor of his grantees over parts previously granted unless the way rests in grant or the easement is an apparent and continuous one, existing and in use at the time of the conveyance.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50-55; Dec. Dig. § 18.*]

12. PUBLIC LANDS (§ 19*)—FENCE LAW—EFFECT.

Act Cong. Feb. 25, 1885, c. 149, § 1, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), prohibits the inclosure of public land, and section 3 forbids obstruction to or prevention of entry on or free passage over or through public lands by force, threats, intimidation, or unlawful fences or inclosures. *Held*, that such act was simply intended to preserve access to the public domain and was not intended to interfere with the use and enjoyment of private property unless such use was a mere subterfuge for inclosing or preventing access to the public domain; and hence the act did not prevent a property owner from constructing fences in good faith on her own land to protect the same against trespass, and useful for the proper enjoyment of such land, without any intention of appropriating or inclosing public lands or preventing lawful access thereto.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.*]

In Equity. Bill by the United States against May K. Rindge, as executrix of the will of Frederick H. Rindge, deceased, and others. Bill dismissed.

A. I. McCormick, U. S. Atty., and H. L. Dunnigan, Special Asst. U. S. Atty., both of Los Angeles, Cal.

James A. Anderson and E. E. Millikin, both of Los Angeles, Cal., for defendants.

BEAN, District Judge. This is a suit brought by the government against May K. Rindge et al. to compel the abatement and removal of certain gates and fences erected and maintained by Mrs. Rindge on her own premises on the ground that the same are obstructions to public highways and ways of necessity and an unlawful inclosure of public lands of the complainant, in violation of the Act of Congress of February 25, 1885, c. 149, 23 St. at L. 321 (U. S. Comp. St. 1901, p. 1524).

The case as made by the record is this: At the time of the cession of California to the United States by Mexico, there was a tract of land of 100,000 acres or more in what is now Los Angeles county, lying along the coast from the Rancho Santa Monica to Point Mugu, a distance of about 35 miles. It was from five to ten miles wide and extended north to and beyond the Calabasas Road, then and now one of the main highways from Los Angeles to points north. It was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bounded on the south by the Pacific Ocean, and on the north, east, and west by land previously granted by the King of Spain to private individuals. A range of mountains known as the Santa Monica Mountains extends through the tract east and west, three or four miles back from and approximately parallel with the coast, and between it and the Calabasas Road.

In 1852 the successor in interest of one Tapia applied to the board of commissioners to ascertain and settle private land claims in the state of California (as provided by the Act of Congress of March 3, 1851, c. 41, 9 Stat. 631) for an order confirming his title to a portion of the land referred to, alleging it to have been granted to Tapia by the King of Spain in 1804. Thereafter such proceedings were had that on October 24, 1864, a decree was regularly made and entered by the United States Court for the Southern District of California confirming the petitioner's title to the land "known by the name of Topanga, Malibu ——— Sequit, extending from a place named 'Topanga,' the dividing line between these lands and the rancho of 'Santa Monica' on the southeast along the Pacific to a point called Mogu on the northwest and bounded on the northeast by a ledge of rocks on the top of and extending the whole length of a range of mountains, and adjoining the lines of the ranchos of 'Las Virgeues,' 'Triunfo,' 'Santa Ysabel,' and 'Conyo.' Said confirmation being hereby made to the extent of three square leagues within said mentioned boundaries." There were more than ten square leagues within the exterior boundaries of the larger tract described in the decree. The portion thereof, the title to which was confirmed to the petitioner, was surveyed by the government of the United States in 1871, and in August, 1872, patent was regularly and duly issued therefor. It is known and referred to in the record as the Malibu Ranch and lies along the coast for about 16 miles west from Las Flores Canyon, a point some 3 or 4 miles west of Topanga, and is from $1\frac{1}{2}$ to $2\frac{1}{2}$ miles wide and contains about 13,000 acres.

The remainder of the tract was surveyed as public lands in 1896 or 1897. A small portion thereof has been patented to settlers, but the larger area still remains a part of the public domain. The Malibu Ranch lies along the foot of the mountains referred to in the decree, two or three miles south of the summit. Extending from the summit of the mountains through the public lands and across the ranch to the ocean are numerous spurs or ridges, in the bottom of the canyons between which spurs are limited areas of agricultural land. The sides of the canyons back of the ranch are in many places so steep and rugged as practically to prevent access north and south from one to the other. The land north of the mountains and between that and the Calabasas Road is more or less broken with small valleys in the canyons.

Prior to the acts complained of in this suit the Malibu Ranch was for the most part wild uninclosed land used principally for grazing stock. From time immemorial there has been more or less travel onto the ranch from the east by persons on horseback, with wagons and vehicles, and an occasional traveler across the ranch to and from Ven-

tura and points north. The travel was on the true ocean beach, except at certain points where it was not possible to use the beach, and then over the hard ground adjoining. About 1884, and while the ranch was uninclosed, persons commenced to enter upon the unsurveyed public lands in the canyons back of it and make settlements, traveling along the beach from the east to the particular canyon in which they settled, and then over and across the ranch on roads or ways built by them. There has always been considerable controversy between the settlers and others and the owners of the ranch as to the right of the former to use the roads or to travel over or across the ranch.

About 1905, or shortly prior thereto, the owner of the ranch, at considerable expense, constructed a good substantial private wagon road and commenced the construction of a railroad along the front of the ranch near the beach. These improvements naturally attracted attention, and the publicity given thereto caused a large number of persons to visit and examine the public lands back of the ranch with a view of settlement thereon, traveling over the ranch, to the annoyance and inconvenience of the owner. To protect her property from injury by travelers and from fires set by them, the owner built in 1907, and now maintains, a fence a few hundred yards long across the beach road, where the mountains come down close to the ocean at a point three or four miles from the east end of the ranch, which with other fences and natural barriers on the west and north practically incloses the ranch, and she has also maintained fences and closed gates across the beach road at other points to the west.

This suit was brought by the government for a decree enjoining and restraining the defendant from maintaining such fences or obstructions on the ground: (1) That the beach road and the roads used by the settlers up the various canyons are public highways and necessary for access to the lands of the complainant; (2) that at the time patent was issued for the ranch there was reserved by implication to the government and its grantees a right of way over the land so patented to the public land back thereof, because there was and is no other practicable way to reach such land from a public highway; and (3) that the construction and maintenance of the fences and gateways in question, although on the defendant's own land, constitute an unlawful inclosure of public lands within the meaning of the act of Congress of February 25, 1885.

The record is exceedingly voluminous, consisting of many thousand pages of testimony and numerous exhibits showing the nature, extent, and character of the travel over and through the ranch, the topography of the country back of the ranch, its accessibility from a highway on the north and across the mountain range, the cost and expense of building roads over the government land, and the like. The prodigious industry of counsel in abstracting and classifying the testimony and their able and exhaustive arguments have relieved the court of a vast amount of labor, and I take this opportunity to express my appreciation thereof. Without the aid thus afforded, an intelligent understanding of the case would have been almost hopeless. A great bulk of the testimony and a considerable portion of the argument were directed

to the issue concerning the existence of a highway along the front of the ranch and next to the ocean, but, as I view the matter, it is unnecessary to consider that question. The evidence signally fails to show that the roads leading from the beach across the ranch are public highways, and, if they are not, the government has no concern with the controversy as to the existence of such a way along the beach, since it has no access thereto by a public way. All the roads across the ranch were built and maintained by the settlers, either with the express or implied consent of the landowner, and were nothing more than mere private ways. There are 12 such roads, known in the record as the Las Flores Canyon Road, the Bieule Road, the Carbon Canyon Road, the Malibu Canyon Road, the Puerco Canyon Road, the Corral Canyon Road, the Sosto Canyon Road, the Latigo or Escandido Canyon Road, the Suma Canyon Road, the Trancas Canyon Road, the Encinal Canyon or Decker Road, and the Nicholas Canyon Road. None of these roads were established by public authority, nor has any public money ever been used in their construction or maintenance or repair, and they have never been recognized as public highways by the public authorities and have never been fenced or in any way separated from the surrounding territory.

The Las Flores Canyon Road is along the east end of the ranch and but a small portion of it, if any, is on the ranch. It has been traveled since 1889 by two or three settlers and by hunters.

The Bieule and Carbon Canyon Roads were built in 1890 and 1898, respectively, by express permission of the owners of the ranch, and there has been very little travel over either of them.

The Malibu Canyon Road was built some time after 1885 and extends up the canyon about half a mile beyond the ranch line and ends on private land. The canyon is steep, has rugged sides, and there is no public land, as I understand the record, accessible from this road or any possible extension thereof. There has been no particular travel over the road except by a few settlers in the canyon and by hunters and trappers.

The Puerco Canyon Road was built by Carey and Daman in 1897 or 1898 and was used by them.

The Sosto Canyon Road was built by Swinney about 1894 with the permission of the owners of the ranch.

The Latigo or Escondido Canyon Road was built by Reeves and Swinney after their settlement in 1890 and a part of it by permission of the owners of the ranch.

The Suma Canyon Road was built by Bandy after his settlement in 1894 and used by him.

The Trancas Canyon Road was built by Haworth about 1885 in order to reach his home.

Decker settled in Encinal Canyon in 1885 and has continued to reside there ever since. The road from the beach across the Malibu Ranch was built by him in 1885 or 1886 and has since been extended to the public lands back of his place and over and across the mountains intersecting the Calabazas Road on the north. There are several settlers along this road near the summit of the mountains who sometimes

use the road to the south across the Malibu Ranch but more frequently the road to the north.

The Nicholas Canyon Road was built by Swinney and Nicholson for their own use some time after 1885.

[1] Each of these roads was therefore built after the year 1883 by settlers to reach their claims and was used for that purpose and by occasional hunters and pleasure seekers. The roads were unquestionably private ways in the first instance, and it does not appear that the landowner ever consented to their change to public highways, nor is there any element of estoppel shown to deprive her of her rights as owner of the fee. The mere fact that the roads were used by persons not settlers, without objection from the landowner, will not make them public highways. Elliott on Roads and Streets, § 5.

[2] The act of the Legislature of California of February 28, 1883, which has since been in force, and is now sections 2618 and 2621 of the Political Code, declares:

"In all counties of this state public highways are roads, streets, alleys, lanes, courts, places, trails, and bridges, laid out or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such in actions for the partition of real property." Section 2618.

"And no route of travel used by one or more persons over another's land shall hereafter become a public road or byway by use, or until so declared by the board of supervisors or by dedication by the owner of the land affected." Section 2621.

Under these statutory provisions a road over another's land does not become a public highway by mere user alone.

[3] Unless it is established by public authority, there must be an abandonment or dedication to the public by the landowner. The abandonment or dedication need not be by express grant nor evidenced by writing, nor indeed be in form of words, oral or written, but may be inferred from other circumstances. It may be established in any conceivable way by which the intention of the owner to dedicate or abandon the land to the public for a public way can be manifested (Elliott on Roads and Streets, § 137; *People v. Davidson*, 79 Cal. 166, 21 Pac. 538; *Sussman v. San Luis Obispo*, 126 Cal. 536, 59 Pac. 24; *Plummer v. Sheldon*, 94 Cal. 533, 29 Pac. 947) and may be presumed from adverse user by the public under a claim of right with the knowledge of the owner for a period of time corresponding to that fixed for conferring title by prescription (*People v. Myring*, 144 Cal. 351, 77 Pac. 975; *Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. 448; *Hartley v. Vermillion*, 141 Cal. 339, 74 Pac. 987). But there must be evidence showing an intention to abandon or dedicate the land to the use of the public, or proven facts from which such intention can be fairly deduced, and, unless the intention expressly appears or can be inferred from acts done or omitted, there is no proof of dedication or abandonment. Elliott on Roads and Streets, §§ 138-173; *Silva v. Spangler*, 43 Pac. 617;¹ *Irwin v. Dixon*, 9 How. 10, 13 L. Ed. 25; *Coburn v. San Mateo County* (C. C.) 75 Fed. 520. The question is always one of fact.

¹ Reported in full in the *Pacific Reporter*; reported as a memorandum decision without opinion in 111 Cal. xvi.

[4] Now the occasional and irregular travel across the ranch by the land claimants and hunters, the principal users of the ways, without more, is not evidence either of the abandonment or dedication of the land to the public use by the owner, nor does it constitute the adverse use necessary to establish a presumption of such dedication.

[5] As the crossroads are not highways, and there is no access by such a way across the ranch from the public domain to the beach road, the government has no interest in the question whether the latter is a public highway or not.

[6] The establishment and maintenance of highways, as such, over privately owned lands belongs primarily to the state authorities and not to the government of the United States. The character of the beach road is now in litigation in the state courts and should be determined there. This suit is maintained by the government as a landed proprietor, and on this branch of the case it is entitled to no greater relief than if it had been brought by a private owner claiming that a public highway leading to his land was unlawfully obstructed.

[7] Certainly a private owner of land back of the Malibu Ranch would have no standing in a court of equity to enjoin the obstruction of the beach road, unless he could show access to such road over some lawful way. The government has no other or greater rights.

The alleged ways of necessity: The defendants claim that ways of necessity, as such, were unknown to the Spanish law, and, since they derive title from the King of Spain, their property cannot be so burdened. The complainant challenges the soundness of this position and argues that in any event the grantee from the King of Spain and the complainant were tenants in common of the larger area described in the decree of confirmation of August, 1864, and the subsequent survey and patenting of the ranch was in effect either a grant from the government of the United States or a partition of the property, and hence the common-law doctrine of ways of necessity is applicable thereto.

I shall not stop to consider these questions, interesting as they are, but shall assume for the purpose of the decision that the defendant holds title as grantee of the government of the United States, the view most favorable to the complainant.

In considering the government's contention, it is important to get a clear view of its position and the consequence thereof. In effect it is that, at the time the patent was issued, there was reserved by implication to it and its subsequent grantees, however numerous, rights of way to be subsequently located over and across the ranch to reach the several portions of the government land, although there is no such provision in the patent, and there was no law in force at the time reserving such a right. The claim is that there was so reserved a way along the beach practically the entire length of the ranch, and also numerous ways across the ranch and up the several canyons.

[8] These roads will, if decreed, be in effect public highways, although ways of necessity are essentially private ways. The government is not asserting a right of passage over the ranch for governmental purposes alone, or as a mere landowner, but seeks to have

ways established for the use and benefit of present and subsequent settlers on the public domain. In other words, it is asserting rights of way for the use of such of the public as may have occasion to visit the public domain for settlement, pleasure, business, or any other lawful purpose.

[9] The logical result of this contention is that a way is reserved by implication for the use of such persons over all land granted by the government to reach the remaining subdivisions when there is no other reasonable or convenient means of access, notwithstanding there is no such reservation in the grant, and there is no public law so providing. A doctrine so contrary to the general theory of the rights acquired by patentees of public lands and guaranteed to private owners by the Constitution challenges attention. Its effect is strikingly apparent in the case at bar. The result of the government's position, if sustained, will be to divide the Malibu Ranch by what are in effect public highways into 10 or 12 different tracts, thus materially impairing its value and usefulness to the owner, and that without compensation. It is, in my judgment, very doubtful whether the doctrine of implied ways of necessity has any application to grants from the general government, under the public land laws. *Pearne v. Coal Coke Co.*, 90 Tenn. 619, 18 S. W. 402; *Bully Hill C. M. & S. Co. v. Bruson*, 4 Cal. App. 180, 87 Pac. 237. If it exists at all, it can be invoked against the government and its grantees as well as in their favor. Hence every grantee of a portion of the public domain from the time the land laws were extended over the same and those succeeding to his title would have an implied right of way over the surrounding and adjacent public lands, and a junior grant thereof if necessary to reach his own land, and a junior grantee and his successors in interest would have such a way over a prior grant under similar circumstances simply because they derive title from a common source. The public domain is disposed of under general laws, and the rights conferred and reserved are defined by such laws, and rules and regulations made in pursuance thereof. If the sale or conveyance of one portion of such domain prevents access to another, it would seem to be a contingency which the government was bound to contemplate in making the conveyance. By public statute Congress has granted rights of way for the construction of highways over public lands not reserved for public use. Act of Congress July 26, 1866, c. 262, 14 Stat. at L. 253. Beyond this and the full protection of the title which it confers, it would seem that the government owes no duty or obligation and reserves to itself or its subsequent grantees no interest in the land granted except such as may appear on the face of the grant, or the law under which it was made, or be declared by a general statute in force at the time the interest of the grantee was acquired. But assuming that the doctrine of ways of necessity can be invoked by the government for the benefit of its grantees, as against a prior grantee, is there any ground for its application here?

[10] What is commonly called a right of way from necessity arises when the owner of a tract of land conveys a portion thereof to another and there is no access from a public highway to the part so

conveyed except over the remaining lands of the grantor, or a stranger, or when the owner sells a portion of his land and the part remaining is inaccessible except over the land sold or that of a stranger. It is not strictly accurate to say one man has a way of necessity over the land of another. The necessity of one man, however great, will not of itself give him an interest in the property of another or justify entry on another's land. The fact that there is no way to the land sold except over the remaining land of the grantor, or that the remaining land of the grantor is not accessible except over the land granted by him, is only a circumstance resorted to for the purpose of ascertaining the intention of the parties to the grant and to raise an implied grant or reservation of a way, because where a thing is granted or reserved the law implies a reservation or grant of that which is necessary to the enjoyment of the thing granted or reserved. Goddard on Easements, p. 262; Bishop on Noncontract Rights (Ed. 1889) § 872; Jones on Easements, § 154. This rule is usually invoked in favor of a grantee but has been held to apply where one sells lands surrounding other lands belonging to him, thus cutting off access to his remaining lands except over the granted premises. It is said that by implication he reserves a way over the land granted, even though there is no such provision in his deed and he conveys with covenant of warranty. 2 Washburn on Real Property, 282. But in such case the rule of strict necessity applies, because the grantor is claiming something in derogation of the deed which he has given, and the title which he has conveyed, and if he intends to reserve any greater right over the land granted it is his duty to expressly so provide in the grant. Neither inconvenience or even great inconvenience is enough. There is no implied reservation of a way by implication in favor of a grantor unless in case of strict necessity and when he has no other practical means of approach to his land. Washburn on Easements (2d Ed.) 219; Jones on Easements, 155-318; 14 Cyc. 1171-1176. As said by the Supreme Court of California in *Kripp v. Curtis*, 71 Cal. 62, 11 Pac. 879:

"The right of way from necessity must be in fact what the term naturally imports and cannot exist except in cases of strict necessity. It will not exist where a man can get to his property through his own land. That the way over his own land is too steep or too narrow, or that other and like difficulties exist, does not alter the case."

A right of way over another's land is, in its final analysis, an interest therein, and when sought on behalf of a grantor contrary to his deed it should never be implied except in case of strict or extreme necessity. That it will be more convenient or desirable than some other way is not sufficient. The fact that there is a bluff or mountain across the grantor's land which is difficult to pass, or that a way through his land is obstructed or will be expensive to construct, or is steep or hilly, or that the public way to which he has access is in such a bad condition that it is impossible to haul more than small loads over it, and the like, is no reason for implying a grant or reservation of another way. Goddard on Easements, 270; *Gaines v. Lunsford*, 120 Ga. 370, 47 S. E. 967, 102 Am. St. Rep. 109; *McDonald*

v. Lindall, 3 Rawie (Pa.) 492; Dee v. King, 73 Vt. 375, 50 Atl. 1109; Nichols v. Luce, 24 Pick. (Mass.) 102, 35 Am. Dec. 302; Pousson v. Porche, 6 La. Ann. 118. Implications of grants or reservations of ways of necessity are looked upon with jealousy and construed with strictness because they are contrary to the deed of conveyance. It is only the necessity of the case that will carry such a way.

Now, applying these principles to the facts and the result, in my judgment, is manifest. At the time the patent was issued for the Malibu Ranch, access to the ranch and to the canyons leading through it to the public lands from the coast was most difficult. It was impossible to do so from the west with any kind of a vehicle, and it was practically impossible to get within eight or ten miles of the ranch from the east with a wagon on any kind of a road. The way from the east was along the beach through dry sand, over rocky points, and was beset with so many difficulties that it was rarely used. On the other hand, the public land north of the ranch was accessible at that time from the Calabasas Road, and it would seem, as stated by Mr. Justice Sloss in a similar case, that "this circumstance alone is fatal to the existence of a way by necessity." *Corea v. Higuera*, 153 Cal. 451, 95 Pac. 882, 17 L. R. A. (N. S.) 1018. It is true that, in order to reach the public land south of the mountains and west of Malibu Canyon from the Calabasas Road, it is necessary to cross the mountains, but they are not impassable barriers. The evidence shows that roads can be constructed across them, and it is doubtful whether, if the conditions were now the same as when patent issued, it would cost more to build such roads than to construct ways to the public lands from the east. One road has already been constructed across the mountains connecting with the Ensinal Canyon or Decker Road and is now being used by the settlers. Others can be built to serve the land between this road and the Malibu Canyon. The land east of Malibu Canyon is accessible by an extension of the Las Flores Canyon Road. The fact that these roads would be expensive to construct and would be steep and difficult and not as convenient or desirable as ways from the east or south does not alter the case. They will afford access to the government land, and therefore it cannot be said that there is no way thereto other than across the ranch.

There is a vast amount of testimony in the record as to estimated cost of building roads from the north to reach the government land south of the mountains. The witnesses differ widely, as is often the case with experts. I do not think it is necessary to examine the evidence in detail. All agree that such roads can be built. The evidence for the government tends to show that it will cost from \$75,000 to \$100,000 to build highways of not to exceed a maximum grade of 12 per cent., and what are designated as "haphazard roads" can be built for about two-fifths of that sum. Experts of apparently equal intelligence and experience testify for the defendant that good substantial roads, such as are common in similar mountainous regions and which will serve the purpose of settlement, can be constructed at a comparatively small outlay. But, taking the estimates of the government's witnesses as correct, I am not prepared to say that the cost

of building the roads would be so disproportionate to the value of the land as to be prohibitive. The question is not to be determined by comparing the value of any particular subdivision with the cost of a road to it but the relative value of the entire tract to be served with the cost of building roads to reach it. It will no doubt cost more to build roads under present conditions from the north than from the south, but neither that fact nor the fact that it will be more convenient for settlers south of the mountains to approach their homes from the ranch side is any reason why the owners of the ranch should be compelled to suffer the loss and inconvenience of having numerous public highways across their property without compensation therefor.

[11] There is another reason why, in my judgment, the government's position is unsound. The necessity from which the law implies a grant or reservation of a way must exist at the time of the grant and as to the whole tract conveyed or reserved. Neither a grantee nor a grantor can subsequently subdivide his land and sell off a portion in such a manner as to create a way of necessity in favor of his grantees over the parts previously granted (*Lankin v. Terwilliger*, 22 Or. 97, 29 Pac. 268; *Jones on Easements*, p. 304), unless perhaps the way rests in grant or the easement is an apparent and continuous one, existing and in use at the time of the conveyance (3 *Washburn on Real Property*, p. 284).

If the land described in the decree of August, 1864, had belonged to a private individual and he had sold the portion now owned by the defendants and conveyed the same by absolute deed without reservation, it would hardly be contended that he could subsequently subdivide the remaining area into 80 or 160 acre tracts and by conveying the same to sundry persons invest in each a right of way over the portion first conveyed, and it is not believed the government has any other or greater rights.

What has already been said would seem to dispose of the question that the fences complained of should be abated because in violation of the act of Congress making it unlawful to inclose public lands, since if, as I conclude, the public lands can be reached without crossing the ranch, the fences in question do not constitute an inclosure thereof or an obstruction to an entry thereon. But, however that may be, the fences are on defendant's land a considerable distance from the exterior boundaries thereof. The one first encountered in journeying to the public lands through the ranch is three or four miles from the east end of the ranch and cannot be approached without traveling for that distance over defendant's property, unless it is across a public highway, a question not important to the point now under consideration. After passing the fence, it is necessary to travel several miles over defendant's land before reaching the public domain. The other fences are across the beach road west of the one just referred to. The abatement of the fences, therefore, would not permit access to the public domain without trespassing on privately owned land, and I am unable to comprehend how such structures can be held to be in violation of the act of Congress.

[12] The Fence Law, as its title implies, was intended to prevent unlawful occupancy of public lands. To that end it makes the inclosure of such land illegal (section 1) and forbids obstruction to or prevention of the entry thereon or free passage or transit over or through the same by force, threats, intimidation, or by unlawful fences or inclosures (section 3). But it was not intended to interfere with the use and enjoyment of private property unless such use is a mere subterfuge for inclosing or preventing access to the public domain. I do not understand that Congress intended to interfere with the use of privately owned lands or the erection of such fences or structures thereon as are reasonably necessary for the full and free enjoyment thereof or to permit or sanction trespass thereon or confer or recognize a right of passage over the same. It was not concerned with the initiation or creation of means of access to public lands but with the matter of keeping the boundaries thereof open so that all persons who could lawfully reach the same might enter. If it had intended or contemplated, as now claimed for the government, the use of a way over privately owned lands to reach the public domain, it would no doubt have so indicated and probably made some provision by which such way could be fixed and located.

It is true that if one builds a fence on his own land which does not inclose the same, but the natural effect of which is to inclose public lands, either separately or together with his own, he will be held to have violated the statute, regardless of the actual intent with which the fence was built or maintained, because every person is presumed to intend the natural and probable consequences of his own act. *Homer v. U. S.*, 185 Fed. 741, 108 C. C. A. 79; *Golconda Cattle Co. v. U. S.*, 201 Fed. 282, 119 C. C. A. 519. But I know of no decision holding that a fence built on one's own land in good faith for the sole purpose of enabling the owner to use and occupy his property, and not as a guise for inclosing public lands, to be an unlawful structure, although it may incidentally interfere with access to the public domain, for, as said by Mr. Justice Brown in *Camfield v. U. S.*, 167 U. S. 528, 17 Sup. Ct. 868, 42 L. Ed. 260:

"So long as the individual proprietor confines his inclosure to his own land, the government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor."

It is only when, "under the guise of inclosing his own land, he builds a fence useless for that purpose, and which can only have been intended to inclose the lands of the government," that he comes within the statute and is guilty of an unwarrantable appropriation of that which belongs to the public at large. The same doctrine is declared by the Court of Appeals of this circuit in *Potts v. U. S.*, 114 Fed. 52, 51 C. C. A. 678; *Hanley v. U. S.*, 186 Fed. 711, 108 C. C. A. 581; *Lillis v. U. S.*, 190 Fed. 530, 111 C. C. A. 362. In the *Potts* Case it is said:

"The act of a person in fencing or inclosing his own land is lawful. It is also lawful for a person to fence and inclose his own land up to a point where it connects immediately with the fence or inclosure of adjoining land owned by another. It is only when, under the guise of inclosing his own land, a person builds a fence for the purpose and with the intention of inclosing

the public lands of the government that the fence or inclosure becomes unlawful."

And in the Hanley Case the following instruction given by the trial court was approved:

"A person has a right, under the law, to erect fences wholly upon his own land and to maintain them if he so desires, and if incidentally such fences may obstruct or impede the ingress or egress of stock ranging upon the public lands, or the free passage of persons upon or over such lands, no one can complain, because a man has a right to do what he pleases with his own, so long as he does no willful injury to another."

It is true the cases referred to were criminal, but the court was construing the Fence Law and distinguishing a lawful from an unlawful inclosure, and I can conceive of no difference in this regard between a civil and a criminal case. A fence cannot be deemed a lawful structure in a civil proceeding and an unlawful one in a criminal case, or vice versa.

I have not overlooked the fact that there are decisions cited by the complainant, the logical effect of which would seem to support the government's contention, but as said by Mr. Justice Moody, in *Telephone Co. v. Los Angeles*, 211 U. S. 274, 29 Sup. Ct. 52, 53 L. Ed. 176:

"No case, unless it is identical in its facts, can serve as a controlling precedent for another."

The fences in question, as I understand the record, were and are reasonable and proper means of protecting the defendant's land from trespass and useful for the proper enjoyment thereof. They were built by her in good faith with no intention of appropriating or inclosing public lands or preventing lawful access thereto. In connection with fences and natural barriers on the west and north, they amount to a substantial inclosure of privately owned lands, and the crux of the question, then, is whether the defendant can use reasonable, proper, and appropriate means to inclose her own property without violating the federal statutes. In my judgment she can.

The complaint will be dismissed.

**NORTHWESTERN LUMBER CO. v. GRAYS HARBOR &
P. S. RY. CO. et al.**

(District Court, W. D. Washington, S. D. November 6, 1913.)

No. 1,866-C.

1. SPECIFIC PERFORMANCE (§ 99*)—DEFAULT OF COMPLAINANT—EFFECT.

Complainant and defendants' predecessor having agreed to a proposition for the sale of certain land to the latter for railroad purposes, a written contract pending the delivery of deeds was demanded; but its terms could not be agreed on because complainant insisted on a provision for a common user bridge which was not in the original negotiations and to which defendants' predecessor would not agree. Complainant demanded a return of the unexecuted draft of the proposed written contract, which was done, and thereafter, when the railroad company de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

manded deeds to the property in accordance with the original agreement, complainant refused to perform except on payment of \$10,000 additional, as it claimed for interest on the original consideration during the delay, which defendants' predecessor declined to pay. *Held*, that such demand was a breach of the agreement by complainant barring its right to specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 290–304; Dec. Dig. § 99.*]

2. EVIDENCE (§ 461*)—PAROL EVIDENCE—WRITTEN CONTRACT.

Where a contract for the sale of certain real property for railroad purposes provided that complainant vendor should co-operate with the vendee in procuring other properties in H. and also franchises there, parol evidence, though admissible to show that franchises in a particular place were contemplated, was not admissible to prove that such provision was intended to require the railroad company and the city to construct a joint user bridge, provided the city contributed its share of the cost of construction and maintenance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129–2133; Dec. Dig. § 461.*]

3. VENDOR AND PURCHASER (§ 16*)—OFFER AND ACCEPTANCE.

Where an acceptance of an offer for the sale of land for railroad purposes required the vendor to co-operate in procuring franchises in H. for the railroad company, a provision, in the proposed contract subsequently tendered for execution, that the vendor would co-operate in procuring such franchises in H., and also in procuring such additional rights of way in the city as the railroad company might desire, was not objectionable as substantially broadening the terms of the acceptance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 17, 20; Dec. Dig. § 16.*]

4. VENDOR AND PURCHASER (§ 16*)—CONTRACT—EXECUTION.

Where a contract for the sale of certain real property for railroad purposes was prepared and submitted to complainant's president in accordance with previous correspondence between the parties, and he redrafted the contract to include an additional provision for a joint user bridge to which the railroad company would not agree, and he was unwilling to sign any other contract not containing such clause, it sufficiently appeared that complainant refused to execute the contract in accordance with such correspondence.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 17, 20; Dec. Dig. § 16.*]

5. VENDOR AND PURCHASER (§ 42*)—FORMAL CONTRACT—WAIVER.

Where an acceptance of a proposition for the sale of land for railroad purposes called for the execution of a formal contract, but, the parties being unable to agree on the elimination of a clause therefrom providing for a joint user bridge, complainant requested the return of the unexecuted contract, and the railroad company complied with such request, but stated that in returning the same they had no intention of waiving their rights with reference to the agreement to purchase the property, they did not waive the provision in the acceptance requiring the execution of a formal contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. : 68; Dec. Dig. § 42.*]

6. VENDOR AND PURCHASER (§ 42*)—CONTRACT OF SALE—EXECUTION—WAIVER.

Where a railroad company's acceptance of a proposition to sell certain land for railroad purposes provided for the execution of a formal contract, but the parties were unable to agree on the form proposed, which complainant insisted should contain a clause for a common user bridge,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
208 F.—40

whereupon negotiations ceased for a time, during which the railroad company treated with the city in regard to such bridge, and afterwards notified complainant that it was ready to consummate the transaction and accept deeds to the property, the railroad company's conduct did not constitute a waiver of its right to a formal agreement in accordance with the offer and acceptance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 68; Dec. Dig. § 42.*]

7. FRAUDS, STATUTE OF (§ 129*)—PART PERFORMANCE.

Where an acceptance of a proposal to sell land for railroad purposes provided that a formal agreement should be entered into in accordance with the offer and acceptance, and that complainant vendor should remove the buildings from the property within six months from the date of the deeds, but no formal contract was ever agreed on, and complainant refused to deliver the deeds on demand, the mere removal of the buildings, not shown to have been done solely in part performance of the contract, was not such a part performance as would take the case out of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287–292, 303, 306–308, 311, 314, 318–320, 322, 325, 326; Dec. Dig. § 129.*]

Suit by the Northwestern Lumber Company against the Grays Harbor & Puget Sound Railway Company and others. Bill dismissed.

Grosscup & Morrow, of Tacoma, Wash., for complainant.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for defendants.

CUSHMAN, District Judge. Complainant relies upon the following authorities: Windsor v. St. Paul, etc., Ry. Co., 37 Wash. 156, 79 Pac. 613, 3 Ann. Cas. 62; No. American Trans. Co. v. Samuels, 146 Fed. 51, 76 C. C. A. 506; Bradley v. Steam Packet Co., 13 Pet. 89, 10 L. Ed. 72; Sultan Log. Co. v. Great Northern, 58 Wash. 604, 109 Pac. 320, 1020; Anderson v. Lumber Co., 30 Wash. 147, 70 Pac. 247; Moses v. Bank, 149 U. S. 298, 13 Sup. Ct. 900, 37 L. Ed. 743; Brashear v. West, 7 Pet. 609, 8 L. Ed. 801; McLean v. Sellers, 44 Mont. 389, 120 Pac. 242; Marden v. Leimbach, 115 Md. 206, 80 Atl. 958; Johnson v. Tribby, 27 App. D. C. 281; Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501; Morgan v. Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614; Pomeroy's Equity Jurisprudence, § 842; Frye on Specific Performance, § 258; Storer v. Great Western Ry., 2 Young & Collier Chancery Reports, 48; Pembroke v. Thorpe, 3 Swanston's Ch. Rep. 482; Hawkes v. Eastern Counties Ry., 22 Chancellor's Reports, 739; Cathcart v. Robinson, 5 Pet. 277, 8 L. Ed. 120; Kentucky Distilleries, etc., Co. v. Blanton, 149 Fed. 40, 80 C. C. A. 343; Tayloe v. Insurance Co., 9 How. 390–405, 13 L. Ed. 187; Eames v. Insurance Co., 94 U. S. 621, 24 L. Ed. 298.

Defendants rely upon the following authorities: Swash v. Sharpstein, 14 Wash. 426, 44 Pac. 862, 32 L. R. A. 796; Hite & Raffeto v. Savannah Elec. Co., 164 Fed. 944, 90 C. C. A. 348; Crossley v. Maycock, 18 Eq. Cas. 180; Clark v. Davidson, 53 Wis. 317, 10 N. W. 384; Ellis v. Cary, 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55, 17 Am. St. Rep. 125; Brown on St. Frauds, § 376; Sorensen v. Keyser, 51 Fed. 30, 2 C. C. A. 92; Bailey v. Railroad Co., 17 Wall. 96, 21 L. Ed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

611; *Blake v. Co.*, 76 Fed. 624, 22 C. C. A. 430; *De Witt v. Berry*, 134 U. S. 306, 10 Sup. Ct. 536, 33 L. Ed. 896; *Johnson v. Lara*, 50 Wash. 368, 97 Pac. 231; *Allen v. Treat*, 48 Wash. 552, 94 Pac. 102; *Hogan v. Kyle*, 7 Wash. 600, 35 Pac. 399, 38 Am. St. Rep. 910; *Peters v. Van Horn*, 37 Wash. 550, 79 Pac. 1110; *Morgan v. Bell*, 3 Wash. 554, 565, 28 Pac. 925, 16 L. R. A. 614; 3 Pom. Eq. Jur. § 1410; *McKinney v. Big H. & C. Co.*, 167 Fed. 770, 93 C. C. A. 258.

This cause is for decision upon the bill, answer, reply, and evidence thereunder. The bill is one for specific performance. Complainant is, and was, the owner of a large amount of real estate in the town of Hoquiam, and otherwise interested in certain business enterprises at that place.

The defendant Grays Harbor & Puget Sound Railway Company was, in 1908, seeking to obtain an entrance for its road to Hoquiam, and to acquire depot and terminal grounds, right of way, and franchises therein. The other defendants have succeeded to or acquired interests from the Grays Harbor & Puget Sound Railway Company, the nature of whose rights and liabilities among themselves it is not necessary to state. They will be mentioned herein as "defendants."

Through the chief engineer of said railroad company, it entered into negotiations with complainant, which resulted in complainant, in September, 1908, submitting three separate propositions to the defendant railroad company, through the latter's engineer. The second and third propositions were:

"*'Simpson Avenue Line,'* with Depot Grounds in Block 50. Across Northwestern Lumber Company's log pocket on the extension of Simpson avenue, which is across lot 1 of tract 15, plat 9, Hoquiam Tide & Shore Lands; thence across or along Levee street, adjacent to blocks 70, 62, 61, eighty-eight feet in block 51 and two hundred and fifty feet, eleven inches, in block 50, together with the return right of way through blocks 62, 70 and 69, joining Northern Pacific right of way through those blocks and through lot 3, tract 15, plat 9, to Railroad avenue along Twelfth street vacated and adjoining Northern Pacific Track, to K street. This right of way to be adequate for double track-
age except on its return or switch track through blocks 70, 69 and Twelfth street. Also to include for depot grounds the east 182 feet of block 50, all for the sum of \$102,000.00, one hundred two thousand dollars."

"*'Emerson's Proposition.'* The same as Simpson Avenue Line omitting depot grounds in block 50 and adding the east half of blocks 62 & 61 and eighty-eight feet on Levee street by 100 feet in block 51, you to join with the Northwestern Lumber Company dedicating 50-foot street along the center line of blocks 61 & 62, for the sum of one hundred thirty-four thousand dollars (\$134,000.00)."

In June, 1909, this offer was conditionally accepted by a letter from the railroad company's engineer to complainant, stating:

"We beg to advise you that we accept what is called the 'Emerson' proposition, contained in your letter to Mr. H. F. Baldwin dated September 25th, 1908, being your proposition for one hundred and thirty-four thousand (\$134,000) dollars. We will present you a map showing in detail such proposition and a formal agreement shall be entered into, pending actual transfers. However, we will expect and you shall give us your co-operation in procuring other properties in Hoquiam and also franchises in Hoquiam. You shall without delay furnish our attorneys with abstracts of title and our attorneys shall have twenty (20) days after delivery of abstracts within which to examine same, and upon our attorneys passing title, and delivery by you to us of prop-

er deeds of warranty to such property, we will pay you the aforesaid sum. All buildings to be removed by you within six months from date of deed."

This, in turn, was accepted by the complainant. Thereafter a map was presented to complainant by the defendant's engineer. This map showed the location of a railroad bridge across the river in Hoquiam. Abstracts were, without delay, furnished the attorney of the defendant railroad company. These abstracts disclosed good title to the property, save in certain particulars, not material.

In June, 1909, the engineer of the defendant railroad company, who had conducted the negotiations, died, being succeeded, July 1, 1909, by Mr. J. R. Holman. There were conferences between the representatives of the parties upon the terms and details of the formal contract, mentioned in the defendant's acceptance.

The attorney for the railroad company and George H. Emerson, vice president of complainant, at length so far agreed upon a form of contract as to dictate a draft to complainant's stenographer, which was submitted to the president of the complainant company. It contained the following provision:

"7. It is agreed by the said first party and their officers, that they will co-operate with the said second party in procuring such franchises of the city of Hoquiam as it may desire and in procuring such additional rights of way in the city of Hoquiam as the second party may desire."

The president of complainant refused to execute the contract until another paragraph was inserted, providing:

"8. It is stipulated by the first party that the construction of the approach to the proposed bridge on the extension of Simpson Ave. shall be so arranged as to interfere with the handling of logs in their mill pond the least possible, and with that object in view that an ample span shall be placed west of the west pier of the drawbridge, and that the bridge abutment be placed as nearly as possible, consistent with the economical spacing of the spans of said bridge, and in accordance with the requirements of the U. S. government, about thirty ft. into the river from the line of the piles of the first party's pond as such piles are now driven. It is also further stipulated by the first party that such bridge may be a joint user bridge with the city of Hoquiam provided the city of Hoquiam contributes its share of cost of construction and maintenance."

The following provision was also inserted:

"1. The said party of the first part for the consideration of \$134,000.00, to be paid by second party, *Twenty thousand dollars of which is paid down by second party, the receipt whereof* is hereby acknowledged, and the covenants and agreements hereinafter mentioned. * * *

The contract, as then prepared, was, on July 7, 1909, forwarded to the railroad company at Seattle by complainant; but was returned, unexecuted, July 21st to the attorney of the railroad company in Hoquiam, by Mr. Holman, who had, on July 1st, succeeded to the position of engineer for the railroad company, after the decease of Mr. Baldwin. This attorney, July 23d, advised complainant that the railroad company would not execute the contract on account of its containing, in paragraph 8, the "common user" bridge clause.

Conferences were had between the officers of complainant and the attorney of the railroad company, trying to reach an agreement con-

cerning the objectionable provision; but without being able to do so. Thereafter, on September 15th, complainant demanded that the attorney for the railroad company return this formal contract to it, which he did on the same day, with the following letter:

"Per your request of this date I herewith hand you a proposed agreement between yourself as the party of the first part and Grays Harbor & Puget Sound Railway Company as the party of the second part, the same being with reference to the purchase of certain properties from you. Such agreement being dated July 7, 1909, and having been executed by you, but not by the railway company. I consider that since this agreement has not been executed by the railway company yet you are entitled to have it returned to you, but by so returning to you it is not the intention of the railway company to waive any rights which it has with reference to the agreement to purchase this property and I anticipate that it is not your intention that the handling of these papers to you should have that effect."

The attorney testifies that the immediate surrender of the prepared draft being required, and having no time to confer with his company, he wrote this letter. Complainant made no answer to it, and negotiations were suspended.

The railroad company thereafter negotiated with the city authorities and with a so-called "Citizens' Committee" concerning the contemplated bridge. Officers of the complainant were present at certain of these negotiations, and its manager was accused, by defendants, of opposing the railroad company in this matter.

In June, 1910, the Grays Harbor & Puget Sound Railway Company sold all of its property to the Oregon & Washington Railway Company. At length, the railroad company, on September 9, 1910, reached an agreement with the "Citizens' Committee" concerning the bridge, by which it was provided that it should not be a "common user" bridge.

After this matter was so arranged, the engineer of the defendant railroad, on the same day, notified the complainant that it was ready to take up the deeds to the property desired. Upon this request, Mr. Jones, the president of complainant, met with the engineer and attorney for the defendant railroad. There is a conflict in the testimony of these men as to exactly what took place at this interview. The attorney and engineer for the railroad company testify that Mr. Jones demanded \$144,000 for the property, being \$10,000 more than the price made in the accepted proposition, which the engineer refused, and that Mr. Jones informed them that it could not be had for less. Mr. Jones testifies that he represented to the engineer that the complainant should receive interest on the \$134,000, the original price, for the length of time that had elapsed since the acceptance. Interest on \$134,000, at 6 per cent., from June 9, 1909, to September 9, 1910, would slightly exceed \$10,000.

It is probable that Mr. Jones demanded \$144,000, and he probably called attention to the fact that interest during the delay would amount to as much as the extra amount demanded. Not only do the attorney and engineer testify that Mr. Jones made a positive demand for the amount in excess of the agreed price, but Mr. Emerson, complainant's vice president, testifies that he understood Mr. Jones had made a

demand for interest. The complainant has been, at all times, in possession of the property.

[1] Complainant now contends that this was not a breaking off of negotiations, nor a refusal on its part to perform, but simply a request of its president that, before carrying out the contract, Mr. Holman submit to his superiors the claim of complainant that it be allowed interest on the purchase price. It cannot be so held. If such was the understanding of those present, or of Mr. Jones, the complainant's president, the matter would, in all probability, soon have been broached again; but this was not done.

In December, 1910, the Oregon & Washington Railway Company sold its property to the Oregon-Washington Railroad & Navigation Company. Defendant's engineer continued to treat with the city authorities, and, at length, the railroad company entered into a traffic arrangement with the Northern Pacific, thereby obtaining an entrance into Hoquiam, and its trains came in over the tracks of that company, upon learning which, complainant tendered deeds to the property to the defendant railroad company, reciting a consideration of \$134,000, and demanded performance of defendant; and, upon refusal, instituted this suit to compel defendants to specifically perform the foregoing agreement.

A "common user" bridge would have been a benefit to complainant and its other property. Much had, doubtless, been said in the negotiations concerning this bridge; but the evidence does not disclose an agreement. No mention is made of it in either of the letters containing the proposition and acceptance. And when, by the provision contained in paragraph 8 of the formal contract, the complainant sought to bind the railroad company to a partnership with the city in a "common user" bridge, it was requiring the making of a new contract, and whether this be viewed as showing that the minds of the parties had not really met, though, *prima facie*, it appeared by the original offer and acceptance that they had met, or as a refusal by complainant to perform—the refusal being put in the shape of a demand not contemplated—is all one, for the effect is the same.

"If we assume that the offer and acceptance is, *prima facie*, evidence of a contract, it is, of course, the contract embraced by the written offer and no other. What is to be inferred by the preparation and presentation by Nash of the formal writing differing in terms from the offer accepted? If he was acting in good faith, the writing prepared by him must be his interpretation and construction of the offer to sell which had been accepted, and if that be true, with the written offer before us, we would be forced to conclude that there was nothing to show that the sellers had made the agreement as construed by Nash. This would lead to the conclusion that the minds of the contracting parties had not met, and that, although the offer and its acceptance was apparently a completed contract, the subsequent occurrences showed that, in fact, there had not been an agreement. But if the offer and its acceptance did, as matter of law, make a contract, it should not be held, and we do not hold, that the subsequent action of the buyer rescinded or canceled it. This plainly could not be done against the wishes of the sellers. Such action could not do more than extend to the sellers the opportunity to withdraw their offer.

"If, on the other hand, we infer that the offer was so plain that Nash must have understood its terms, and that the formal writing prepared by him does

not present his construction of the offer, but that it is a counter proposition made by him, or an effort to obtain better terms than those embraced in the offer, what then should follow? If the offer and its acceptance was not binding on the buyer, it was not binding on the sellers; for it is axiomatic that, unless both are bound, neither will be bound. Bishop on Contracts, § 78. If the buyer was free to propose new terms, the sellers were free to decline them. In suggesting new terms, the buyer, in effect, said that the offer and acceptance was not final. If not final as to the buyer, it could not be conclusive as to the sellers, and they were free to withdraw from the negotiations. Bristol, etc., Co. v. Maggs, 44 Ch. Div. L. R. 618; Johnson v. Latimer, 71 Ga. 470. See, also, Bellamy v. Debenham, 45 Ch. Div. L. R. 481; s. c., on appeal, 1 Ch. Div. (1891) L. R. 412. The buyer should not be permitted to treat the negotiations as open for the purpose of seeking better terms, and, at the same time, hold them closed so as to bind the sellers if they fail to accept the proposed changes. When it proposes a contract materially variant from the offer, it takes the position that the acceptance of the offer was not unconditional and conclusive. The contract for the breach of which this suit is brought is the offer to sell and the acceptance of the offer. If they stood alone, as we have said, they would contain apparently all the elements of a contract. It seems to us that we cannot be required to stop at the acceptance and refuse to consider what followed. Nash immediately proceeded to prepare the formal writing. It was ready for signing on the next day. If it could have been finished instantly when the offer was accepted, and if Nash could have handed the sellers his draft of the formal contract at the moment of acceptance, the acts all taken together would have meant an acceptance of the offer, with the understanding that it be construed to mean what Nash proposed in the new writing. Clearly the first offer would not bind the buyer until it was unconditionally accepted, and the new writing would not bind the sellers, it containing new terms, until they agreed to it. Crossley v. Maycock, 18 Eq. Cas. 180." Hite & Rafetto v. Savannah Elec. Co., 164 Fed. 944, at pages 951, 952, 90 C. C. A. 348, at pages 355, 356.

It was argued, on behalf of complainant, that the eighth paragraph was no departure from, or variation of, the original contract; that it was only putting in form what the parties had agreed concerning one of those franchises to be asked from the city. It may have been complainant's understanding; but it is not shown that the railroad company so agreed, or understood. It is urged that the evidence as to those negotiations does not tend to vary the terms of the written contract, but only to disclose the subject-matter referred to as "franchises in Hoquiam," mentioned in the railroad company's acceptance of complainant's proposition.

[2] If it were conceded that "franchises in Hoquiam" might be shown to contemplate franchises in particular places in Hoquiam, and not such franchises as the railroad company then or thereafter concluded that it desired, yet it would be an abuse of the exception to the rule to go further and hold that the particular form of franchise in contemplation was to be limited and burdened in the manner sought by the last clause of paragraph eight, and parol evidence to substantiate such claim would constitute an unwarranted variation of the contract.

A formal contract was contemplated when the letter of acceptance was written. If the formal contract had been made, the preliminary arrangement made by letter would be *functus officio*—either the letters would, of necessity, have formed the contract, or the formal instrument would have done so. The letters disclose certain main con-

siderations for the contract, but much of detail in them was left unexpressed, as is disclosed by the provisions in the formal draft, concerning which there is no dispute.

These specifications, in the letters, would hold the parties to the main provisions of the proposition, where they could not break them, or, if they did, it would be clear who was wrong. If, when they came to enter into a formal agreement, one side or the other refused to subscribe to one of these main propositions, the right of the matter could be easily determined. But when, in the preparation of the formal agreement, the parties find, although honestly striving, that they cannot agree on some matter unexpressed in the original agreement made by the letters, then the court must conclude that their minds have not met. The formal agreement then becomes a prerequisite to the consummated contract. A breach cannot be determined because the parties, themselves, by providing, specially, for a formal agreement, have provided against the very thing that happened. If, when the letters were written, they considered it necessary to provide against this contingency, by requiring a formal contract, the court cannot undertake to interpret the unconsummated agreement and make a contract for them.

[3] It is further urged that the contract is not varied by paragraph eight; that it was a requirement called forth by the language of paragraph 7, the latter having been inserted at the dictation of the attorney for the railroad company; that paragraph 7 is broader than the provisions contained in the original acceptance, which acceptance read, "franchises in Hoquiam," while paragraph 7 reads, "such franchises of the city of Hoquiam as it may desire and in procuring such additional rights of way in the city of Hoquiam as the second party may desire."

Paragraph 7 is not a substantial broadening or variation of the language contained in the acceptance. The situation of the parties and the magnitude of the enterprise undertaken by the defendant render it unlikely that each and all of the franchises necessary to its undertaking had been determined upon by the engineer. It is more reasonable to think that the provision in the acceptance contemplated, not only franchises then deemed necessary by the defendant railroad company, but those which, in the progress of its undertaking, would be found necessary and desirable.

Literally, "franchises in Hoquiam" is broader and more comprehensive than "such franchises in Hoquiam as we may desire"; for the former would include those desired and those not. The letter of acceptance did not fairly contemplate any limitation other than that the franchises should be in Hoquiam. The addition limited, rather than broadened, the original language. The map mentioned in the acceptance and furnished complainant shows that a bridge was contemplated at the point in question. Therefore the issue between the parties was whether the franchise for this bridge should be such as complainant desired, or as defendant desired. The latter is the more likely.

Parol testimony will be admitted to disclose the situation of the parties to a contract, but this is as far as the statute of frauds may be relaxed in allowing evidence to make plain the contract.

While, doubtless, the more important franchise requirements had been determined upon, yet, at the stage at which the project then was, naturally, all franchises to be asked of the city could not be foreseen, and, whether in fact they had been foreseen or not, an engineer of ordinary prudence would hesitate to act on the assumption that he had foreseen everything. It is therefore reasonable to conclude that the language used in the acceptance must have been used in at least as broad a sense as that expressed in paragraph 7.

It is further concluded, as a matter of fact, that the objectionable clause in paragraph 8 was insisted upon by complainant, as pointed out above, rather for its own advantage and protection—in a matter deemed necessary by it—than on account of the language of paragraph 7. The complainant could have protected itself against paragraph 7 by stipulating that it be not required to co-operate with defendant for other than a “common user” bridge, without stipulating that the bridge be a “common user” bridge, thus binding defendant to accept a “common user” bridge.

[4] It is argued that no demand was made upon the complainant to execute a contract from which paragraph 8 was omitted. As pointed out, one was prepared and submitted to complainant in which this objectionable paragraph was omitted. At the dictation of complainant's president, it was redrafted to include paragraph 8 and was, in that form, executed by him for complainant. The vice president of the complainant testifies that Mr. Jones, its president, only signed the contract containing the “common user” bridge clause; his testimony being as follows:

“Q. Is it not a fact that the only agreement Mr. Jones was willing to sign was the one containing the bridge clause? A. The only one he was willing to sign was the one he did sign, and it contained a bridge clause.”

This sufficiently shows a refusal by complainant to execute a contract that did not include paragraph 8.

[5] It is argued that the formal agreement called for in the acceptance is waived both by the letter of the attorney of the railroad, returning, unexecuted, the prepared draft, and the conduct of the parties. So far as this letter is concerned, if it were conceded that the attorney had the authority to change the contract, he did not waive any right on account of a breach of the contract. If the prepared contract had simply been returned without comment or demand, no rights would have been waived. The attorney's letter no more than called the attention of complainant to the fact that no acknowledgment was made by the return of the demanded instrument of a changed situation, or the loss of any right on account of a breach, or otherwise, that the railroad had not surrendered any rights by the surrender of this paper.

[6] In so far as the contention that the conduct of the parties constituted a waiver of the formal agreement is concerned, the evidence warrants no other conclusion than that, when they found that an agreement could not be reached on account of the “common user” bridge clause, insisted upon by complainant, matters were left in

abeyance; as each party desired the consummation of the entire transaction, while the railroad treated with the city in regard to the bridge, it being the plan of each to resume negotiations when the bridge question was settled.

Such conduct does not constitute a waiver of the formal contract. It might constitute a waiver of the time contemplated within which it was to be entered into. It is no more than saying: "We cannot agree now. We will wait and see if we cannot agree later."

[7] Nothing was done towards acceptance or performance by either party. It is argued that the removal of certain buildings from the land by complainant was such part performance as to take the contract out of the statute of frauds. These buildings were not moved at the request of the railroad company. The acceptance provided that the buildings upon the land should be removed within six months from the date of the deeds.

The mere removal of buildings would not constitute such part performance of this contract as to take it out of the statute of frauds, because, in the nature of things, it could not be made to appear that it was solely done as performance and not for other reasons. Further, the evidence is not sufficient to warrant a finding that the defendant knew that they were being removed in performance.

Complainant contends that it was warranted in removing the buildings upon the assumption that the defendant would take the land, because it was known that the defendant railroad was continuing its negotiations with the city of Hoquiam for its contemplated franchise. Complainant may have been influenced by this fact in the course pursued by it; but that fact does not give it any legal or equitable right against the defendant company. There was no privity between it and the city in this matter. The removal of the buildings would not be a sufficient part performance, in any event, to take the contract out of the statute of frauds.

"By the weight of authority at this time the rule seems to be settled that, in order to enforce specific performance of a parol contract to convey land, possession must have been transferred. The Supreme Court of the United States, in *Purcell v. Miner*, 4 Wall. 513 [18 L. Ed. 435], decided in 1866, strongly support this doctrine. *Pond v. Sheehan* [23 N. E. 1018], decided by the Supreme Court of Illinois in 1890, holds that delivery is essential. Many other cases are cited in the opinion there rendered. *Johns v. Johns*, 67 Ind. 440, holds likewise, and the Supreme Court of Pennsylvania, in the case of *Pugh v. Good*, 3 Watts & S. 56, 37 Am. Dec. 534, holds that delivery of possession pursuant to the contract is the test of part performance. We shall not call attention to all of the cases so holding, but there is another line which, while not directly passing upon this question, holds that a part performance by one of the parties is not sufficient, and that there must have been a part performance by the other party also. Some of them are *Wallace v. Long*, 105 Ind. 522, 5 N. E. 666, 55 Am. Rep. 222; *Austin v. Davis*, 128 Ind. 472, 26 N. E. 890, 12 L. R. A. 520, 25 Am. St. Rep. 456; and *Ellis v. Cary*, supra, 74 Wis. 176, 42 N. W. 252, 4 L. R. A. 55, 17 Am. St. Rep. 125." *Swash v. Sharpstein*, 14 Wash. 426, at page 436, 44 Pac. 862, 32 L. R. A. 796.

Whether a formal agreement was waived by the defendant, either by its conduct at the time of the halting of negotiations, on account of a disagreement over the "common user" bridge clause, or upon the

engineer's informing complainant's president that he was ready to take up the deeds, in September, 1910, is not important, as it is clear that the complainant, through its president, refused to perform its part of the contract and demanded \$10,000 additional compensation to that agreed upon. The complainant's demand and refusal excused the defendant from making any further offer, as a useless formality, and it makes no difference whether the offer of \$134,000 by defendant's engineer be considered as an assertion by him that the contract was still in force, or as an offer to pay the price before offered.

The complainant having refused to perform what it now claims was the contract, and the defendant having acquired other property for the purposes desired, it is now excused from performance, and a rescission of the contract should be decreed.

For the reasons above stated, complainant was not entitled to anything in the nature of interest for the time of the delay. If complainant considered that it was entitled to interest, it could have protected itself by tendering the deeds, without waiving its claim to interest; but, when it made a demand for \$10,000, additional, before the surrender of its deeds, it made a demand for such substantial additional compensation as to require a new contract to warrant it.

Having reached this conclusion, it is not necessary to consider the question of complainant's laches, based on its quiescence, after the refusal of complainant to transfer the property for \$134,000 and defendant's refusal to pay \$144,000, during which delay the defendant had acquired other rights and property, giving it the desired entry into Hoquiam.

The bill is dismissed.

THE GEORGIA.
THE SEACONNET.

(District Court, D. Rhode Island. October 30, 1913.)

No. 1293.

1. COLLISION (§ 82*)—MOVING AND ANCHORED VESSELS—EXCESSIVE SPEED IN Fog.

A steamer which, while proceeding up by the western passage of Narragansett Bay in the early morning in a dense fog at a speed of 6 knots or more, came into collision with an anchored vessel *held* in fault for excessive speed which was such that she could not avoid collision after sighting the anchored vessel; the place also being one where vessels were to be expected and great caution was required.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 170-174; Dec. Dig. § 82.*]

2. COLLISION (§ 80*)—MOVING AND ANCHORED VESSELS—IMPROPER ANCHORAGE.

The anchored vessel, a steam collier, which was not on any anchorage ground but in a position to embarrass all passing vessels, whether by the eastern or western channel, anchored at 4 o'clock on the previous evening owing to the fog and the facts that her compass varied and that she was light and made leeway to an unknown extent. She had left the port of Providence, however, only an hour before when the fog and all other conditions were the same and known to her master. *Held* that, while she may perhaps have been justified in anchoring where she did under the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

circumstances, she was in fault for not staying in port until the weather cleared.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 152-155; Dec. Dig. § 80.*]

3. COLLISION (§ 69*)—OBSTRUCTION—VESSELS ANCHORED IN CHANNEL.

Whether a vessel is so anchored as to prevent or obstruct the passage of other vessels, in violation of Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543), must be determined by looking not alone to the chart and the geography of the situation but also to the weather conditions and to the usual course of vessels using the thoroughfare. A vessel so anchored as to leave room for the passage of vessels on either side may not be an obstruction in clear weather when an approaching vessel would have abundant time to avoid her by a change of course but may be an obstruction within the statute when there is a thick fog and she lies in the compass course of passing vessels.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 87-90; Dec. Dig. § 69.*]

4. COLLISION (§ 81*)—MOVING AND ANCHORED VESSELS—FOG SIGNALS BY ANCHORED VESSEL.

A vessel, anchored in a thick fog during the night, whose fog bell was rung for five seconds every second minute by the watchman by means of a cord 40 or 50 feet long, held not to have complied with article 15d of the Inland Rules (Act June 7, 1897, c. 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2880]), which requires the bell to be rung "rapidly for about five seconds" at intervals of not more than one minute, and to have been in fault for a collision with a moving vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 157-166; Dec. Dig. § 81.*]

In Admiralty. Suit for collision by Donald B. Smith, master of the steamer Seaconnet, against the steamer Georgia, the Hartford & New York Transportation Company, claimant, with cross-libel against the Seaconnet. Decree against both vessels.

Stimson, Stockton, Livermore & Palmer, of Boston, Mass., for libelant.

Haight, Sandford & Smith, of New York City, for claimant.

BROWN, District Judge. These libels grow out of a collision in Narragansett Bay on the early morning of March 15, 1913, between the Seaconnet, a steel collier, 265 feet, 3,800 tons, trading between Norfolk, Boston, and Providence, and the Georgia, a steel single-screw steamer, 280 feet, engaged in regular service between New York and Providence with passengers and cargo, on the so-called Bay State Line.

The Seaconnet was at anchor and the collision occurred in a thick fog, about 6:10 a. m., at a point whose exact location is disputed, but somewhere in the vicinity of buoy No. 7, known as the "Middle Ground Buoy," which lies nearly south of Conimicut Point Light and about a mile away.

The Georgia was on her way to Providence through the western passage on her regular voyage from New York. She had made Warwick Light, leaving it about two lengths to port, and then steered her usual compass course from Warwick Light to the Middle Ground

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Buoy, No. 7, N. E. $\frac{1}{4}$ N., which, allowing for compass deviation, brings her to buoy No. 7, which she ordinarily passes sometimes above and sometimes below, but very near the buoy. On this morning the buoy was not observed before the collision.

It is quite clear that the Georgia had passed somewhat to the north of the buoy, and she was probably not far from her usual compass course. The wind was southerly, about 12 miles an hour, and the tide was nearly out, low water being about 6:27 a. m. As the Georgia was drawing 14 feet she could hardly have taken a course which would have brought her very much to the north of buoy No. 7. An inspection of the chart will show this.

The officers of the Georgia say that the collision followed shortly after they had passed from the shoaler water into deep water, and that they felt the ship clear herself and noticed the stopping of the vibration a moment before they sighted the Seaconnet. Capt. Flanagan of the Georgia says that he first saw her smokestack on his starboard bow about the same time that he felt the vibration stop and estimates that the Georgia was then but about two of her lengths away from the Seaconnet. She then lay across the Georgia's course, heading about N. W., nearly for Conimicut Light. The Georgia was still on her compass course and was about to haul up for Conimicut Light, but had not yet done so, when the Seaconnet was sighted.

Capt. Flanagan at once stopped the Georgia's engines and put her wheel hard astarboard. He says that when he saw the ship "she looked as though she would strike and sheer along the side"; that finding she would not clear he put her engines astern. This is criticised as tending to throw her head to starboard. Capt. Flanagan says, however, that, had he put his wheel to port, the result would have been merely to hit the Seaconnet a little further aft.

The stem of the Georgia struck the Seaconnet on her port side, about amidships, breaking some of her plates and angle bars, and twisting the stem of the Georgia.

[1] It is practically conceded for the Georgia that when the Seaconnet was sighted she was so close that it was impossible to avoid striking her.

The main fault of the Georgia was in maintaining a rate of speed which made it impossible for her to avoid the Seaconnet after sighting her, and under the conditions which existed when the Seaconnet was first sighted I am not satisfied that there was any error in Capt. Flanagan's orders or that porting his wheel would have in any degree changed the result.

The speed of the Georgia is fairly well established. She passed Warwick Light at 5:52 a. m. The engines were slowed at 6 to half speed, or 45 turns, were stopped at 6:08, and reversed at 6:09. The distance from Warwick Light is about $2\frac{3}{4}$ miles. For the Georgia it is contended that she had an average speed of 8.67 knots from Warwick to the buoy. Making all allowances for the drag of the flats over which she passed and for her slackening of speed in passing an oyster

boat, the Georgia's speed could hardly have been less than 6 knots and was probably somewhat more when she sighted the Seaconnet.

According to the testimony from the Georgia, no fog bell was heard from the Seaconnet until after she had been sighted and at a moment before the collision, although the bell at Conimicut and the whistles of other steamers were heard.

While it is true that the anchorage of the Seaconnet was unusual, yet the Georgia was in a part of the river where vessels were to be expected and where in a fog great caution was required.

I think it must be held, according to the great weight of authority, that the speed of the Georgia was excessive. *The Pennsylvania*, 19 Wall. 125, 22 L. Ed. 148; *The Martello*, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637; *The Belgian King*, 125 Fed. 869, 60 C. C. A. 451; *The H. F. Dimock*, 77 Fed. 226, 23 C. C. A. 123; *The Louisburg*, 75 Fed. 424, 21 C. C. A. 424. See, also, cases cited in note to *The Niagara*, 28 C. C. A. 532; *Marsden's Collisions at Sea* (6th Ed.) 375 et seq.

[2] The faults charged to the Seaconnet are that she anchored in an unnecessary and improper position, in the path of traffic bound to and from Providence, and on the line of the Georgia's regular course, and remained at this anchorage from 4 o'clock in the afternoon of March 14th until the morning of March 15th, although during this period the fog had lightened enough to make it possible for her to leave this position; also that she failed to give proper notice to approaching vessels of her presence.

The Seaconnet left her dock at Providence shortly after 3 o'clock p. m., March 14th, for her voyage to Hampton Roads. The weather, Capt. Smith of the Seaconnet says, was "thick, hazy," but channel marks could be distinguished. He says that from Pomham rock to Sabins "my compass differed as near as I could judge fully three-fourths of a point." After leaving Bullock's Light, Conimicut Light could not be seen. Capt. Smith then ran by compass and by the sound of Conimicut bell. He passed Conimicut Light within $1\frac{1}{2}$ lengths and could just see it. The Seaconnet was then under half speed and making probably 5 or 6 knots. After leaving Conimicut she ran on slow bell, making 3 or 4 knots. Capt. Smith says that she ran about 7 minutes, in his opinion, one-third to one-half a mile, when he anchored the ship; that he tried to get as near as he could to the center so as to give ships going by room ahead of him on the west and astern on the east; that he was then headed S. E. by S. $\frac{1}{2}$ S. His ship is 265 feet long and he anchored with 40 fathoms of cable. He testifies that after leaving Conimicut bell there was nothing to run for except the spar buoy, and not knowing the error of his compass with that course, and with a S. S. W. wind of perhaps 15 to 18 miles on the starboard, and not knowing the leeway his ship would make it was almost impossible to proceed. The ship was light and drew aft $14\frac{1}{2}$ to 15 feet and forward $7\frac{1}{2}$ to 8 feet. He says that he had known his compass to vary from true $2\frac{1}{2}$ points and perhaps more; that it had been adjusted about two months previous to the collision; and that he had noticed in

the interval between this and March 14th that after discharging the compass would be out $\frac{1}{2}$ to $1\frac{1}{2}$ points.

After anchoring, a little after 4 p. m., the master remained on deck until about half past 10. He saw the steamer Norfolk pass to the northeast, two lengths off, also one of the Merchants' & Miners' line. A number of mud scows passed, two to the west and one on the northeast, going down, perhaps a length off. Two steamers going down were heard. He turned in about half past 10, and at 3 o'clock looked out of the porthole to see about the weather and found conditions the same. He gave orders to the mate to say to the night watch to keep the bell ringing and call him if there was any change in the weather. The watchman was stationed on the bridge, with a line about 40 or 50 feet long from the bridge to the bell. The line was knotted to the tongue. Capt. Smith looked out again about 4 o'clock a. m., but the weather condition was the same. About 6 o'clock he heard a whistle and heard the bell of the Seaconnet ringing constantly. Somewhere about 6 o'clock he heard a whistle and started to get up, when the night watchman opened the door and said, "Captain, collision." He immediately jumped out of the office door on the port side and saw a steamer about 6 or 8 feet off, at right angles to the port side, and headed about amidships on the port side of the Seaconnet.

Capt. Smith locates the anchorage of the Seaconnet at a point about 3,000 feet below Conimicut Light and rather to the eastward of the course of a vessel rounding buoy No. 7. From the preponderance of testimony in the case, however, it appears that he anchored considerably farther to the south and substantially on the range of the Georgia's course. It would have been impossible for the Georgia, drawing 14 feet, to pass very far to the north of buoy No. 7, or over the line where the chart indicates about 11 feet, which would have been necessary in order to bring the Georgia to the place of anchorage designated by Capt. Smith.

The steamer H. C. Rowe & Co. passed the Seaconnet a few minutes before the collision. Having passed Conimicut Light she steered south, which on her compass would take her to the Middle Ground Buoy No. 7. Just before she came to the buoy she encountered a collier at anchor a trifle on her port bow. She held to the west and passed around the collier's bow, swung back to the eastward again, and as she did so made buoy No. 7. Capt. Leake of the Rowe estimates the Seaconnet's distance from the buoy at 600 feet, and he is corroborated by the pilot, who says his helm was first ported, that next the bow was swung about a point and a half to the eastward, and he then made the Middle Ground Buoy on the starboard bow. He puts the Seaconnet about two of her lengths from the buoy.

The suggestion that this might have been another vessel is without much weight. After leaving buoy No. 7 the Rowe steered S. W. $\frac{1}{8}$ W. for Warwick Light and on this course passed the Georgia starboard to starboard, and quite near, showing that the Georgia, when perhaps a mile from the place of collision, was on substantially the regular course of vessels coming from the western passage.

The Tennessee, the companion vessel of the Georgia, running the course for the western passage on the previous evening, passed the Seaconnet, and her officers put her at that time considerably to the southward of the position claimed by the Seaconnet.

Testimony from the oyster boat C. D. Parmlee and from the steamer Lexington are to the like effect.

The testimony from the Seaconnet as to a more northerly location is corroborated by Capt. Hart of the steamer Norfolk, which also anchored somewhat further to the south.

Without attempting, however, to determine the exact location of the Seaconnet's anchorage, and giving due regard to the differences which may be expected in the testimony of well-intentioned witnesses, it must be held, I think, that the Georgia met the Seaconnet when on a course which was usual for vessels using the western passage, and that, while she may have overrun the buoy and have gone slightly more to the eastward than is usual before making her turn, it is in my opinion highly improbable that she was on a course that was substantially different from that usually followed by vessels bound to Providence from the western passage.

The brief for the Seaconnet claims that it was half tide, but this is an error, since the collision occurred about 6:10 and low water at Providence was at 6:27.

It is well established that the Seaconnet's anchorage was in a place not used for anchorage and where steam vessels are seldom, if ever, found at anchor. She was in a position where the usual courses from both the west and east passages converge, and where vessels using either passage would be likely to be embarrassed by a vessel 265 feet long swinging on a cable 240 feet long. In fact, it appears that six vessels, some using the east and some the west passage, were more or less embarrassed by her presence and were obliged to maneuver in order to avoid her. The steamer Norfolk was obliged to stop her engines and to starboard her wheel to give her clearance and was thus so thrown out of her calculations for her run to her next mark, buoy No. 5, that she was compelled to anchor and remain at anchor until the next morning. There was safe anchorage ground to the south within half or three-quarters of a mile, and it was clearly the duty of the Seaconnet to go out of the traveled way if consistent with her safety. Whether, under the conditions existing below Conimicut Light at the time of anchoring, the master was justified in then dropping his anchor, or whether in the exercise of prudent judgment he should have proceeded further, is a question of some doubt. Capt. Smith testifies that his vessel being light, and "so straight forward" would have made considerable leeway, his compass was unreliable, and that soundings at that place would have been of no avail as they were practically the same on both sides. There is also evidence that at slow speed it was difficult to run to time.

Capt. W. N. Hart of the steamer Norfolk, which also came to anchor shortly after passing the Seaconnet on the evening of March 14th, gives his opinion that under the conditions then existing the Seaconnet was justified in anchoring.

The case for the Georgia is lacking in expert opinion based upon the exact conditions which presented themselves to Capt. Smith at the time of anchoring. Whether with a ship of that type, taking Conimicut Light as his point of departure, and with a compass with an error of three-quarters of a point, which he had observed before making Conimicut Light, and with a southerly wind of about 14 miles, there would be serious danger in running in a thick fog to a point which would have brought him clearly outside the compass courses for the east and west passages is peculiarly a matter for expert opinion; and, in the absence of such testimony from the Georgia, the court should be reluctant to substitute its own judgment for that of the master of a vessel observing actual conditions, which of course can be only imperfectly reproduced upon a trial record. The judgment of the master of a vessel made in the performance of his duty is to be given weight, and especially when this judgment is approved by the master of the Norfolk, who also considered it good judgment to anchor.

But, assuming that under the conditions then existing it was necessary to anchor as she did, we must still consider whether the Seaconnet was not in fault in voluntarily exposing herself to such conditions; whether the emergency which required anchoring was not one that should have been anticipated and avoided. In leaving her dock the Seaconnet was bound to consider not only her own safety and convenience but the safety of other vessels using the route over which she was to pass.

The following are extracts from the Seaconnet's log:

2:45 P. M. Discharged. Thick fog.
3:08 P. M. Left dock.
4:07 P. M. Anchored. Thick fog and rain. Wind southwest.
8:00 P. M. Thick and rainy. Still at anchor.
12:00 P. M. Still thick. Ringing fog bell.

Saturday, March 15.

4:00 A. M. Still thick fog.
6:06 A. M. Steamer Georgia coming up bay hit us broadside, starting frame and plate at No. 4 hatch.

It appears that the Seaconnet, within about 23 minutes after discharging, left her dock at the Seaconnet Coal Company and within an hour from sailing was at anchor below Conimicut. There is no evidence to show any substantial change of conditions of weather in this time. If it were true that because of her liability to make leeway, and of the unreliability of her compasses, the Seaconnet was unable to run for any considerable distance without channel marks, this was as well known when she started as when she came to anchor. The master of the Seaconnet knew the location of his buoys after passing Conimicut Light; that they were not as frequent as in the upper part of the river; and if he was of the opinion that it would be unsafe for him to run without marks for a distance sufficient to have brought him to good anchorage he should not have started. The excuses which he gives for anchoring in this exposed position entirely fail to show any unexpected emergency or sudden exigency. Both the character of his

own vessel and the character of the weather conditions which she was to encounter were as obvious when she started as when she anchored, and, if under such conditions she was unable to navigate in a thick fog, this but emphasizes her negligence in starting and moving to a position where she would be compelled to remain so near the path of vessels leaving and approaching the port of Providence.

The following is an extract from the cross-examination of Capt. Smith:

C.Q. 268. And you left your dock then knowing that it was thick and might or might not clear, with a compass that you knew would change?

A. Yes, sir.

C.Q. 269. Do you consider that prudent navigation?

A. Yes, sir.

C.Q. 270. At the time you left your dock, did you take into consideration that you would have to anchor—you would not be able to navigate far away?

A. I thought if I got down north of Conimicut—

C.Q. 271. Suppose it shut down after that, what did you expect to do?

A. Get by Conimicut and anchor.

C.Q. 272. You consider, then, you were entitled to anchor anywhere below Conimicut?

A. I do; where it is not on a dug channel or on ranges.

It must be held, I think, that conditions which existed and the conduct of the Seaconnet in anchoring as she did were anticipated when she left the dock. Assuming, however, that a vessel may anchor in an unexpected fog or wherever controlling conditions overtake her, yet if she has full reason to expect such conditions, and unnecessarily goes on to meet them, they cannot then be urged as a sufficient excuse for an improper anchorage.

Not only the Seaconnet but the Norfolk, another collier, anchored in such a way as to embarrass vessels on usual compass courses, and, if colliers or other vessels were to adopt this part of the fairway for anchorage, the result would be a serious practical obstruction to the approach to the port of Providence.

While Capt. Smith says he made an attempt to place the Seaconnet between the two courses, it is evident from the chart and from the actual conduct of passing vessels that he did not avoid embarrassing vessels on either one of the compass courses. The master of the Seaconnet should have considered not only his own difficulties in a fog but also that vessels on regular compass courses would be hindered to some extent by the fog from holding to an exact course and especially in making the turn at buoy No. 7 from the western passage, would be likely to be somewhat wider off the usual range than in clear weather.

Being of the opinion that the conditions which caused the Seaconnet to anchor, if controlling conditions, of which I am in doubt, were neither unexpected nor unforeseen, I am of the opinion that the Seaconnet should not have left her dock in thick weather unless prepared to go not only beyond Conimicut Light but far enough to take her safely out of the usual course of a vessel using either passage.

She is also charged with a special fault in not shifting her anchorage in a period of clear weather during the night.

If such an opportunity presented itself, it was clearly the duty of the Seaconnet to move from her exposed position immediately on the discontinuance of the conditions which compelled her to anchor. This charge of fault is based upon evidence from witnesses who were on the tug J. S. Packard, which was towing scows to the dumping ground off Sand Point. Capt. Little of the Packard passed the steamer Norfolk at anchor and also the steamer New Orleans of the Merchants' & Miners' Line, anchored off Pappoosequaw. He states that the weather was thick until he got down to the farmhouse on Pappoosequaw and for an hour was clear from the farmhouse to the dump; that he was then probably three miles from the position where he passed the anchored steamer. His testimony is indefinite as to which steamer is referred to. At this point he could see the lights at Bristol over the land and on Warwick Neck. In about an hour it shut down again. In this period the New Orleans got under way and anchored again on the dump near Sand Point.

Hazard, the inspector of dumping, who was also on the Packard, testifies that the weather cleared when they were about at Ohio Ledge, and that they could see three or four miles. Neither of these witnesses was asked specifically as to the condition of the weather at the position of the anchorage of the Seaconnet and the Norfolk at the time the weather cleared in the lower part of the river.

On the other hand is the testimony of Capt. Hart of the steamer Norfolk, which anchored shortly after passing the Seaconnet, and which lay at anchor all night. Capt. Hart says that the first lift of the fog was in the neighborhood of half past 6 in the morning.

Rassmussen, who stood watch on the Seaconnet, testifies that during the night he was ringing the bell "about five seconds every second minute." He says that he received word from the captain to call him for breakfast if it did not clear up, and if it did clear up to call him right away. He went on duty about half past 5 in the evening of March 14th and stayed there until after the collision. He was on the bridge all night and rang the bell all night.

The evidence as to clearing was not specifically directed to the condition of the weather at the position of the Seaconnet, and as both the Seaconnet and the Norfolk remained at their anchorage throughout the night, and as the evidence of the watchman on the Seaconnet and of the master of the Norfolk is to the effect that at that point the fog was continuous throughout the night, I am of the opinion that the Georgia has not satisfactorily established its contention that there was negligence in not shifting the anchorage in a short period of clear weather.

[3] The Georgia charges the Seaconnet with a violation of Act March 3, 1899, c. 425, § 15, 30 Stat. 1152 (U. S. Comp. St. 1901, p. 3543), "that it shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft." For the Seaconnet it is contended that, whether the place of anchorage was as she claims or as the Georgia claims, she did not in the sense of the statute obstruct or render difficult the navigation.

While there was doubtless abundant room to pass on either side of the Seaconnet, and while in clear weather only a slight change from the usual course of vessels would have been necessary to avoid her, yet the statute, as it seems to me, is not inapplicable merely for this reason, under the conditions then existing.

In a thick fog vessels must move, to use the words of counsel, "on that narrowest of all narrow channels, a compass course." A vessel anchored at or near such course in a fog may be an obstruction for the reason that, even if her presence is made known by the timely ringing of a bell, she requires special maneuvering of the moving vessel, and thus imposes a special burden upon her. If her presence be not so made known, she leaves so little opportunity to avoid her after being sighted, and requires such a sharp deviation from the compass course, that her presence would in ordinary language properly be termed an obstruction to the passage of other vessels or craft.

The evidence as to the other vessels which passed up and down the river while she was at anchor, as well as this collision, shows, I think, that she was so anchored as to obstruct the passage of vessels. What in clear weather might not be an obstruction, in a practical sense, may, in a thick fog, be considered an obstruction. An anchored vessel that can be early sighted and readily avoided by a slight change of wheel may not be an obstruction, but when she can with difficulty be sighted, and when she requires other vessels on their usual courses to stop or to maneuver sharply, she may be considered an obstruction. As a practical matter, even though a channel is of sufficient width to permit the passage of vessels on either side, so that in clear weather an approaching vessel would have abundant time to so alter her course as to easily avoid the anchored vessel, yet the coming of a thick fog introduces a new element of danger. Although the steamer must in a fog reduce her speed, which tends to give her more time for maneuvering, yet even with a reduced speed, but still with the maintenance of a reasonable headway, the moment of discovery may be so delayed as to leave but a short time for maneuvering, and the risk of collision is, of course, thus greatly increased.

Safety in a fog is not sufficiently provided for by relying solely upon the reduction of speed of the moving vessel. The statute is designed to avoid the unnecessary embarrassment of vessels on the usual courses by requiring vessels coming to anchor to have due regard for the safety of moving vessels under all conditions of weather.

While it may be reasonable to say that the statute does not absolutely prohibit anchoring in navigable channels or make it a fault to anchor where controlling conditions make it absolutely necessary, yet the question whether a vessel is anchored in such manner as to prevent or obstruct the passage of other vessels must be determined by looking not alone to the chart and to the geography of the situation but also to weather conditions and to the usual course of vessels using the thoroughfare.

I am of the opinion that the Seaconnet was so anchored as to obstruct the passage not only of the Georgia but of other vessels, and

that, as she was not forced to this anchorage by any sudden and unavoidable emergency, she was guilty of a violation of the statute.

[4] The Seaconnet is further charged with negligence in two particulars: That she had no officer on deck but only a watchman stationed on the bridge, who had been on duty continuously from 5:30 p. m. on March 14th until 6:10 on March 15th, the time of the collision, and that she adopted no proper method of warning by bell. If we take the evidence of the watchman, Rassmussen, literally, the Seaconnet was not performing her duty. The requirement of rule 12 of the Pilot Rules for Inland Waters and of Act June 7, 1897, art. 15d, is:

"A vessel when at anchor shall, at intervals of not more than one minute, ring a bell rapidly for about five seconds."

According to Rassmussen's repeated statement, he was ringing his bell about five seconds every second minute.

According to the testimony of several masters of vessels, the method of ringing the bell, by a cord 40 or 50 feet long attached to the tongue and extending to the bridge, was unusual and improper, and it was their opinion that by such a method the bell could not be rung properly. The evidence shows that the customary method of ringing the bell is by a small cord held in the hand, by which a man standing at the bell may strike the tongue quickly against the two sides of the bell alternately.

Capt. Gray of the Lexington testifies that the sound of the Seaconnet's bell was faint. Hazard, who was on the Packard, says the bell was ringing in a very dilatory way and not a quick, sharp, continuous ring.

It was doubtless the fact that the Seaconnet's bell was rung from time to time during the night, but the evidence from the Seaconnet is insufficient to show that it was rung in accordance with the rule, and the evidence from the Georgia preponderates to the contrary.

The Georgia was properly manned and her lookout was proper. She heard no bell in season to enable her to change her course to any practical extent before the collision. In fact, the bell was not heard until after the smokestack of the Seaconnet was sighted.

While it is suggested that the deposition of Rassmussen, which shows the Seaconnet to have been guilty of a violation of the rule, should not be taken literally, yet, as it is entirely in accordance with probability that Rassmussen's ringing of the bell was not in accordance with the requirement of the statute, this evidence cannot be disregarded. The occasion was one requiring special diligence, and I am of the opinion that the Seaconnet should have taken greater precautions and should have provided for a more efficient ringing of her bell.

It may be useful to include in this opinion reference to cases collected by counsel on the immediate questions at issue.

Counsel for the Georgia cite the following cases on the question of improper anchorage:

Cases prior to the statute: *Ailsa v. La Bourgogne* (D. C.) 76 Fed. 868, affirmed 86 Fed. 475, 30 C. C. A. 203; *The Benj. A. Van Brunt*, 98 Fed. 131, 38 C. C. A. 668; *U. S. v. St. Louis & T. Co.*, 184 U. S. 247, 22 Sup. Ct. 350, 46 L. Ed. 520; *The Silica* (D. C.) 27 Fed. 467; *The S. Shaw* (D. C.) 6 Fed. 93; *The Scioto*, 2 Ware (Dav. 359) 360, Fed. Cas. No. 12,508; *Spencer, Marine Collisions*, § 99.

Cases arising under the statute: *The Persian Hesperides*, 181 Fed. 439, 104 C. C. A. 187; *City of Birmingham*, 138 Fed. 555, 71 C. C. A. 115; *The Itasca* (D. C.) 117 Fed. 885; *The Maggie Ellen* (D. C.) 115 Fed. 442; *The Caldys*, 153 Fed. 837, 83 C. C. A. 19; *The Margaret J. Sanford* (D. C.) 203 Fed. 331; *The Annasona* (D. C.) 166 Fed. 801.

As to precautions when at anchor: *The John H. Starin*, 122 Fed. 236, 58 C. C. A. 600; *The Ailsa* (D. C.) 76 Fed. 868; *The Ogemaw* (D. C.) 32 Fed. 919-925; *The Frank S. Hall* (D. C.) 116 Fed. 559.

Counsel for the *Seaconnet* cite on the question of anchorage: *The Margaret J. Sanford* (D. C.) 203 Fed. 331; *The A. P. Skidmore—City of Lawrence*, 115 Fed. 791, 53 C. C. A. 287; *The Job J. Jackson—N. J. Trainer* (D. C.) 144 Fed. 896; *The Europe*, 190 Fed. 475, 111 C. C. A. 307; *The City of Dundee*, 108 Fed. 679, 47 C. C. A. 581; *The Northern Queen* (D. C.) 117 Fed. 906.

As to the *Seaconnet's* lookout: *The Bermuda* (D. C.) 17 Fed. 397; *The Altenower* (C. C.) 39 Fed. 118; *The Blue Jacket*, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469; *The Annie Lindsley*, 104 U. S. 185-191, 26 L. Ed. 716.

Upon the whole case I am of the opinion that both vessels were in fault for the collision, for the reasons above set forth.

A draft decree may be presented accordingly.

STROUT v. UNITED SHOE MACHINERY CO. et al.

(District Court, D. Massachusetts. September 15, 1913.)

No. 203.

1. PLEADING (§ 180*)—INCONSISTENT ALLEGATIONS—EFFECT.

Where, in a suit by a substituted trustee of a corporation to recover damages alleged to have resulted to the corporation's business from a secret conspiracy by defendants in alleged violation of the anti-trust act, plaintiff described himself as trustee of the corporation, and alleged that he had been appointed substituted trustee in a proceeding in Maine for the dissolution of the corporation, and that the decree vested in his predecessor all the corporation's choses in action, property, etc., and that he had succeeded thereto, and had received authority to collect all debts and claims due the corporation, his denial in a replication that the corporation or its officers, after the decree had been entered, were without control of the corporation's affairs or management, was inconsistent with the allegations of his declaration, and no force could be given thereto.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 358-384; Dec. Dig. § 180.*]

2. CORPORATIONS (§ 619*)—ACTS AFTER DISSOLUTION—LIABILITY OF OFFICERS TO TRUSTEE.

Where a trustee was appointed for a corporation in dissolution proceedings February 17, 1905, and a substituted trustee thereafter sued

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

defendants, who controlled the corporation, for alleged injuries to its business, charging that they so managed the corporation as to destroy its competition with another corporation, and refused to permit use of patents owned by plaintiff's company, or permit it to do business, plaintiff could not recover for any of such alleged acts committed after the date of the appointment of a trustee, since from that time defendants were not in control of the company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2459, 2460; Dec. Dig. § 619.*]

3. LIMITATION OF ACTIONS (§ 34*)—DISSOLUTION OF CORPORATION—ACTION BY TRUSTEE.

A trustee of a corporation, appointed in dissolution proceedings, could not recover damages alleged to have resulted to its business from a conspiracy of those previously in control, preventing the corporation from doing business and using its patents, where the acts charged were committed more than six years prior to the date of the writ.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 151-157; Dec. Dig. § 34.*]

4. LIMITATION OF ACTIONS (§ 192*)—REPLY—FRAUDULENT CONCEALMENT.

Where plaintiff alleges fraudulent concealment in reply to a defense of limitations, it is not sufficient to allege generally that defendants fraudulently concealed the cause of action, but the fraud whereby such concealment was effected must be specified; nor will specific allegations of frauds or falsehoods by the defendants suffice, unless concealment of the cause of action would necessarily follow from them.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 699-702; Dec. Dig. § 192.*]

5. LIMITATION OF ACTIONS (§ 192*)—PLEADING—FRAUDULENT CONCEALMENT.

Plaintiff, in alleging fraudulent concealment in reply to a defense of limitations, must specify the date and circumstances of his discovery of the cause of action, and show that, though he exercised reasonable diligence, he was unable to discover it sooner.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 699-702; Dec. Dig. § 192.*]

6. LIMITATION OF ACTIONS (§ 192*)—FRAUDULENT CONCEALMENT—PLEADING.

Where, in an action by a substituted trustee of a corporation, appointed in dissolution proceedings, against those previously in control of the company for damages, due to defendants' acts, which were alleged to constitute an unlawful restraint of trade only, defendants pleaded limitations, and there was nothing to show a fiduciary relation between defendants and plaintiff, or his predecessor, requiring a disclosure of the facts, nor any breach of trust alleged as a basis of the action, there was nothing to relieve plaintiff from the obligation of specifying the fraud in a reply alleging fraudulent concealment of the cause of action; and hence a reply merely alleging that defendants fraudulently concealed the cause of action from plaintiff and his predecessor was insufficient.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 699-702; Dec. Dig. § 192.*]

7. LIMITATION OF ACTIONS (§ 104*)—CAUSE OF ACTION—ACCRUAL—FRAUDULENT CONCEALMENT.

If defendants, having secured control of the G. Company by buying a majority of its stock, elected officers or directors of their own choosing, including the three individual defendants to form the G. Company's entire board of directors, and continued them in office at successive elections, stopping the G. Company's business, and enforcing the disuse of its patents in order to prevent its competition with another concern in which they were interested, such acts, not having been done in secret,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

were incapable of alleged fraudulent concealment, so as to entitle the G. Company's trustee, in dissolution proceedings, to recover damages after limitations had run, on the ground that the acts had been fraudulently concealed by the defendants, and that the trustee had acquired knowledge thereof within the period limited.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 511-513; Dec. Dig. § 104.*]

8. PLEADING (§ 360*)—AVOIDANCE—FRAUDULENT CONCEALMENT—NOTICE—REPORTS OF DECIDED CASES.

Where, in a suit by a corporation's trustee in dissolution proceedings to recover damages against defendants for an alleged unlawful restraint of trade in managing the corporation, defendants pleaded limitations, and plaintiff replied that the cause of action had been fraudulently concealed by defendants, reports of decided cases involving the matters in controversy could not be resorted to, on a motion to strike the replication, as showing that defendants' alleged acts were matters of public record, which they had no power to conceal.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1129-1146; Dec. Dig. § 360.*]

At Law. Action by Charles A. Strout, as substituted trustee of the Goddu Company, against the United Shoe Machinery Company and others. On motion to strike out amendment to special replication, and on demurrer to such replication. Judgment for defendants.

Whipple, Sears & Ogden and Dunbar & Rackemann, all of Boston, Mass., for complainant.

Coolidge & Hight, W. H. Coolidge, C. A. Hight, and Charles F. Choate, Jr., all of Boston, Mass., for defendants.

DODGE, Circuit Judge. The plaintiff's writ is dated September 8, 1911. A motion to dismiss was denied, and a plea in abatement overruled, March 30, 1912. 195 Fed. 313. The declaration was amended, and a demurrer to the amended declaration overruled, January 31, 1913. 202 Fed. 602. The opinion then filed explains the nature of the case and summarizes the allegations of the amended declaration then material.

On March 4, 1913, the defendants answered the amended declaration. Besides a denial of each and every allegation, their answer contains, among others, affirmative allegations in substance as follows:

The cause of action declared on did not accrue within six years before the suing out of the plaintiff's writ.

The action was not commenced within six years next after the cause of action accrued.

The company whereof the plaintiff is trustee was dissolved and its charter terminated by decree of the Maine Supreme Court entered February 17, 1905, in equity proceedings under Maine statutes, providing for voluntary dissolution of corporations; a trustee was on that day appointed to wind up its affairs according to said statutes; and from that day until the present time, and for more than six years prior to the bringing of this suit, the entire control and management of its affairs was in said court, and the defendants have not had, nor could have, anything to do therewith. The cause of action accrued before February 17, 1905, and not within six years prior to the suing out of the writ.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

On March 26, 1913, the defendants moved that the plaintiff be required to reply to the new matter thus set up in avoidance of the action. This motion was based on the provisions of Rev. Laws Mass. c. 173, § 31. It was allowed April 3, 1913.

In a "special replication," filed April 5, 1913, the plaintiff admitted:

"That on said date, February 17, 1905, a trustee was appointed, as provided by the statutes of the state of Maine, to wind up the affairs of the corporation"

—and denied all the remaining allegations above summarized from the answer.

On April 10, 1913, the defendants demurred to this special replication, assigning causes of demurrer below considered.

On April 12, 1913, the plaintiff moved to strike out this demurrer, for the alleged reasons that the replication is in exact compliance with the motion to require it, and the statute whereon the same was based; it contains no new allegations not contained in the amended declaration, and can therefore raise no new issue not open on demurrer to the declaration; it does not in fact raise any such new issue; Rev. Laws Mass. c. 173, § 31, was not intended to enable a defendant, by an order requiring a replication, to continue to file dilatory pleadings preventing the plaintiff from proceeding to trial. This motion was denied April 28, 1913.

On May 3, 1913, the special replication was amended by adding thereto the following:

"The plaintiff further says that the defendants and each of them (in pursuance of the plan and conspiracy set forth in his amended declaration) fraudulently concealed the cause of action set forth in said amended declaration from the knowledge of the trustee appointed on February 17, 1905, as aforesaid, and that said trustee did not, prior to six years before the commencement of this action, or for some time thereafter, discover said cause of action."

On May 16, 1913, the defendants moved (leave to do so having been reserved to them when the above amendment was allowed) to strike out the amendment on the ground that it is manifestly false and sham pleading. In their motion they alleged, among other things:

That it is manifest on the face of the record that the cause of action and the matters and things complained of in the declaration could not be concealed by the defendants, not being within their control or secret knowledge, but being matters of record or of common knowledge, presumed to have been known by the trustee, of which he had means of discovery, and must have discovered if he exercised due diligence.

That it is of public record and general knowledge that the claims whereon the cause of action is based have been litigated in the Massachusetts courts for more than ten years before this suit was begun. (Certain Massachusetts decisions were here cited.)

That the plaintiff ought not to be allowed to evade the question raised under the statute of limitations by their demurrer to the replication, by thus amending said replication.

On May 16, 1913, the defendants also demurred to the replication as amended, assigning the grounds assigned in their demurrer to the

original replication, with others. These grounds are now, after a hearing had, to be considered.

[1] The plaintiff's denials, in his replication, of the defendants' allegations that the Goddu Company, whereof he is trustee, was dissolved and its charter terminated by the decree of the Maine court, and that from and after the date of that decree the entire control and management of the company's affairs was with the Maine court, and not with the defendants, and that the defendants neither had nor could have any control or management of said affairs after said date, seem to me wholly inconsistent with his own allegations elsewhere regarding the decree referred to and its effect, as well as with his admission above quoted from his replication.

In his writ the plaintiff describes himself as trustee of the company. In his declaration he says he is successor as trustee to Whitehouse, appointed trustee by the Maine court's decree of February 17, 1905, "in a proceeding in equity for the dissolution of said corporation and the appointment of a trustee to wind up its affairs in accordance with the statutes of Maine in such case made and provided." In the same declaration he further says that the decree vested in said Whitehouse, as statutory successor and quasi assignee of the company, all its property, debts, claims, and choses in action; also that by Whitehouse's resignation, and his own appointment in Whitehouse's place by the same court, he had succeeded to Whitehouse in title to all the company's property and rights of action; and in the same declaration he says he has been duly appointed by the same court to collect all debts and claims due the company, and to take possession of all its property, of every name and nature.

The Maine statutes here referred to, the proceedings under them in the Maine court, and the effect of these proceedings have been considered in the opinion dated March 30, 1912, upon the plea in abatement and motion to dismiss in this case. 195 Fed. 313. It was there held, in the plaintiff's favor, that the trustee appointed in 1905 had capacity to bring this suit, because his appointment vested him, by operation of law, with the title of the dissolved corporation (195 Fed. 321, 322), and that his power to sue was unaffected by the limit of three years during which the statutes allowed the corporate existence of the company to continue, for certain limited purposes, after its final dissolution by the decree entered February 17, 1905.

[2, 3] Having admitted as above, as well as having alleged it on his own behalf, that a trustee was appointed by that decree under the statutes mentioned to wind up the dissolved company's affairs, I am unable to see how any effect can be given to any denial by the plaintiff that the company or its officers were, after the decree had been entered, without control of its affairs or management. The record shows that these statements were not open to denial by him. No denial such as the plaintiff now attempts can stand with his own allegations and admissions. I am obliged to consider it clear as matter of law upon the record that no act complained of by him as unlawful, and as having injured the Goddu Company in its business or property,

could have been done by the defendants after February 17, 1905. The mere existence of the alleged combination or conspiracy, however long continued, could not have injured that company's business or property, nor has the plaintiff said that its business or property were thus injured. Acts which the defendants had planned to do, as part of their alleged combination or conspiracy, must have been done by the defendants, and must have caused the injuries complained of, if recovery for them is to be had under the Anti-Trust Act. The injuries complained of are (1) waste of the Goddu Company's assets by enforced disuse, and (2) loss through such disuse of the value of its patents, etc., until they were about to expire. The defendants' acts alleged to have inflicted these injuries are (1) so managing the Goddu Company as to prevent or destroy its competition with the defendant United Shoe Machinery Company, instead of carrying on and developing its own business, and (2) refusing to cause it to use its own patents or let it do any business. Only while the defendants held their alleged control of the Goddu Company, could they have done any of these acts. Only while it was capable of doing business, could its business have been injured by such acts. The declaration alleges that the acts were done by virtue of the same alleged control, without which allegation, indeed, it would not have made the acts appear as unlawful under the statute. That none of the acts referred to could have been done after title and possession of all the Goddu Company's property, of every kind, had passed from it to a trustee, in dissolution proceedings of the kind alleged and admitted as above, and that the defendants' alleged control of the company was of necessity ended by such appointment, as well as its capacity to do business capable of injury by them, I must regard as obvious. If so, no injury for which the company or its trustee can recover can have been done to it within six years prior to the date of the writ. The demurrer to the replication, so far as it rests on the grounds numbered 8-12, inclusive, is therefore sustained.

The amendment to the replication is an attempt to avert the above conclusion by setting up that the trustee under the appointment made February 17, 1905 (or his successor, the plaintiff), did not find out that any cause of action existed prior to that time; the same having been fraudulently concealed by the defendants, and not discovered by the trustee until within six years before the date of the writ.

[4] A plaintiff who, in reply to a defense setting up the statute of limitations, alleges fraudulent concealment of a cause of action by the defendant, is required to specify the fraud whereby such concealment was effected. It is not sufficient to allege generally that the defendant fraudulently concealed the cause of action, without further specification. This is one of the cases wherein a general allegation of fraud is not enough. Nor will specific allegations of frauds or falsehoods by the defendant suffice, unless concealment of the cause of action would necessarily follow from them. *Wood v. Carpenter*, 101 U. S. 135, 139, 25 L. Ed. 807.

[5] A plaintiff, answering such a defense, is also required to speci-

fy the date and circumstances of his discovery of the cause of action, and his allegations must show that he exercised reasonable diligence, yet was unable to discover it earlier. *Wood v. Carpenter*, 101 U. S. 135, 140, 25 L. Ed. 807; *Hardt v. Heidweyer*, 152 U. S. 547, 559, 560, 14 Sup. Ct. 671, 38 L. Ed. 548.

[6] No such specifications are found in the plaintiff's replication as amended. The amendment amounts to no more than a bare allegation that the defendants fraudulently concealed the cause of action from him or his predecessor. No attempt is made in it to comply with either of the above requirements, nor does the bracketed clause, asserting the concealment to have been "in pursuance of the plan of conspiracy set forth," in the declaration, do anything toward supplying what is deficient. The plaintiff says that, because he had alleged three of the defendants to have been officers of the Goddu Company when the acts claimed to have injured that company were done, the above requirements do not apply. It is true that, when the cause of action is fraud or breach of trust, secret in its nature, and there are fiduciary relations requiring disclosure by the defendants, fraudulent concealment of the cause of action may appear from the transaction itself, sufficiently for the purpose of preventing the statutory limitation from beginning to run. But this plaintiff has not made the defendants' acts complained of appear to have been secret in their nature, or such that their existence could not be readily ascertained; nor has he made it appear that any fiduciary relations requiring disclosure existed between himself or his predecessor and the defendants. Nor, if he had made these things appear, has he based his claim upon fraud or breach of trust. His cause of action is unlawful restraint of trade only. There is nothing, therefore, which relieves him from specifying as ordinarily required, if he undertakes to assert fraudulent concealment of the cause of action in order to escape the statute of limitations, and I must sustain the demurrer so far as it rests on the grounds numbered 7a-7e, inclusive.

[7] The defendants contend that all the acts complained of in the declaration as having injured the Goddu Company's business or property appear from the declaration itself to have been incapable of concealment, and that the amendment to the replication therefore makes the replication inconsistent with the declaration itself. In this I am obliged to think they are right. If their control of the Goddu Company was acquired by buying a majority of its stock after negotiations with certain of its stockholders who owned it, if they thereupon elected officers or directors of the defendant Shoe Machinery Company, including the three individual defendants, to form the entire board of directors of the Goddu Company, and continued them in office at successive elections, and if they stopped the Goddu Company's business and enforced disuse of its patents by exercising the control thus acquired, the supposition that these doings might have been fraudulently concealed does not seem to me entitled to serious consideration. The declaration does not allege that these things

were done in secret, and, as has appeared, the later allegation that they were fraudulently concealed is unsupported by specifications. The plaintiff says that these acts were made unlawful by the purpose of the defendants, in combination, to do the above acts in restraint of trade, and that this purpose, if not disclosed to the trustee, was fraudulently concealed. No doubt it may be assumed that such a purpose, apart from the acts done, would not be disclosed; but, except so far as its existence is established by the alleged acts done, I do not see how it could have afforded this plaintiff any cause of action. The demurrer is sustained so far as it rests upon the ground numbered 7f.

The defendants contend that the amended declaration must be taken to have fully and finally set forth the cause of action, and that, when the plaintiff undertakes to say in his amended replication that the cause of action was fraudulently concealed "in pursuance of the plan and conspiracy" described in the declaration, he so modifies or adds to the description there given as to present a cause of action different in some respects from that therein stated. The defendants contend that nothing of this kind can be done in a replication, that the attempt to do it constitutes a "departure" in pleading, and of itself makes the replication bad on demurrer. If the allegation referred to must be understood as setting up another act, planned as part of the combination or conspiracy complained of, and thereafter done by the defendants to the Goddu Company's injury, I think their contention right, and sustain their demurrer on the grounds, numbered 3-6, inclusive. If the words quoted need not be so understood, and the declaration seems to me so framed as to leave this subject to some doubt, they are without importance upon the questions raised by this demurrer.

[8] The defendants' motion to strike out the amendment to the replication is based in part upon grounds already considered in dealing with their demurrer. It is also based upon allegations that the facts found or recited in *Converse et al. v. United Shoe Machinery Co.*, 185 Mass. 422, 70 N. E. 444, and 209 Mass. 539, 95 N. E. 929, show the existence of the claims upon which the cause of action in this case is based to have been matters of public record, not within the defendants' power to conceal, of which the trustee had ample means of knowledge, and which he could not have failed to know had he exercised due diligence. Although it appears from the above reports of these cases that the first case was decided in 1904, and was brought against the defendants here by minority stockholders of the Goddu Company, for injury to their interest therein, alleged to have been done by the defendants while in control of that company, acquired by conspiracy to obtain such control, also that the second suit, decided in September, 1911, was brought by the same minority stockholders in equity, against the same defendants and the Goddu Company, to redress the same alleged injuries, and upon the claim that the defendants attempted to create a monopoly, I am not satisfied that the reports cited can properly be resorted to, upon a motion of this kind, for the purpose of establishing the conclusion for which the defendants contend. Having sustained the

demurrer to the amended replication, I shall deny the motion to strike out the amendment.

If the demurrer has been rightly sustained, the defense that the suit is barred by the statute of limitations has not been met. Judgment is therefore to be entered for the defendants.

THE AVALON.

THE POWER LAUNCHES C. F. CO. NOS. 2, 3, AND 4.

(District Court, D. Maryland. October 28, 1913.)

COLLISION (§ 95*)—STEAMER AND TOW MEETING—NEGLIGENT TOWAGE.

A bugeye 58 feet long, with a large number of passengers, while being towed down the river from Baltimore by a gasoline launch made fast to her starboard quarter, came into collision with a meeting steamer, which had signaled to pass port to port. The launch was in such position that the only man in charge could not see the steamer, and neither he nor the master of the tow, who was also the owner, was paying any attention to the course, which up to immediately before the collision was being directed by another launch with a line ahead, which with a third one, all belonging to the same owner, had been voluntarily assisting with the tow, as they were for some distance going in the same direction. There was room to pass in safety, and one of the launches answered the steamer's signal, but before the collision both the volunteer launches cast off. *Held*, on the evidence, that the steamer was not in fault, having no reason to apprehend collision until it was too late to avoid it; that it was brought about by the smaller vessel changing her course to port, due probably to the casting off of the two launches, one of which had been on the port side of the tow, and that the tow and all the launches were in fault.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200-202; Dec. Dig. § 95.*]

In Admiralty. Petition by the Baltimore, Chesapeake & Atlantic Railway Company, as owner of the steamer Avalon, for limitation of liability; also against the power launches C. F. Co. No. 2, C. F. Co. No. 3, and C. F. Co. No. 4, and the Consolidated Ferry Company, their owner, and against Gustav Bembe as owner of the bugeye Elisha, for collision; also suit by said Bembe against the Avalon. Decree in favor of the Avalon against all the other vessels.

Beverly W. Mister, of Baltimore, Md., for master of Elisha.

Daniel H. Hayne, of Baltimore, Md., for Baltimore, C. & A. Ry. Co.

Arthur D. Foster, of Baltimore, Md., for Consolidated Ferry Company.

George T. Mister and James Fluegel, both of Baltimore, Md., for intervening petitioners.

ROSE, District Judge. On May 22, 1913, the steamer Avalon and the bugeye Elisha were in collision. They came together about a quarter of a mile southwest of Lazaretto Point in the Fort McHenry Channel. The Avalon belonged to the Baltimore, Chesapeake & Atlantic

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Railway Company. It was about 190 feet long. At its best speed it could travel 12 knots an hour. At the time of the collision it was on one of its regular trips to Baltimore. The Elisha was of nine tons gross and five net tonnage. It was about 58 feet long. It was not using either the power with which it was equipped or its sails. It was in tow of a gasoline launch known as C. F. Co. No. 4. Up until almost the very instant of the collision two similar launches, the C. F. Co. No. 2 and the C. F. Co. No. 3, had been assisting in towing it. All three of the launches belonged to the Consolidated Ferry Company, a Maryland corporation. The Elisha was in charge of its master, one Gustav Bembe. He was also its sole owner. It is customary in the month of May for whole families of men, women, and children to go from their homes in Baltimore to truck farms in Anne Arundel county on the south side of the Patapsco river, there to engage for some weeks in strawberry and pea picking. Bembe had agreed to take a number of such families from the foot of Chester street in Baltimore city to a landing in Curtis Bay. There were about 50 in the party. They had with them their trunks and boxes, rolls of bedding, household and kitchen utensils, etc. Much of this baggage was piled on the deck of the Elisha. The collision damaged both the steamer and the bugeye. One of the passengers on the latter in some way lost her life, and a number of them received injuries more or less serious or trivial in their nature. Much of their baggage is alleged to have been lost or damaged. Bembe libeled the Avalon and the three launches. Twenty-two separate suits were brought in the state courts against the owner of the Avalon to recover for injuries done to person or property by the collision. It filed a petition in this court to limit its liability, and to require all persons having claims against it growing out of the collision to come into the proceedings it thereby instituted. It filed a libel in rem against the launches, and one in personam against their owner and against Bembe as the owner of the Elisha. By agreement all these cases have been consolidated.

The collision took place in broad daylight. The air was free from any suggestion of fog or mist. The wind was about south southwest, and blowing somewhere from 10 to 13 miles an hour. When the two vessels came in sight of each other they were moving in very nearly opposite directions. Both were in the channel—the Avalon coming up almost in the center, the Elisha going down somewhat to the west of the center. When the vessels were within half a mile or less of each other the Elisha was heading a little to the westward of the channel course, the Avalon directly upon it. The latter accordingly blew one whistle, and put its head slightly to starboard promptly thereafter steadying upon its course. One of the power boats at that time fast to the Elisha replied with one whistle, which, however, was not heard on the Avalon. Up to this time everything had proceeded according to rule. If each of the two vessels had done what each had agreed to do they would have passed each other in safety. That they would have done so is shown by the testimony of the man in launch No. 3. That launch was lashed to the port quarter of the Elisha. As the Avalon

approached, the man in it saw that the steamer would pass to the port of the bugeye. The waves from it would tend to chafe the side of his launch against the quarter of the Elisha. His boat was used, as we shall see, for carrying passengers. It had been recently painted. He did not wish to run any risks of having its paint scratched, and he accordingly for that, as well as for another reason to be hereafter mentioned, cast off from the Elisha.

It is certain that either the steamer or the bugeye did not keep its course, but went to port and thereby caused the collision. Each says the other did so. The experienced master of the Avalon was himself in the pilot house and in charge. A bright and capable young quarter-master was at the wheel. Both of them impressed me favorably. The captain had the Elisha in plain view. He saw its decks crowded with people. Deliberately to change his course so as to take his vessel into the bugeye would have been to have attempted wholesale murder in cold blood. It is suggested by the proctors for the bugeye and the launches that such change of course was not deliberate, but was made in an unwise effort to escape from the consequences of an earlier mistake in navigation. The Avalon and the Elisha were not at the time the only craft in the channel. The powerful sea-going tug Britannia, with the large four-masted schooner Addison E. Bullard in tow on a hawser of 125 fathoms in length, had started out shortly after the Elisha. It was traveling faster than the latter, and at the time of the collision the Britannia was some distance ahead of the bugeye, the Bullard some distance behind it. For the launches and the bugeye it is said that the courses upon which the Britannia and its tow and the Elisha were moving were so close together that there was not room for the Avalon safely to pass between them at the speed at which it was moving. The suggestion is made that at the last moment the master of the Avalon became fearful that he would run into the Britannia, and in attempting to avoid that result made such a change of course as carried him into the Elisha. I do not think the facts sustain this contention. Captain Dunn of the Britannia testifies that there was 400 feet between his course and that of the Elisha. Other witnesses estimate this distance as considerably less, but it is significant that no one on either the Britannia or the Bullard ever for a moment thought that there was the slightest danger that the Avalon would strike either. Moreover, when the Avalon did blow its one whistle no one on the Britannia supposed that such whistle was intended for it, and no reply was made to it. Had the Britannia been then close to the Elisha the natural inference would have been that the Avalon's signal was intended for the tug.

I am satisfied that the collision did not result from any alteration of course on the part of the Avalon. It must then have been brought about by a change in that of the Elisha. The conditions controlling the navigation of the latter were very different from those prevailing on the steamer. The Elisha's crew consisted of its master and one other man. The latter was, as he testified, occupied altogether in keeping the children of the passengers out of danger. In short, he was discharging the duties of a nurse rather than those of a sailor. The cap-

tain says he did not consider himself as responsible for the navigation of his vessel. He had hired the launch to tow him, and in his view he was in its hands. This launch was C. F. Co. No. 4. It was some 28 feet long, and of 12 horse power. It was lashed to the starboard quarter of the Elisha in such manner that its stern was beyond that of the bugeye. There was only one man on it. As its engine and wheel were at its stern, he was necessarily required to be there also. At the coroner's inquest over the body of the passenger who was killed, he testified that the trunks and baggage of the passengers were piled so high on the deck of the Elisha that he could not see over them, but that he supposed the captain of the Elisha was keeping a lookout. The latter, on the other hand, said that he did not feel bound to do so. He had not hired the other two launches. All three of them belonged to the same owner. It so happened that the Elisha was ready to start about 12:30 p. m. At that hour launches Nos. 2 and 3 were in the daily habit of going to Riverview, an excursion resort on the north side of the Patapsco river some little distance beyond Lazaretto Point. They there made a business of taking visitors to the resort out on the water for short trips. As the course of the Elisha as far as Lazaretto Point would be identical with their own, they offered to assist in towing her. Launch No. 3 made fast to her port quarter in a position similar to that occupied by No. 4 on the starboard quarter. No. 2 was the smallest of the three. It went ahead of the Elisha, and took a line from the latter's bow. Launches Nos. 2 and 3, so soon as the flotilla had passed Lazaretto Point, intended to cast off. From that point their course diverged from that of the Elisha. She was to go to the south and west—they to the north and east.

As already mentioned, according to the testimony of the man in charge of launch No. 3, his fear that the approach of the Avalon would scratch his new paint hastened the moment at which he cast off from the Elisha. He called to the captain of the latter to slacken off his line. When the request was complied with he cast off, went ahead and alongside of launch No. 2. He took a line from No. 2 and went ahead of it. About this time he says he heard the whistle from the Avalon, and answered it. He then called to the man in No. 2 to cast off the line from the Elisha and to turn to Riverview. Launch No. 2 did so, but by this time the Avalon had gotten quite close. Launch No. 3 went off to the westward. Launch No. 2 to the eastward of the steamer. Both escaped the collision. Neither the man on No. 2 nor the man on No. 3 felt themselves in any way responsible for the Elisha, in spite of the fact that it was from the latter that the Avalon's signal was answered. Each of the men in charge of these two launches testified at the coroner's inquest that he thought one whistle meant to go to port, and the man in charge of No. 2 at that time said that they all did go to port, as he, himself, certainly did.

It is now suggested that they were confused at the inquest, and did not accurately express their meaning. Both of them, however, testified in open court, as did the man in charge of the other launch, and indeed most of the other witnesses. No one of

the three appeared to me to be qualified to take part in towing a vessel in frequented waters in which it was likely that its movements would have to be directed with reference to those of other ships. With three boats so manned participating in the navigation of the Elisha anything might happen. What did happen is not difficult to understand. The man on No. 3 first occupied himself and the captain of the Elisha in getting free from the latter. Then he went ahead and took the attention of No. 2 in getting a line from it, and then he told No. 2 to cast off from the bugeye. When No. 2 started to obey this direction, the one man on the Elisha besides the master busied himself in pulling in the line. The withdrawal of the launch which on the port quarter had balanced the launch on the starboard quarter, and the slackening up and casting off of the launch which had been towing in front, would, in view of the direction of the wind, have tended to throw the Elisha's head to port. Such tendency might have been controlled by the Elisha's helm or by that of launch No. 4, but the captain of the Elisha did not seem to think that any action on his part was necessary, while the man in launch No. 4 was, as he testified at the coroner's inquest, at that time engaged in oiling his engines. I have no doubt that the Elisha did change its course from one which would have carried it entirely clear of that of the Avalon to one which intersected that of the latter. Had this change not been made, there would have been no collision. The change was the result of the careless and unskillful way in which it and the launches were navigated.

It is suggested that it would have been better navigation on the part of the Avalon to have passed the Britannia and its tow port to port. With this suggestion I do not agree. The captain of the Britannia himself says there was not room between his tug and tow and the wharves on the northern side of the channel to have made such course either safe or practicable. It may be that he was not as close to those wharves as he thinks he was. Nevertheless, the wind was from the south southwest, the effect of which was to send his tow somewhat to the northward and eastward of the course of the tug. It would seem that the captain of the Avalon in not making the maneuver suggested acted wisely. In any event whether he should or should not have made the attempt was a question upon which he was entitled to exercise his own judgment.

It is also contended that the Avalon might have passed the Elisha starboard to starboard, after having given the proper signals to indicate such purpose. Here again it is sought to be wise after the event. The ordinary rule of the road is to pass port to port. There are doubtless many circumstances in which it may be departed from, and perhaps some in which it must be, but when two ships are approaching each other head on, or nearly so, it is, unless conditions are peculiar, their duty is to follow it. Very shortly before the collision the Elisha was headed in the direction in which it really wanted to go, viz., slightly towards the Anne Arundel shore. Under such circumstances, had the Avalon attempted to cross the

Elisha's bow and any accident had happened, it could not have escaped liability.

It is said that if the Avalon had been somewhere other than it was, the change of course by the Elisha could have done no harm. True, but not important. There is no doubt that the Avalon was the burdened vessel. The Elisha was the privileged. Nevertheless, the latter was bound to keep its own course and speed.

It is strenuously argued that even if the Elisha had not changed its course, the Avalon would have passed close to it, and that the Avalon was going much faster than its officers now say they think it was. These contentions may be well founded, but it does not follow if they are that the Avalon was at fault. It was not bound to anticipate that the Elisha would do what the Elisha did. Nor does the testimony disclose that the Avalon can be held liable under what is called the doctrine of the last clear chance. It does not appear that after the Elisha's change of course was perceived upon the Avalon, or would have been perceived if reasonable care had been exercised, the Avalon could have done anything to avoid the collision. A very little while before the Elisha's change of course was perceived, the master of the Avalon had directed its engines to be put under half speed. After he saw the Elisha had changed its course he did not stop or do anything further to slacken the pace at which his vessel was moving. The reason given by him for not doing so is conclusive. After the change of course took place nothing he could do would have prevented a collision. He could choose between running into the Elisha or letting the Elisha run into him. Other choice he had none. If he slackened his speed he would strike the Elisha. If he did it would almost inevitably sink her with great loss of life. If he kept up his speed there was a chance that the collision would take the form it actually did, viz., that the Elisha would strike his side. The master of the latter at the very last moment attempted to go to starboard, and at the instant the vessels came together it appears probable that the head of the bugeye had begun to move in that direction. The consequences to be anticipated from a collision in which the Elisha ran into the Avalon were far less serious than those which would have almost certainly followed had the Avalon run into the Elisha. So soon as the master of the steamer saw that he would not strike the Elisha, although the Elisha would strike him, he ordered his engines stopped. He did not reverse because of the increased danger in which persons who had been thrown overboard from the Elisha would thereby be put. The Avalon was not in any wise at fault.

How is responsibility to be distributed among the Elisha and the three launches? The former says that no blame can be imputed to it. Its navigation was entirely in charge of power boat No. 4. When the control of the navigation of the tow is completely in the hands of the tug, the latter and not the former is liable for faults in such navigation, provided the tug so selected might reasonably be believed to be of such capacity and to be so equipped and manned as to be able to conduct such navigation safely. It should have been clear to any one

that in the position in which launch No. 4 was lashed to the Elisha one man on it could not safely take charge of the navigation of both the vessels. He could not keep a proper lookout, and he did not attempt to do so. The master of the Elisha could not transfer responsibility for the lives on board his vessel to one who was obviously unable safely to assume it. As the owner and master of the Elisha was one and the same person, and as he himself was the individual whose lack of care directly contributed to the disaster, his liability cannot be limited. This conclusion, however, does not relieve power boat No. 4. It undertook to do more than it was manned to accomplish. It made no attempt to arrive at a distinct understanding in advance as to what part of the navigation it would take charge of and what part was to be looked after by the crew of the Elisha, or by the other launches.

It has been urged that neither of the latter can be held liable because it is said they were not engaged to do any towing. I am persuaded that they contributed to bring about the accident. As already explained, their casting off when and as they did had a large, if not a principal, share in causing the unfortunate change of course by the Elisha. To engage in such maneuvers at the time the Avalon was swiftly approaching was, under all the circumstances, highly negligent.

The Avalon also filed a libel in personam against the Consolidated Ferry Company as the owner of the launches in question. I am informed that it is unnecessary to consider whether this company is entitled to the benefit of the limited liability provisions of law or not, as it is said that the three launches in question constitute all its assets.

It follows that Bembe and power launches 2, 3, and 4 are held solely responsible for the collision.

If it be necessary, the usual order for a reference to ascertain the amount of damages will be made.

If either Bembe or the claimant of the launches shall desire to raise the question as to primary liability as between themselves, I will hear them.

GRIFFIN v. MORGAN.

(District Court, D. Vermont. October 27, 1913.)

No. 23.

1. WILLS (§ 439*)—CONSTRUCTION—INTENTION OF TESTATOR.

In construing a will, the intention of testator expressed therein, if consistent with rules of law, must prevail over all other rules of construction.

[Ed. Note.—For other cases, see Wills. Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.*]

2. WILLS (§ 69*)—DEFINITION.

A will is the legal declaration of a man's intention to be performed after his death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 183; Dec. Dig. § 69.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7461-7468, 7835.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. WILLS (§ 601*)—CONSTRUCTION—DEVISE OVER AFTER FEE.

In the devolution of real property by will, it is competent for testator to provide for a devise over following a devise in fee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1340-1350, 1608; Dec. Dig. § 601.*]

4. WILLS (§ 601*)—CONSTRUCTION—ESTATE DEVISED.

Testatrix having two daughters, one unmarried, bequeathed the residue of her estate to them equally for the natural life of the one who died first, each to hold and enjoy her share as if she were the absolute owner, with power to use such part of the corpus as she deemed necessary for her suitable support. Testatrix then declared that if the unmarried daughter and the husband of the married daughter should survive the latter, then she devised to the husband absolutely one-third of his wife's share and the remainder of the estate to the surviving unmarried daughter. *Held*, that the provision for the devise over was not void as in conflict with the devise in fee, and that on the married daughter dying before her sister, the remaining portion of the property passed in accordance with the devise over.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1340-1350, 1608; Dec. Dig. § 601.*]

In Equity. Suit by Clara L. Griffin against Ransom S. Morgan. Judgment for complainant.

Jenkins & Barker, of Glens Falls, N. Y., for orator.
M. C. Webber, of Rutland, Vt., for defendant.

MARTIN. District Judge. Mary W. Griffin died at her domicile in Glens Falls, N. Y., January 1, 1907, leaving a will which was duly probated in the Surrogate Court, in Warren county, N. Y., on the 14th day of January, 1907. Clara L. Griffin and Mrs. Julia G. Morgan were the only members of her family that survived her. By her will she made certain legacies, and the residue of her estate she disposed of in clause 2, which reads as follows:

"All the rest and residue of my estate both real and personal I give, devise and bequeath unto my two daughters, Julia G. Morgan and Clara L. Griffin equally share and share alike for and during the term of the natural life of that one of said daughters who shall die before the other, each of them to have, hold, possess and enjoy her half part thereof as if she were the absolute owner thereof, and each of my said daughters may if she deem it necessary and proper so to do, use up and consume not only the interest and income therefrom but also so much of the corpus of her half part of said rest and residue as she may deem necessary and proper for her suitable maintenance and support."

She further provided:

"If both said Clara and Ransom S. Morgan, husband of said Julia G. Morgan, shall survive said Julia then in such case I give, devise and bequeath unto said Ransom S. Morgan absolutely one third part of so much of said Julia's one half share of said rest and residue, as may remain at her decease and unto said Clara I give, devise and bequeath absolutely all the rest, residue and remainder of my estate of every name and nature whatsoever."

Mrs. Julia G. Morgan died at Rochester, Windsor county, Vt., on the 20th day of July, 1910, her husband, Ransom S. Morgan, and her sister, Clara L. Griffin, surviving her. She left a will, dated Au-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

gust 9, 1904, naming her husband as her sole legatee, devisee, and executor. Said will has been established in the probate court for the district of Hartford, Vt., and the said Ransom S. Morgan duly qualified as executor, and now has in his possession the whole of the estate of his deceased wife, all of which he claims under her will. His said wife received from her mother's estate, under the mother's will, as aforesaid, \$17,925.28 in personal assets.

There is no question as to the foregoing facts, the diverse citizenship, or that the amount involved exceeds \$3,000.

The complaint further alleges that the said Julia G. Morgan, at her death, was possessed of the property that she received from her mother's estate, and that the same is subject to the provisions of the mother's will, and under those provisions that two-thirds of it belongs to the plaintiff, with interest thereon since said Julia's decease. There are the usual allegations in the complaint, and the plaintiff prays judgment—

"that an account be taken of all and singular the moneys and personal property that the defendant has taken into his possession since the death of said Julia G. Morgan which was of the estate left by said Mary W. Griffin, or which was purchased by said Julia G. Morgan with the avails of said estate; and also that the said defendant may account with your orator for all and singular his dealings and transactions in regard to the said property; and that the defendant may be adjudged to pay to your orator what shall, upon the taking of such account, appear to be due her; and that your orator may have such other or further relief in the premises as the equity of the case may require and to your honor may seem just."

The defendant avers that:

"By the terms of the will of the said Mary W. Griffin the said Julia G. Morgan became the sole and absolute owner of all the property received by her from her mother's estate, so that she had full authority to take, hold, and dispose of the same as fully and as absolutely as she could any other property, being her sole property."

The defendant—

"denies that the orator is remediless at law on the facts alleged, if proved, and denies that the orator can obtain relief only in a court of equity if the facts alleged were true, and avers that the matters and things set forth in said bill of complaint are not sufficient to require defendant to answer thereto, and this defendant, agreeable to the rules in equity, demurs to said bill of complaint, and craves the benefit of a demurrer the same as if separately filed, for that the matters and things set forth in said bill of complaint are not sufficient to confer jurisdiction in equity, and for that there is abundant and adequate remedy at law."

The evidence was taken without argument on the defendant's demurrer, and briefs were submitted.

This court plainly has jurisdiction of the parties, and that the court of equity is the proper forum for this accounting is not questioned in the defendant's brief, wherefore the demurrer is overruled.

The plaintiff's right of recovery is challenged by the defendant on the ground that the devise over is repugnant to the preceding provision of clause second of the will of said Mary W. Griffin.

[1, 2] The first great principle in the exposition of wills, to which all other rules must yield, is that the intention of the testator, ex-

pressed in the will, shall prevail if it be consistent with the rules of law. This principle is generally asserted by every court having to do with the construction of testamentary dispositions of property. A will is "the legal declaration of a man's intentions, which he wills to be performed after his death." 2 Bl. Com. 499.

These intentions are to be found from the words, which ought to be carried into effect. They must be carried into effect unless inconsistent with some settled principle of law. Ambiguous expressions are not to be classified as repugnant if the intent of the testator can be ascertained. The situation of the parties should always be taken into view. The ties of affection between the testator and his legatees, the motives which may reasonably be supposed to operate upon and to influence him in the disposition of his property, are all entitled to serious consideration in explaining doubtful words or ascertaining the meaning in which they are used. Courts should never resort to the principle of repugnancy when the meaning can be thus ascertained.

Prior to the case of *Pells v. Brown*, Cro. Jac. 590, decided by the King's Bench in 1619, it was frequently held that where a devise conferred an absolute beneficial power over dispositions, with a limitation over in the event of something happening, the limitation over was repugnant to the absolute beneficial power; and, in perusing some of those cases, it would seem as though the court made no great effort to study the intent of the testator. In the *Pells Case* lands were devised to A. and his heirs, but if he died without issue living at his death, then to B. The devise to A. was in words that conveyed a fee simple, and, according to many of the common-law cases prevailing prior to that time, no limitation would be permitted, because it was said that a conveyance in fee was a conveyance of the whole estate, and that nothing was left upon which the limitation over could operate; but under the statute of uses, a species of limitations, known as shifting or springing uses, had been recognized, which permitted ulterior estates to be created. The courts after the passage of the statute of wills, St. 32 Hen. VIII, following the analogies furnished in conveyances to uses, and especially in support of the intention of the testator, came to recognize the validity of limitations over, though in a strict technical sense they were repugnant to the absolute devise preceding in testamentary documents, so that the doctrine that "a fee limited after a fee is good" is valid where the intent of the testator can be ascertained. The *Pells Case* established the validity and indestructibility of that species of limitations.

Lord Kenyon said in *Porter v. Bradley*, 3 Term Rep. 145, that ever since the *Pells Case* this doctrine has been regarded as the "foundation and, as it were, magna charta of this branch of the law." Since that time executory devises limiting a fee after a fee, upon some contingency operating to defeat the estate of the first taker, have become quite common. For more than a hundred years the trend of authorities has been that limitations over after the devise of a fee are not repugnant where the intent of the testator is apparent. The intent of the testator is, as it should be, the guiding star to all courts of law

which may have jurisdiction of the construction of testamentary documents.

Counsel for the defendant have cited *Stowell v. Hastings*, 59 Vt. 494, 8 Atl. 738, 59 Am. Rep. 748. That case is the most apt authority in support of the defendant's contention of any Vermont case, at least to which my attention has been called. The provisions of that will were:

"I give to my beloved wife, * * * The residue and remainder of all my estate, both real and personal, for her benefit and support, to use and dispose of as she may think proper. If any of the estate should be left in my wife's possession at her death, it is my will that the same should be equally divided between eight of my brothers and sisters," etc.

Judge Taft, speaking for the court, said:

"In determining what estate is given the first taker, the whole will should be considered, and all the clauses construed together. Even in those cases where an absolute estate is in terms given, if subsequent passages unequivocally show that the testator meant the legatee to take a life interest only, the prior gift is restricted accordingly"—and cites *Jarman on Wills*, c. 15; *Richardson v. Paige*, 54 Vt. 373; *McCloskey v. Gleason*, 56 Vt. 264, 48 Am. Rep. 770; *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322.

It is further stated:

"If we could construe the will in question as giving the residue to Mrs. Stowell for her support only, which is the construction the appellants insist should be given it, their claim might be upheld. It was given for her support, but not for that alone. It was for her *benefit*, and using the synonyms of the word, it was for her *advantage*, her *profit*, her *gain*, her *account*, her *interest*. The word 'benefit' and its synonyms mean more than simply support; they mean any purpose to which the absolute owner of property can devote it; and, given for that purpose, they mean that Mrs. Stowell had unlimited power to dispose of it at her pleasure."

I do not concur in the court's interpretation of the meaning of the word "benefit," as therein expressed. The same court, and others, has construed wills making absolute gifts for "*comfort and support*," and what may remain at death to be distributed to other heirs, as creating a life estate only, in that "*comfort and support*" are the uses to which the legatee can apply the property. To harmonize the decision of the court in the *Stowell-Hastings Will Case* with other like cases, the word "benefit" must be construed to mean more than "comfort." Which is the broader word, "comfort" or "benefit"? People do many things, supposing them to be for their comfort, in the gratification of their tastes, their desires, their wants, that are not, in fact, beneficial. The words "comfort and support" have been construed, over and over again, as a limitation to the bequest or devise where the meaning of the testator was apparent. The *Hastings will*, read with a view of ascertaining the meaning, instead of undertaking to get around it, would indicate to the layman, at least, if not to the lawyer, that he intended that his wife might use the estate for her support, and in addition thereto, for such things as she might deem beneficial to her, but she was not to will it, for if there was anything left, it was to go to his brothers and sisters; nevertheless the court said that the devise over was repugnant. I have sometimes queried

whether the reasoning of the court in this case in saying, "The whole will should be considered and all the clauses construed together," and "if subsequent passages unequivocally show that the testator meant the legatee to take a life interest only, the prior gift is restricted accordingly," and then holding that the language made use of in that will was intended as an unrestricted gift to the wife, was not as repugnant to the logic of the case as the devise over in *Mr. Hastings'* will was repugnant to the preceding provision thereof. Whether the conclusion of the court in that case merits criticism or not need not be further discussed, because in that case the court recognized that the first principle in the construction of wills is to ascertain the meaning of the testator, but held that because the testator used the word "benefit," he must have intended to make an absolute and unqualified gift to his wife and therefore the qualifying clause was repugnant.

No such construction should be given to the will in this case. Mary W. Griffin, at the time she executed the will in question, had of her own family but two daughters. That they were nearest to her heart is plainly to be seen in every phrase of her will. Clara was unmarried and she was first in her mother's mind and mother's care. She first gives her \$5,000, and then divides the residue equally between Clara and Julia. It is plainly to be seen that in the mother's mind Clara and Julia were each to possess one-half of that residue, without a trustee to handle it for them, and each was to enjoy her half part thereof by using the whole of the interest and so much of the "corpus" as she might deem necessary "for her suitable maintenance and support," and each was to be her own judge of what should or might be necessary "for her suitable maintenance and support," acting in good faith. Observe the language: Each may "hold, possess and enjoy her half part thereof as if she were the absolute owner thereof." The words "as if" indicate that there are qualifying clauses to follow, and those qualifying clauses are, in substance, that if said Julia shall survive said Clara, said Julia shall have all of said Clara's part not "used up and consumed in her lifetime"; and, further:

"If both said Clara and Ransom S. Morgan, husband of the said Julia G., survive said Julia, then in such case I give, devise and bequeath unto said Ransom S. Morgan absolutely one third part of so much of said Julia's one half share of said rest and residue as may remain at her decease, and unto said Clara I give, devise and bequeath absolutely all the rest, residue and remainder of my estate of every name and nature whatsoever."

With these clauses in view, she uses the expression "as if she were the absolute owner thereof."

[3] There can be no question whatever as to the intent of this testatrix, and therefore the *Hastings-Stowell* Case does not apply. It is simply a question as to whether a devise over can follow a provision that carries a fee. That was settled here in Vermont in *Richardson v. Paige*, *supra*, and recognized in *Hastings v. Stowell*.

[4] In *Richardson v. Paige* the question was whether the two provisions of the will could subsist together. The court recognized the doctrine in *Hibbard v. Hurlburt*, 10 Vt. 178, wherein Judge Phelps stated:

"Of his intention (the testator's) in this case, to create both estates there can be no doubt; and that intention must be effectuated, unless there be a legal impossibility that they should subsist together."

Applying the doctrine of *Hibbard v. Hurlburt*, cited with approval in *Richardson v. Paige* and *McCloskey v. Gleason*, there is no question in my mind that the devise over in the case at bar would be sustained by the Supreme Court of Vermont.

So far as this will is concerned, the construction to be given it is alike in both states, as will be seen in the citations given above and the following cases in New York: *Wager v. Wager*, 96 N. Y. 167; *Van Horne v. Campbell et al.*, 100 N. Y. 292, 3 N. E. 316, 771, 53 Am. Rep. 166; *Seaward v. Davis*, 198 N. Y. 415, 91 N. E. 1107; *Terry v. Wiggins*, 47 N. Y. 512; *Crozier v. Bray*, 120 N. Y. 366, 24 N. E. 712; *Leggett v. Firth*, 132 N. Y. 7, 29 N. E. 950.

The reasoning by Chief Justice Marshall in *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322, seems to have been followed by the federal court; and, as the question of repugnancy raised in the case at bar is by no means a new question, further citations are unnecessary.

As I construe the last will and testament of said Mary W. Griffin there is no repugnancy, and the devise over is valid. The defendant should account for two-thirds of the property that his wife received under her mother's will which at her decease had not been used by her for her "suitable maintenance and support."

PALMER et al. v. OREGON-WASHINGTON R. & NAV. CO.

(District Court, W. D. Washington, S. D. October 22, 1913.)

No. 1,367.

1. REMOVAL OF CAUSES (§ 36*)—CITIZENSHIP OF PARTIES—REAL OR NOMINAL PARTIES.

Insurance companies which have paid policies on property destroyed by fire caused by the negligence of a third person and have by equitable principles or by the terms of the policies been subrogated to the right of action of the owner against such person may maintain an action thereon in their own name under the laws of Washington, which require actions to be brought in the name of the real party in interest and permit the assignment of such causes of action, and where they join with the owner as plaintiffs they are parties in interest, and not merely nominal parties for the purpose of determining the removability of the cause.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

2. TRUSTS (§ 30½*)—CREATION—"EXPRESS TRUST."

An "express trust" can be created only by agreement of the parties to the trust concerning it (citing 3 Words and Phrases, pp. 2611-2613).

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 41, 41½; Dec. Dig. § 30½.*]

At Law. Action by O. K. Palmer, doing business as the Palmer Lumber & Manufacturing Company, the Fireman's Fund Insurance Company, the Norwich Union Fire Insurance Society, Limited, the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

London & Lancashire Fire Insurance Company, the National Fire Insurance Company, the Insurance Company of North America, the British America Assurance Company, and the Pennsylvania Fire Insurance Company, against the Oregon-Washington Railroad & Navigation Company. On motion to remand to state court. Granted.

Granger & Clarke, of Seattle, Wash., for plaintiffs.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for defendant.

CUSHMAN, District Judge. This matter is for decision upon a motion to remand the cause to the state court. The plaintiff Palmer is a citizen of Washington and resident of this district. The plaintiff insurance companies are corporations of California, Connecticut, Pennsylvania, and Great Britain, doing business in this state and district. The defendant is an Oregon corporation. The amount in controversy exceeds \$3,000.

The suit is one to recover for the loss, by fire, of the mill of the plaintiff Palmer, alleged to have been caused by the defendant's negligence. It appears that the plaintiff companies had insured the mill and paid the plaintiff Palmer, on account of its destruction, part of the loss alleged to have been caused, under policies of insurance providing:

"If this company (the insurance company) shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured, on receiving such payment."

Plaintiff relies upon the following authorities: Fireman's Fund Ins. Co. v. O. R. & N., 58 Wash. 332, 76 Pac. 1075; Pratt v. Radford, 52 Wis. 114, 8 N. W. 606; Wunderlich v. C. N. W., 93 Wis. 132, 66 N. W. 1144; Gaugler v. C., M., P. S. R. R. Co. (U. S. D. C., Mont.) 197 Fed. 79; Smith v. Lyon, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635; Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; Dickerson v. Spokane, 26 Wash. 292, 66 Pac. 381; McElroy v. Williams, 14 Wash. 627, 45 Pac. 306; State ex rel. Adjustment Co. v. Superior Court, 67 Wash. 355, 121 Pac. 847; Continental Ins. Co. v. Loud, 93 Mich. 139, 53 N. W. 394, 32 Am. St. Rep. 494; Fairbanks et al. v. Ry. Co., 115 Cal. 579, 47 Pac. 450; United Coal Co. v. Canon City Coal Co., 24 Colo. 116, 48 Pac. 1045; State Ins. Co. v. Oregon Ry. & Nav. Co., 20 Or. 563, 26 Pac. 838; Fireman's Ins. Co. v. Oregon Ry. & Nav. Co., 45 Or. 53, 76 Pac. 1075, 67 L. R. A. 161, 2 Ann. Cas. 360; First Presbyterian Society v. Goodrich Trans. Co. (C. C.) 7 Fed. 257; Glenn v. Marbury, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. Ed. 790; Kansas Midland Ry. Co. v. Brehm, 54 Kan. 751, 39 Pac. 690; Liverpool & G. W. S. S. Co. v. Phenix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; City of New Orleans v. Whitney, 138 U. S. 595, 11 Sup. Ct. 428, 34 L. Ed. 1106; Downs v. Pioneer Mutual Ins. Co., 41 Wash. 372, 83 Pac. 423; Thompson v. Cent. Ohio R. R. Co., 6 Wall. 134, 18 L. Ed. 765; Delaware Co. v. Diebold Safe & Lock Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 680; Mexican Cent. R. R. Co. v. Eckman, 187 U. S. 429, 23 Sup. Ct. 211,

47 L. Ed. 247; *Over v. R. R. Co.* (C. C.) 63 Fed. 34; *Evans v. Durango Land Co.*, 80 Fed. 433, 25 C. C. A. 531.

The following cases are relied upon by defendant: *Slauson v. Schwabacher Bros. & Co.*, 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 918; *Hall & Long v. R. R. Companies*, 13 Wall. 367, 20 L. Ed. 594; *Norwich Union Fire Ins. Society v. Standard Oil Co.*, 59 Fed. 984, 8 C. C. A. 433; *Turk v. Ill. Cent. Ry. Co.* (D. C.) 193 Fed. 252; *Kansas City M. & O. R. Co. v. Shutt*, 24 Okl. 96, 104 Pac. 51, 138 Am. St. Rep. 870, 20 Ann. Cas. 255.

It is conceded that, if the insurance companies are necessary parties to the action, the motion to remand is well taken. *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; *In re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 52 L. Ed. 904, 14 Ann. Cas. 1164; *Ex parte Harding*, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392.

At common law, Palmer, the holder of the legal cause of action, alone, could sue, and the insurance companies, if joined, on the motion to remand, would be held merely nominal parties, whose citizenship and residence would not affect the jurisdiction. *First Pres. Society of Green Bay v. Goodrich Trans. Co.* (C. C.) 7 Fed. 257; *London Assurance Co. v. Sainsbury*, 3 Doug. 245; *Mason v. Sainsbury*, Id. 60; *Yates v. Whyte*, 4 Bing. (N. C.) 272; *Hart v. Western R. Corporation*, 13 Metc. 105, 46 Am. Dec. 719; *Rockingham Mut. Fire Ins. Co. v. Boshier*, 39 Me. 254, 63 Am. Dec. 618; *Conn. Mut. Life Ins. Co. v. N. Y., etc., R. Co.*, 25 Conn. 270, 65 Am. Dec. 571; *Peoria Ins. Co. v. Frost*, 37 Ill. 333.

A different rule is admitted to exist in code states. *Glenn v. Marbury*, 145 U. S. 499 at 511, 12 Sup. Ct. 914, 36 L. Ed. 790.

The law of the state of Washington as to necessary parties is controlling in this court. *Thompson v. Railroad Co.*, 6 Wall. 134, 18 L. Ed. 765.

The Washington statute provides:

"There shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil action." *Pierce's Code* 1912, tit. 81—3.

"Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided by law." *Pierce's Code* 1912, 81—7.

"An executor or administrator, or guardian of a minor or person of unsound mind, a trustee of an express trust, or a person authorized by statute, may sue without joining the person for whose benefit the suit is prosecuted. A trustee of an express trust within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." *Pierce's Code* 1912, 81—9.

"The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in." *Pierce's Code* 1912, tit. 81—41.

"The defendant may set forth by answer as many defenses and counter-claims as he may have whether they be such as have been heretofore denominated legal or equitable, or both. They shall each be separately stated, and refer to the causes of action which they are intended to answer, in such a manner that they may be intelligibly distinguished." Paragraph 3, title 81—237, *Pierce's Code* 1912.

[1] Under the foregoing provisions, in the state of Washington, an insurance company, under the circumstances in this case, would be held a party in interest and could sue in its own name. *McElroy v. Williams*, 14 Wash. 627, 45 Pac. 306; *Fireman's Fund Ins. Co. v. O. R. & N. Co.*, 58 Wash. 332, 108 Pac. 770; *State of Washington ex rel. Adjustment Co. v. Superior Court*, 67 Wash. 355, 121 Pac. 847.

[2] An "express trust" can only be created by agreement of the parties to the trust concerning it. *Words & Phrases*, "Express Trust," vol. 3, p. 2611.

The right in the plaintiff insurance companies, upon the payment of Palmer's loss, through subrogation, was created by operation of equitable principles, and not created, but rather recognized, by the terms of the insurance policy. *New Orleans v. Gaines' Adm'r (Whitney)*, 138 U. S. 595, 11 Sup. Ct. 428, 34 L. Ed. 1106; *Liverpool & G. W. S. S. Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788.

Choses in action are not assignable at common law. *Glenn v. Marbury*, supra, 145 U. S. 499, at 507, et seq., 12 Sup. Ct. 914, 36 L. Ed. 790.

In Washington, a cause of action for the tortious destruction of, or injury to, property is assignable. *Jordan v. Welch*, 61 Wash. 569, 112 Pac. 656.

As pointed out, the right of the insurance companies to sue is by virtue of this subrogation to the right of the insured, upon payment of his loss. While it may be called an equitable assignment, there is not the opportunity in such case to fraudulently confer, or deprive the court of, jurisdiction as there is by means of a simulated legal assignment. *New Orleans v. Gaines' Adm'r (Whitney)*, 138 U. S. 595, at 606, 11 Sup. Ct. 428, 34 L. Ed. 1102, supra.

Under the statutes of the state of Washington and the decisions of its courts, the insurance companies are held to be real parties in interest, and therefore necessary parties.

Turk v. Illinois Central Railway (D. C.) 193 Fed. 252, relied upon by defendant, was a case in which it was held that a right of action for tort, either in whole or in part, was not assignable. If such is the law in Kentucky, where this case arose, it would be controlling of the decision and distinguish it from the law of this state. The same is true of the case of *Over v. Lake Erie & W. R. Co. (C. C.)* 63 Fed. 34, also relied upon by defendant. As shown, such a right is assignable in Washington. *Jordan v. Welch*, 61 Wash. 569, 112 Pac. 656.

The motion to remand is granted.

THE TICELINE.
THE TRANSFER NO. 12.

(District Court, S. D. New York. September 24, 1913.)

1. SEAMEN (§ 29*)—PERSONAL INJURIES—LIABILITY OF VESSEL.

Neither the vessel nor owner is liable to a seaman for personal injuries sustained in the service, but he may recover for the expense of his cure and maintenance while disabled.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188–194; Dec. Dig. § 29.*]

2. ADMIRALTY (§ 51*)—DEATH OF DAMAGE CLAIMANT—PROCEEDINGS FOR LIMITATION OF LIABILITY.

A claim in rem for a tort filed against a vessel in admiralty proceedings by the owner for limitation of liability does not abate by the death of the claimant.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 430–432; Dec. Dig. § 51.*]

In Admiralty. Proceeding by the owners of the steam tugs Ticeline and Transfer No. 12, for limitation of liability. On exceptions to report of commissioner. Sustained in part.

Black, Varian, Bigelow & Somers, of New York City (Warren Bigelow, of New York City, of counsel), for administratrix of James Lavin.

Carpenter & Park, of New York City, for owners of the Ticeline. Charles M. Sheafe, Jr., of New York City (James T. Kilbreth, of New York City, of counsel), for owner of the Transfer No. 12.

Burlingham, Montgomery & Beecher, of New York City (Chauncey I. Clark and Nathan F. George, both of New York City, of counsel), for administrator of John O'Donnell.

HOLT, District Judge. This matter arises upon exceptions to the report of a commissioner appointed to take proof as to the amount, validity, and priority of all claims, to which objections and defenses had been filed in proceedings for the limitation of the liability of the owners of the steamtugs Ticeline, formerly called the R. B. Little, and the Transfer No. 12. These proceedings were tried together, and grew out of a collision between the Transfer No. 12, having in tow Carfloat 48, and the R. B. Little, having in tow the Carrie Heffner. By this collision the R. B. Little was sunk, the Carrie Heffner and the Carfloat 48 were each injured, John O'Donnell was killed, James Lavin was injured, and the crew of the Little lost their personal effects. On the trial it was held that both tugs were in fault for the collision, and the owners of each were entitled to a limitation of liability.

I concur with all the conclusions in the able report of Mr. Goodrich, the commissioner, except those in respect to the claim of the administratrix of James Lavin, which the commissioner rejected. The question arising on his claim is novel. My first impression was that the commissioner's view was correct; but, on full consideration, I think

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the claim should be allowed. Lavin was a fireman on the tug Little. He was asleep in his bunk at the time of the collision and received severe injuries. He filed a libel in rem against each tug and a libel in personam against the owners of each tug. Each of these suits was stayed by the proceedings brought by the owners of each tug for limitation of liability. On the trial Lavin was present in court. His counsel asked leave to call him and prove the amount of his damages. It was conceded on the record that he was employed as a fireman on the Little, was asleep in his bunk, and was injured by the collision. Objection was made to taking proof of his damages at that time, and the court declined to take proof and ordered a general reference on damages. Thereafter, and before any proof on his claim could be taken before the commissioner, Lavin died. The objection is made that his claim abated by his death, and the commissioner so held.

[1] The maxim of the common law that a personal action dies with the person, which seems to be based on a kind of judicial pun, is ancient and well established. But it is inherently an unjust rule, which, in my opinion, ought long since to have been abolished by the Legislature. In this case, if it applies, its operation will be peculiarly harsh. Lavin's right to recover was entirely established by the facts conceded on the trial. The only question remaining was the amount of his damages. But as there had been no evidence given sufficient to determine that amount, and no actual determination was made, I have no doubt that, if the common-law rule governs, his administratrix cannot recover. There must have been a verdict, or a decision, or at least a submission of the case to a court on complete evidence, to authorize a judgment in a personal action after the death of a party. But these proceedings are proceedings in rem in admiralty. Lavin's claim against the Little or Ticeline arises on contract, and therefore, under the old admiralty rule, he cannot recover damages for injuries, but can recover for the expense of his cure and maintenance while ill. The *Osceola*, 189 U. S. 159, 23 Sup. Ct. 483, 47 L. Ed. 760; *Brown v. Overton*, 1 Spr. 462, Fed. Cas. No. 2,024; *The City of Alexandria* (D. C.) 17 Fed. 390. The commissioner so held, and I concur with that conclusion as to the claim against the Ticeline.

[2] Lavin's claim against the Transfer No. 12 arises in tort. In such cases, there are some statements in opinions and text-books to the effect that the rule in admiralty is the same as at common law and that the cause of action for personal injuries abates by death. *Crapo v. Allen*, 1 Spr. 184, Fed. Cas. No. 3,360; *The City of Belfast* (D. C.) 135 Fed. 208; *Benedict's Admiralty*, § 309. But there are other cases which seem to me are better authority, in which it is held that suits in rem in admiralty do not abate by the death of the party. *Penhallow v. Doane*, 3 Dall. 54, 1 L. Ed. 507; *Munks v. Jackson*, 66 Fed. 574, 13 C. C. A. 641; *The James A. Wright*, Fed. Cas. No. 7,191. These are cases where a claimant died, and it may be urged that they do not apply to the case of the death of a libellant. But it is not apparent why any such distinction should be made. At common law, the death either of the plaintiff or defendant abated a personal action. But in a suit in rem the thing proceeded against cannot die. Such a suit is based

on the idea of the enforcement of an existing lien. How can the death of the libellant in an admiralty suit in rem divest the lien? If the lien is valid, why does it not descend to his legal representatives, like his other property and choses in action? Suppose a person who had negligently caused personal injuries to another had admitted his liability and given a mortgage to secure it; would the death of either party prevent the enforcement of the mortgage? But in any event, in this case, Lavin, at the time of his death, was no longer an actor. His suits had been stayed. If no proceedings to limit liability had been taken, his death would have raised the question squarely whether his suits would be abated. But the proceedings for the limitation of liability turned Lavin from an actor into a claimant. Such proceedings are proceedings in rem in admiralty, and I do not see why the authorities above cited do not apply to such a case. In proceedings to limit liability, the full value of the res is surrendered without regard to the liens (*The Maria & Elizabeth* [D. C.] 12 Fed. 627; *The Catskill* [D. C.] 95 Fed. 700; *The St. Johns* [D. C.] 101 Fed. 469), and every admissible claim is made a statutory lien on the fund (*The Catskill* [D. C.] 95 Fed. 703).

The commissioner, although holding that the claim of Lavin abated, very properly reported on the amount of damage suffered by Lavin, so that, in case the court should conclude that he was entitled to recover, no further reference would be necessary. The amount so reported was \$750, and it is directed that a claim for that amount be allowed in favor of his administratrix against the Transfer No. 12. In all other respects the exceptions filed are overruled and the commissioner's report confirmed.

RIVERSIDE NAT. BANK v. PREDMORE.

(Circuit Court of Appeals, Third Circuit. November 1, 1913.)

No. 1,749.

CHATTEL MORTGAGES (§ 63*)—VALIDITY—AFFIDAVIT FOR RECORDING UNDER NEW JERSEY STATUTE.

Chattel Mortgage Act N. J. (P. L. 1902, p. 487, 1 Comp. St. 1910, p. 463) § 4, provides that a chattel mortgage shall be void as against creditors, etc., unless recorded, having annexed thereto the affidavit of the mortgagee stating the consideration for the mortgage and as nearly as possible the amount due and to become due thereon. A bankrupt corporation executed to a bank a chattel mortgage for \$1,500 to secure three notes, of \$500 each, which were given and the proceeds of the discount credited to the bankrupt's account. It was agreed, however, that the third note was accepted subject to the approval of the bank's directors. The cashier filed the mortgage for record, with his affidavit stating the consideration as \$1,500 and describing the three notes. The directors disapproved the third loan of \$500, but approved a further loan of \$200, in addition to the \$1,000 covered by the first two notes, whereupon the amount of the third note was charged back to bankrupt's account and a note for \$200 was executed and discounted. *Held*, that the cashier's affidavit was correct and sufficient under the statute, the charging back of the amount of the third note being in effect a partial payment on the mortgage debt, and that the mortgage was valid as to the \$1,000 due on the first two notes, but that the note for \$200 subsequently given was not within the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 125-135; Dec. Dig. § 63.*]

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

In the matter of the National Envelope Company, bankrupt; Winfield Predmore, trustee. The Riverside National Bank appeals from an order of the District Court disallowing its claim to a lien by virtue of a chattel mortgage. Reversed.

G. M. Hillman, of Mt. Holly, N. J., and John G. Horner, of Camden, N. J., for appellant.

Wilson & Carr and W. R. Carroll, all of Camden, N. J., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from a decree of the court below, sitting as a court of bankruptcy, affirming an order of the referee in bankruptcy, in which the claim of the appellant, Riverside National Bank, against the bankrupt's estate for a priority in payment, based upon three promissory notes aggregating in amount \$1,200.00, alleged to be secured by a chattel mortgage made by said company to the bank on goods and chattels in the possession of the trustee, as part of the bankrupt's estate, was refused. The facts necessary to the determination of the question involved are not in dispute and have been in the main stipulated into the record now before us. They are as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
208 F.—43

National Envelope Company, a corporation of the state of New Jersey, was, on the 15th day of February, 1912, duly adjudged a bankrupt, and on the 6th day of March, 1912, Winfield Predmore was duly appointed trustee of the estate of the said bankrupt. On July 5, 1911, the National Envelope Company, the bankrupt aforesaid, made and delivered to the Riverside National Bank its promissory note for \$500.00, drawn to its own order, payable four months after date and indorsed by H. W. Hunter and W. H. Holt. This note was duly discounted by said bank and the proceeds thereof credited to the account of the National Envelope Company on July 5, 1911.

Shortly after the discounting of the note of July 5, 1911, and before maturity thereof, the National Envelope Company, by its president, H. W. Hunter, made application to the bank for a further loan. Albert L. Pancoast, cashier of the bank, was unwilling to make an additional loan, unless satisfactory security was given to cover not only such new loans as might be made, but also the existing loan upon the note of July 5, 1911. It was thereupon arranged between Hunter, acting for the company, and Pancoast, acting for the bank, that the company should execute and deliver to the bank a chattel mortgage upon all the company's personal property, for \$1,500.00, as collateral security for the existing loan of \$500.00, a new loan of \$500.00, for which a note, dated July 21, 1911, was given by the company to the bank, and by the bank discounted and proceeds placed to credit of company, and a third loan of \$500.00, "it being understood that this last loan was to be conditioned only and subject to the subsequent approval of the board of directors of the Riverside National Bank."

The execution and delivery of the chattel mortgage was duly authorized by a resolution of the board of directors of the National Envelope Company, at a meeting held in July, 1911. This resolution is in the following language:

"Whereas the National Envelope Company according to its charter has authority to borrow money and execute a mortgage whenever needed to carry on the business successfully, therefore be it resolved that we approve the suggestion of the president and authorize the giving and execution of a collateral chattel mortgage to the Riverside National Bank for \$1,500, to cover three notes of \$500 each, as needed for ready cash."

Pursuant to this arrangement, the company executed and delivered to the bank a chattel mortgage covering all its personal property, to secure the sum of \$1,500.00; the mortgage was dated July 21, 1911, and was, on the 24th day of July, 1911, duly recorded in the office of the clerk of Burlington county, at Mt. Holly.

In further execution of the arrangement between Messrs. Hunter and Pancoast, acting respectively as aforesaid, the National Envelope Company, on July 22, 1911, one day after the date of said mortgage but two days before the date of its recording, made and delivered to the Riverside National Bank its promissory note for \$500.00. This note represented the third loan above referred to, and was given by the company and accepted by the bank upon the understanding that the loan represented was conditional only and was subject to the subsequent approval of the board of directors of the said bank. This note was, however, discounted immediately and the proceeds thereof were,

on the 22d day of July, 1911, the day upon which the affidavit accompanying the chattel mortgage was made by the cashier of the bank, credited to the company's account. Fourteen days thereafter, the board of directors of said bank disapproved of said third loan of \$500.00, and thereupon the same was charged back against the company's account. The board of directors, however, authorized a third loan of \$200.00, and thereupon, on August 7, 1911, the company delivered to the bank its note for \$200.00, payable four months after date. This note was duly discounted by the said bank and credited to the company's account on August 7th, the day of its date.

The statute of the state of New Jersey, in regard to chattel mortgages and the recording thereof, among other things provides as follows:

"Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against the subsequent purchasers and mortgagees in good faith, unless the mortgage, having annexed thereto an affidavit or affirmation made and subscribed by the holder of said mortgage, his agent, or attorney, stating the consideration of said mortgage and as nearly as possible the amount due and to grow due thereon, be recorded as directed in the succeeding section of this act," etc.

The affidavit annexed to said mortgage on behalf of the mortgagee, before the mortgage was lodged for record in the office of the clerk of Burlington county, was as follows:

"State of New Jersey, Burlington County—ss.:

"Albert L. Pancoast, cashier of the Riverside National Bank, the mortgagee named, being duly sworn on his oath, says that the true consideration of said mortgage is as follows, viz.: Fifteen hundred dollars loaned to said National Envelope Company on three promissory notes of five hundred dollars each, one dated July 5, 1911, and two dated July 21, 1911, and payable in four months from the date thereof, together with interest thereon at the rate of six per cent. per annum, this chattel mortgage being given to secure the payment of said notes and the renewals thereof and that there is due on said mortgage the sum of fifteen hundred dollars, besides lawful interest thereon from the twenty-first day of July, nineteen hundred and eleven.

"Albert L. Pancoast, Cashier.

"Sworn and subscribed this twenty-second day of July, A. D. 1911, before me,

"[Seal.]

Chas. H. Ziegler, Justice of the Peace."

The sole question presented for determination is, does the affidavit of the mortgagee to the chattel mortgage annexed, meet and comply with the requirements of the fourth section of the statute of the state of New Jersey, as above quoted. The trustee challenges the sufficiency of the affidavit upon two grounds:

1. That it does not truly and correctly state the amount due and to grow due on said mortgage.

2. That it does not set forth the consideration of said mortgage with sufficient particularity of detail to acquaint creditors of the mortgagor with the complete transaction between the parties thereto.

On August 5, 1911, when the third note of \$500.00, dated July 22, 1911, was charged back against the account of the said National En-

velope Company, the result was that the account of said National Envelope Company on that day was overdrawn to the amount of \$24.62. This overdraft was taken care of, by crediting to the company's account the proceeds of the \$200.00 note, discounted August 7, 1911. The referee refused the claim of priority for the \$1,200.00, being the aggregate of the two \$500.00 and the \$200.00 note, afterwards given in lieu of the third \$500.00 note, on the ground that the affidavit accompanying the mortgage did not state truly the indebtedness of the company to the bank, and therefore did not comply with the requirement of the New Jersey statute, in order to make the mortgage a lien as against creditors.

The learned judge of the court below affirmed the order of the referee on substantially the same ground, saying that:

"From this affidavit, it would appear that \$1,500.00 was then due from the mortgagor to the mortgagee, to secure the payment of which such mortgage was given. This in fact was not true, there being then due only \$1,000.00, represented by two notes of \$500.00 each; one dated July 5, 1911, and the other July 21, 1911, while the remaining sum of \$500.00, represented by a note bearing the last mentioned date, could only become due in case the loan so intended to be evidenced was approved by the bank directors."

We are constrained to think that, in so holding, the learned judge of the court below was in error. As a matter of fact, it seems to us that the cashier of the bank could not have truly sworn on the date of his affidavit that the company was indebted to the bank in any less sum than \$1,500.00. The third note had been discounted and placed to the credit of the company. It therefore received the \$500.00, for which the third note was given, as truly as if it had received that amount in cash over the counter of the bank.

The bank's money had been loaned for the face amount of the third note. The fact that 14 days thereafter the board of directors disapproved of said loan, and ordered the note to be charged against the account of the company, does not affect the matters sworn to by the cashier on the day he made his affidavit. Apparently the charge back of the note on the company's account was made with the consent of the company, and we do not see how it could otherwise have been made. This at most was a return or payment of the loan by the company on the demand of the bank. There was nothing in the transaction to impugn the good faith of the cashier in making the affidavit, nor were creditors injured by the fact that the sum sworn to as due on July 22d, was reduced through an arrangement between the mortgagor and mortgagee on August 7th following; that is, the amount of the indebtedness as sworn to in the affidavit was reduced by one-third. It seems to us that, by this affidavit both the letter and the spirit of the statute of New Jersey were complied with.

The second ground stated by the appellee in support of the order below, to wit, "that it does not set forth the consideration of said mortgage with sufficient particularity of detail to acquaint creditors of the mortgagor with the complete transaction between the parties to said mortgage," is largely disposed of by what we have already said as to the first ground. The consideration of the mortgage at the time

the affidavit was made was the sum of \$1,500.00, represented by the three notes to which reference has been above made. It was a subsisting indebtedness, as represented by said notes from the company to the bank, and, as we have said, was truly stated as such. No greater particularity was necessary to meet the requirements of the New Jersey statute.

The note for \$200.00, given August 7th, after the third note for \$500.00 had been paid or discharged by the arrangement between the parties on the 5th of August, was a new indebtedness not covered by the affidavit, but in fact excluded therefrom by the specification of the three notes for \$500.00 each.

The decisions cited in the state courts of New Jersey are entitled, of course, to entire deference. An examination of them, however, does not convince us that they support the position of the appellee, or require on the facts of this case a different conclusion from that at which we have arrived.

We think the decree of the court below, affirming the order of the referee, should be reversed and the claim of the Riverside National Bank for priority of payment out of the proceeds of the goods and chattels, covered by the mortgage of the said bankrupt, be allowed to the extent of \$1,000.00, being the aggregate amount of the two notes first mentioned, with interest thereon to the date of the entry of this decree, and that the claim for priority as to the \$200.00 secured by the note of the said bankrupt, dated August 7, 1911, be disallowed.

And it is so ordered.

NATIONAL BANK OF ATHENS v. SHACKELFORD.

(Circuit Court of Appeals, Fifth Circuit. October 29, 1913.)

No. 2,548.

BANKRUPTCY (§ 175*)—MORTGAGES—VALIDITY AS AGAINST TRUSTEE.

A mortgage given by a bankrupt, although for a valid consideration and valid as between the parties, if withheld from record by agreement or understanding between them, so as not to affect the mortgagor's credit, may be set aside at the suit of his trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. § 175.*]

Appeal from the District Court of the United States for the Northern District of Georgia; Wm. T. Newman, Judge.

Suit in equity by F. C. Shackelford, trustee in bankruptcy of J. N. Webb, against the National Bank of Athens. Decree for complainant, and defendant appeals. Affirmed.

John J. Strickland, of Athens, Ga., for appellant.

Howell C. Erwin, Stephen C. Upson, Andrew J. Cobb, and Horace M. Holden, all of Athens, Ga., for appellee.

Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PER CURIAM. The evidence in this case tends strongly to show that, although the mortgage given by the bankrupt to the appellant was for a valid consideration and effective as between the parties thereto, the same by understanding, if not agreement, was withheld from record, so as not to affect the mortgagor's credit; and we therefore concur with the trial judge in his disposition of the case.

The decree appealed from is affirmed.

BLAKE v. MOYER, Warden.

(Circuit Court of Appeals, Fifth Circuit. October 29, 1913.)

No. 2,543.

HABEAS CORPUS (§ 30*)—DEFECTS AND ERRORS—SENTENCE IN GROSS.

Where a defendant, convicted on two counts of an indictment charging separate offenses of the same kind, was given a sentence in gross for a term of imprisonment not exceeding the sum of the terms which might have been imposed under the counts separately, the sentence, although it may be irregular, is not a nullity, and the defendant cannot be discharged on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

Appeal from the District Court of the United States for the Northern District of Georgia; Wm. T. Newman, Judge.

Proceeding by Edward F. Blake for writ of habeas corpus for his discharge from the custody of William H. Moyer, Warden of the United States Penitentiary at Atlanta, Ga. Writ denied, and petitioner appeals. Affirmed.

For opinion below, see 206 Fed. 559. See, also, 206 Fed. 555.

Lamar Hill, of Atlanta, Ga., for appellant.

F. C. Tate, U. S. Atty., and J. W. Henley, Asst. U. S. Atty., both of Atlanta, Ga., for appellee.

Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. We concur with Judge Newman in his opinion, found in the record of this case, 206 Fed. 555.

The decree appealed from is affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

NATIONAL ELECTRIC SIGNALING CO. et al. v. TELEFUNKEN WIRELESS TELEGRAPH CO. OF UNITED STATES.

(Circuit Court of Appeals, Third Circuit. October 20, 1913. Rehearing Denied December 9, 1913.)

No. 1,724.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—METHOD AND APPARATUS FOR WIRELESS SIGNALING.

The Fessenden patents No. 918,306 for a method of wireless signaling, the primary object of which is the prevention of atmospheric or other disturbances, and No. 918,307 for apparatus for practicing such method by means of the conjoint co-operation of a high group frequency transmitting station and a receiving station with a nonresonant receiver were not anticipated, but are of a pioneer character, embodying an original disclosure of great merit. Both also *held* infringed.

2. PATENTS (§ 328*)—INVENTION—WIRELESS SIGNALING.

The Fessenden patent No. 928,371 for signaling by electro-magnetic waves addressed to provision for tuning the circuits in apparatus is void for lack of invention, in view of the prior art.

3. PATENTS (§ 202*)—ASSIGNMENT—DATE OF TAKING EFFECT.

An assignment of a patent passes title at the date of its execution and delivery, although it is acknowledged by the assignor at a later date.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 281-289; Dec. Dig. § 202.*]

4. RECEIVERS (§ 80*)—SUIT FOR INFRINGEMENT—PARTIES—RIGHT OF RECEIVERS FOR COMPLAINANT TO INTERVENE.

Receivers for a corporation vested by the order of appointment with all the property of the corporation, with the right to sue for the recovery of any property, chose in action, or demands, and to whom the corporation, in compliance with such order, also made an assignment of all its property and rights, including patents with the right to sue for past infringement thereof, are authorized to intervene and carry on a pending suit for infringement brought by the corporation.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 149; Dec. Dig. § 80.*]

5. WORDS AND PHRASES—"TUNE"—"TUNING."

The term "tuning" as used with reference to signaling by electro-magnetic waves, or wireless telegraphy, means the bringing of two or more electrical circuits into resonance, or the adjustment of capacity and inductance to secure the time-period vibration or wave length desired. The wave length assigned to a station might be called its "tune."

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit in equity by the National Electric Signaling Company and Samuel M. Kintner and Halsey M. Barrett, receivers, against the Telefunken Wireless Telegraph Company of the United States. Decree for defendant, and complainants appeal. Reversed.

Melville Church, of Washington, D. C., and F. W. H. Clay, of Pittsburgh, Pa., for appellants.

Hector T. Fenton, of Philadelphia, Pa., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BUFFINGTON, Circuit Judge. In the court below, Samuel M. Kintner and Halsey M. Barrett, receivers of National Electric Signaling Company, brought suit against the Telefunken Wireless Telegraph Company of the United States, charging it with infringing three patents, viz., claims 1 and 3 of patent No. 918,306, to Reginald A. Fessenden, for a method of wireless signaling, applied for July 1, 1907, and granted April 13, 1909; claims 1, 2, 3, and 4 of patent No. 918,307, to the same, for apparatus for wireless signaling, applied for August 25, 1908, and granted April 13, 1909; and claims 1, 2, 3, 5, and 6 of patent No. 928,371, to the same, applied for May 4, 1906, and granted July 20, 1909, for signaling by electro-magnetic waves. The court below dismissed the bill, whereupon plaintiffs took this appeal.

[1] Turning first to the process patent No. 918,306, for a method of wireless signaling, and to No. 918,307, the divisional application for apparatus used in working such process, we find the art involved is that of wireless telegraphy and the process patent, as stated therein, "relates to electric signaling, and especially to methods of prevention of atmospheric or other disturbances, which is its primary object." Since wireless signaling necessarily employs a sending operator and a transmitting apparatus and a receiving operator and a receiving apparatus, and since Fig. 3 shows an arrangement of circuits for use in sending, and Fig. 4, an arrangement of circuits for use in receiving, it is clear that the "method of wireless signaling" concerns both the sending and receiving of such messages. It is of course a mere truism to say, but a fact to be borne constantly in mind in considering this case, that the vital point in such telegraphy is the intelligent reproduction of the message at the receiving station; and, unless this is effected, all prior efforts, methods, and distinct apparatus go for naught. As the wireless art was developed no difficulty was found in creating at sending stations electric disturbances of the ether which evidenced themselves at distant receiving stations; the trouble arose in their intelligent reproduction at the latter. In receiving them the operator met other and interfering electrical disturbances. These latter might be either signals from other stations, or those created by atmospheric electric discharges. The former we refer to as station, the latter as static, electricity. This station and static might be so light as to cause the receiving operator no trouble, or so powerful as to interfere with and indeed prevent him from recognizing and deciphering the message. The interference due to other stations corresponds, in a general way, to that confusing "cross talk" which one listening on a telephone hears not only from the person speaking to him, but the stray talk coming from electrically adjacent circuits. In the same way comes the disturbing cross talk of all other wireless stations within range. Wholly independent of these artificial or station interferences are the disturbances that come from nature. Such interferences, which are called static, vary in power from the lightning discharges in storms to those delicate restorations of electric equilibrium in the upper atmospheric regions, only capable of being manifested to the senses through the extraordinarily sensitive receiving apparatus used in wireless telegraphy. It is these lightning disturbances which, of course, interfere during storms. In a lesser, but

nevertheless confusing, manner lightning and atmospheric electric phenomena generally interfere with wireless receiving at most seasons and in all parts of the world. Such interference is generally more prevalent by day than by night, and more so in the tropics than in the temperate zones. In the latter they also evidence themselves more in summer than in winter. Station and static disturbances, and principally the latter, are the bugbears of the wireless receiving art; at times they prevent the operator from receiving anything, and at others cause him to misread signals and to confuse messages. On that subject complainant's witness Pickard says:

"At practically all times our atmosphere is in a state of disturbed electric equilibrium; different strata and even masses of air in the same stratum being at relatively large differences of potential. From time to time balance is partially restored by electrical discharges, either from stratum to stratum, or even from the charged air to the receiving antenna itself. At each such discharge, which is in reality a miniature bolt of lightning, electrical waves are radiated, often of very great intensity. Although these waves are usually highly damped—that is to say, of a 'whip-crack' character—and therefore very different from the waves which it is desired to receive, it is often impossible to entirely 'tune' them out, owing to their intensity. * * *

"During severe static an operator listening in the receiving telephone hears an almost continuous crackle and snap, often deafening in intensity, varied at times by sounds resembling that of handfuls of gravel thrown violently against a window pane. From such a jumble of loud noise it is often impossible to pick out and interpret the fainter sounds of the ordinary wireless sending. It is impossible to concentrate the attention on such faint sounds, overlaid as they are with a distracting riot of noise, and as a result the operator can only pick out a word or a letter here and there; the message as a coherent whole being entirely lost.

"Sharp tuning of the oscillation frequency of the distant station, while reducing to an extent the loudness of static, has been found far from a complete remedy. This may best be understood by an acoustical analogy. If one sings the note A near a piano with the damper raised, only the A string will respond. If, however, one strikes the back of the piano violently with a sledge hammer (which is not 'tuned' at all) the A string, and every other string as well, is set into vibration. So, with the untuned sledge-hammer blows of the atmospheric disturbances, even a very sharply tuned receiving circuit is set into strong electrical vibrations."

It will be noted also that the tone of such atmospheric disturbances was similar to that of the 60 cycle machines in the ordinary commercial use prior to these patents. To the elimination of the effect of the raid, so to speak, of these hostile electrical guerillas at the receiving station, Fessenden addressed himself, stating, as we have seen, that his invention relates "especially to methods of prevention of atmospheric and other disturbances, which is its primary object." And that he, at least, thought the crucial and effective object of his method was to eliminate the trouble at the receiving point is evidenced by the statement in his specification as originally filed that, "By my apparatus and method herein described, I succeeded in annulling the effects of disturbances and more particularly such atmospheric disturbances," effects, it will be observed, that concern and evidence themselves wholly at the receiving station. We take this opportunity to emphasize this fact because we deem it essential to a proper appreciation of the real significance of these two patents. So also a just estimate of the real disclosure of the original specification and of the amendment of it, and

the claims is based on the fact that what Fessenden invented, disclosed, and claimed from the beginning was a method that effectively fulfilled its purpose at the receiving station. For without forestalling what his disclosure was, or what his original claim covered, we limit ourselves to quoting its language:

"Having thus described my invention and illustrated its use, what I claim as new and desire to secure by letters patent, is the following: 1. In a system of wireless signaling, *the production of signals* by groups of impulses having a group frequency higher than commercially used alternating current frequencies and within the limits of audition."

His method was "in a system of wireless signaling," and as we have shown that system comprised, and had to comprise, a receiving as well as a sending apparatus, or, as he says:

"Fig. 3 shows an arrangement of circuits for use in sending, and Fig. 4, an arrangement of circuits for use in receiving."

It will thus be seen that the object and limit of the method was, not the production groups of impulses at the sending station, but "the production of signals." Where? Necessarily at the receiving station; and these signals were of such character that when they were produced they were "within the limits of audition." And where was the place of audition? Necessarily at the receiving station. These signals, which were produced and heard through agencies not at the sending but at the receiving station were to be produced "by groups of impulses having a group frequency higher than commercially used alternating current frequencies." As the object and end of the method culminates at the receiving station—the means to there produce signals, being certain groups of waves, concededly old in themselves—he who says that the real invention was the wave group, and not the production of signals, asserts what the specification, the illustration, and the claim contradict.

Turning now to the method patent, we are naturally brought to a consideration of the underlying element of that claim as originally made, viz., "groups of impulses having a group frequency higher than commercially used alternating current frequencies." Impulses having a group frequency were well known in wireless telegraphy from the first; indeed, it may be said that the recognition and utilization of group frequency is the foundation of wireless transmission. Generally stated, that art is thus practiced. At the sending station are suspended wires called "antennæ," from their resemblance to those sensitive organs of insects. These wires are charged or excited by electric sparks in rapid succession. Each electrical charging of such antennæ, which may be likened to an electric blow, causes a rupture or agitation in the surrounding ether, with the result that a group of ether waves radiates from the antennæ as water waves radiate when a stone is thrown into a pond. But these ether waves radiate at the speed of solar light, viz., circling the globe $7\frac{1}{2}$ times in a second. The theory that electricity, like light, traversed space through the medium of ether, and that disruptive discharges caused radiating waves, was advanced about 1865 by an Englishman, Prof. Maxwell, of Cambridge Univer-

sity. The correctness of this theory was later demonstrated by a German, Heinrich Hertz. He devised apparatus consisting, inter alia, of a radiator, and a receiver equipped with rods having small metallic knobs on the ends, and separated a short distance from each other. In this gap were produced the radiating waves foretold by Maxwell, but which were thereafter named for their practical producer, Hertz, as the Hertz or Hertzian waves of modern science. The radiation of these waves through ether is independent of weather or wind; they penetrate all nonconducting substances and reach points below the horizon. When they strike upright conductors, such as the sensitive antennæ of a receiving station, a portion of their energy is cut out and generates therein high frequency electric currents of minute power. Without entering into details it suffices to say that the effect of the electric blow on the sending antennæ is similar to the effect of a blow on a tuning fork, in that it causes the antennæ to emit, not a single wave, but a series of waves of decreasing amplitude, and, like a pebble dropped in a pool, each spark causes train puffs or groups of electric waves to be radiated. It will also be understood the succession of sparks or electric blows, and therefore the succession of groups of waves, continues as long as the sending operator's key is depressed. When these emitted waves reach the receiving antennæ they set up oscillation of relatively feeble intensity, but of the same frequency as the oscillations which produced them at the sending station. Led through a detector, they are able to measurably affect a receiving telephone. But even if the telephone diaphragm were set in responsive vibration to the received oscillation, the rate of vibration would be inaudible because the ear receives no impression from a wave frequency above, say 20,000 vibrations a second. Nevertheless, while this would be the action of the telephone diaphragm in response to each particular wave oscillation, so to speak, such diaphragm would flex or buckle in response to groups of these waves as a whole. The result would be that these groups or pulses of waves make themselves audible while wave oscillations do not. Now as these electric waves can be readily differentiated by simple working changes in the sending apparatus, it follows that by corresponding tuning in the receiving apparatus, there would be no trouble in intelligently transmitting messages if there was no interference by other stations, or by static electricity. By tuning or harmonizing the rates of vibration of the electrical currents in the two stations, the receiving would electrically respond to the sending. But with static or station interference, receiving antennæ, which are sensitively ready to receive and respond to all other electric waves, vibrate in various other ways at the same time. This undesired and interfering excitation of the antennæ affects the receiving circuits, which also respond to any excitation in the receiving antennæ. The resultant difficulty is clearly stated by complainant's witness Pickard, as heretofore quoted.

From this consideration of the term "groups of impulses," we next turn to inquire what were "the commercially used alternating current frequencies" which wireless telegraphy employed prior to Fessenden's disclosure. When the sending apparatus is adjusted, as used com-

mercially, and in its most effective condition, it is conceded that two sparks occur for each complete cycle of applied alternating current. While there is some proof, to which we will later refer, to the contrary, the weight of the testimony clearly establishes, and we find it as a fact, that up to that time it was customary, in wireless telegraphy, to use 60 cycles and 120 sparks. Thus Dr Arthur Kennelly, Professor of Electrical Engineering at Harvard University, and who has had wide experience as an electrical consulting engineer, says:

"At the date of the application for the patents 918,306 and 918,307, in suit, it was customary, when alternating current generators were employed as sources of electrical energy for exciting the sending mast wire of a wireless station, to employ a machine of the ordinary low frequency used in electric lighting or power transmission. This frequency was 60 cycles per second. When supplied to a spark gap it would tend to produce a spark frequency of 120."

Professor Kintner, one of the complainants, formerly Professor of Electricity at the University of Pittsburgh, and also a consultant of wide experience, says:

* * * It was the practice at that time (1903) to use low frequency apparatus. I recall during my summer at Old Point Comfort listening to the spark of a number of ships that came into the harbor equipped with wireless outfits. Some of these, notably the *Prairie* and *Topeka*, had outfits supplied by the Slaby-Arco system, and these spark frequencies were invariably low. I do not recall a single exception to the above statement. Most of the early outfits were small, and an effort was made to economize the amount of power taken by them, and for a given frequency with a given spark length of operation a certain distance of transmission would be affected with a given amount of energy. If, however, the spark frequency was increased with the spark length maintained the same, the amount of energy required would be increased in direct proportion to the frequency; this would necessitate larger equipment, and was generally considered at that time to be the wrong line of development. That is, the tendency was towards a lower frequency than towards a higher one. * * *

"My first personal knowledge of the high frequency resulted from an inquiry that was made of the Westinghouse Company for a high frequency alternator; that is, one of 500 cycles. This inquiry, as I now remember it, came from the United Wireless Telegraph Company, and was made about the year 1908 or 1909. The design of this particular machine did not come in my department, but the designer affected by it, knowing of my having been interested in wireless work, came to me inquiring about the essential characteristics of such machines, as it was decidedly out of the ordinary and very special. I made it my business to inquire at once from some of the engineers of the National Electric Signaling Company of the advantages to be gained by the use of such frequency, and was informed that its advantages lie in the fact that the pure tone of these high frequencies had the property of penetrating through interference and atmospheric disturbances, and produced results far superior to that secured with the low frequency."

To the same effect is the testimony of John W. Lee, an experienced operator, who also says that in 1905 and 1906, the customary spark frequency was 60 cycle. In this connection it should be noted that there is some proof by the defendant of its having installed certain high spark frequency apparatus at the Brooklyn Navy Yard in March, 1905, which it is now alleged was a complete anticipation of Fessenden's subsequent disclosure. As to what use was made in practice of such apparatus, as to whether any high notes enabled operators to read

their messages through static and station interference, is not shown. No receiving operator testified as to their workings. Baldly stated, it is clear to us that if such apparatus was installed at the time and successfully used to produce high notes so as to dominate static and station interference, we would have had the testimony of operators in such quantity and character as would have conclusively disposed of Fessenden's claim of originality. Moreover, if such results were secured by the government from this Brooklyn Yard installation it is highly improbable that the government's electrical bureau and its operators as well would not, some months later, have made, as we shall see they did, Fessenden's "new spark"—which they "had never heard before"—the subject of report and inquiry. Indeed, that wireless telegraphy as then practiced was kept within such spark frequency limit was imperative, in view of the aural physiological theories then held in the scientific world. The nature of these theories is well illustrated by patent No. 824,682 to Blondell, hereafter noted, where when higher frequency was suggested the patentee coupled it with a selective, resonant, receiving system, tuned and responsive to such high frequencies. It was, of course, known, and is indeed self-evident, that higher group frequencies produce higher and shriller tones. But with the mistaken scientific theories which then prevailed, any one contemplating the use of such high group frequency would have been deterred from employing them. For, by such theories, it would have followed that a use of such high group frequency would only have increased existing confusion. From the mistaken aural theories then accepted by the scientific world, Fessenden departed with an originality that marks him as a pioneer. He not only blocked out a new path, but in a field which was not deemed available. Perhaps no clearer statement of the nature of this departure occurs in the record than in the language used by Fessenden himself in an explanation made by him to the patent authorities while prosecuting the patents now under consideration. He there says:

"In 1905 and prior thereto, I made a number of experiments which seemed to demonstrate that the view held by the scientific world generally, including such eminent authorities as Lord Rayleigh, to the effect that the ear was equally sensitive to all frequencies, was incorrect. That by means of special apparatus and special methods invented by me * * * I discovered that the sensitiveness of the ear increased to a very great extent for frequencies above those heretofore used in wireless signaling, and reached a maximum at about 920 impulses per second, and thereafter began to decrease. * * *

"Within a year after the filing of the present application, serial No. 381,732, this increased physiological effect was also independently discovered and confirmed by Lord Rayleigh, and published by him in the *Philosophical Magazine*."

In his specification as originally filed Fessenden likewise said:

"In experimenting with a high frequency alternator having a frequency of 80,000 in order to determine the integrating effect of certain types of receivers, it was noted by me that when the trains of waves were broken up into different lengths, when the trains succeeded each other at a *frequency above the normal frequencies used for alternating current work, the signals became more distinct in the presence of atmospheric disturbances*. It was noted, for example, that in a specific case where it is impossible to determine whether the experimental station was sending or not when the sparks succeeded each

other at a frequency of 250 (being generated by dynamo of approximately 125 cycles per second), yet the signals could be easily read when the spark frequency was raised to 900. I discovered and experimentally determined that the main reason for this was a physiological phenomenon; i. e., that when the higher frequencies were being used for signaling the attention of the hearer was concentrated on the higher notes to such an extent that the lower noises made by atmospheric disturbances ceased to affect the consciousness. On the other hand, when the sparks were produced by alternating currents of the usual frequency it was impossible to concentrate the hearing upon the signals, and reception could not be accomplished.

"This physiological effect was found by experiment to be so marked that messages could be read with the greatest of ease at a spark frequency of 900 per second, when at a spark frequency of 250 per second it is impossible to tell whether the station was sending or not, although with the same setting, at a time when there is no atmospheric disturbances, both sets of signals were as measured by shunt on the telephone of equal strength."

Confirming this, Dr. Kennelly says, and we find nothing in the record to contradict his statement:

"Lord Rayleigh, an eminent scientific authority, had published in the Philosophical Magazine of 1894 (volume 38, p. 365), some experimental observations, tending to show that the sensitiveness of the ear was roughly about the same over the range of frequency from 256 to 512 acoustic vibrations per second, indicating that the sensibility of the ear did not vary markedly in frequency or pitch of sounds reaching it. In the Philosophical Magazine of 1907, however (volume 14, p. 596), or about two years after the research date in applicant Fessenden's affidavit, Lord Rayleigh published a new series of observations which superseded the earlier ones, and which went to show that the sensitiveness of the ear increased very markedly with acoustic frequency, at least up to 500 cycles per second, and probably up to 1,000 cycles per second. *It is this greater sensibility of the ear to a sustained high pitch, when mingled with relatively louder sounds of lower general pitch, that is the essence of the utility of the inventions disclosed in the United States patents in suit, 918,306 and 918,307. This differential sensibility of the ear was not scientifically established in 1905.*"

Standing alone as a mere scientific fact, Fessenden could no more have obtained a patent monopoly for such abstract idea than could Lord Rayleigh have done for the discovery of the same truth two years later. Valuable as the independent discoveries of these two independent thinkers were, they did not come within the range of patent protection; for, so far as practical utilization was concerned, the discovery was like gravitation, or any other law of nature. Rayleigh stopped, so far as the record shows, with the discovery and disclosure of the truth, but Fessenden at once proceeded to utilize in wireless telegraphy this newly discovered truth in a way it had never been used before, viz., by the conjoint co-operation of a high group frequency transmitting station and a receiving station with a nonresident receiver. The result of such practical use he disclosed at length, as we have seen in his original specification. So far as the proofs show we agree with one of complainant's witnesses who testified:

"So far as I am aware the applicant Fessenden was the first to apply a high frequency alternating current generator to wireless signaling, and the first to discover that when using a telephone receiver in a receiving system not resonant to the group frequency, there was a great advantage secured by separating acoustically the signaling tone from disturbing sounds."

Waiving the question of who originated the process, there can be no question under the proofs of the marked advantages resulting from

such combination of high frequency transmission with nonresonant reception. That it brought into the wireless field notes hitherto unused in that art is clear. That such notes were of such a unique, insistent, and dominating type that they overmastered and eliminated the audible character of all other static and other station interference is equally clear. Indeed, both the new and the dominant character of this note is strikingly illustrated in the proofs. On the night of December 11, 1905, Fessenden's company, for the first time, sent out from its station at Brant Rock, Mass., high frequency group sparks, produced by newly installed apparatus. The novelty and efficiency of the spark on the receiver at San Juan, Porto Rico, presumably the ordinary nonresonant receiver in common use, was such that eight days later the Bureau of Equipment of the United States Navy began a search for the new phenomenon in wireless telegraphy. On December 19, 1905, that bureau wrote Fessenden's company as follows:

"The operator in charge at San Juan reports as follows, on December 11th: 'At 9:15 P. M. heard a new spark. Had never heard it before. Was making signals "Boz" and kept repeating "Boz" in the Continental Code. Caught the words "Spark—do you get it? How does our spark sound?" At 9:52 the same station repeated the following message several times, "Metallise wire receipt of these messages."' The bureau would be pleased to know if any of your stations were sending the above at the time given, and what station it was."

To this Fessenden replied on December 22, 1905:

"Sir: Replying to your letter of December 19th, I would say that the messages received at San Juan were sent out from our station at Brant Rock. I inclose report of messages sent out December 11th. The reason for the operator stating that he heard a new spark is because on that night we sent for the first time on a new selector which gives a spark of a different sound from the old selector. We inclose report. I would say that the amount of radiation sent out with the new and old selectors is practically the same, but the new selector gives a clearer pitched note. This company would be pleased to learn what the strength of the signals was as received at San Juan."

Without quoting, in extenso, the correspondence arising from this incident, we add an extract from a letter of July 2, 1906, to Fessenden, from the above operator at San Juan, who says:

"I was pleased to receive your letter of May 29th and note what you say. I think you have the best spark of all I have heard, as it penetrates the static when others fail. I held you one night when Marconi on Cape Cod, Key West, and all was cut out by static. I should like to ask if it will be allowed what cycle do you use? and what K. W. at BO. As near as I can test by sound it is the key of A natural in the music scale, against D sharp an octave lower in 60 cycle, which is very near the tone of static. I should like some information about your system."

This estimate of the value of high group frequency spark is confirmed by other wireless operators. Thus, referring to high frequency sparks of 1,000 a second, one operator says:

"One advantage is its high, clear note. Another advantage, it is an unusual sound, and one which will fix the attention immediately. * * * It also has a tone very different from that of atmospheric disturbances. Atmospheric disturbances give off a noise which is similar in tone to that of thunder, and Mr. Pickard's explanation of it is that it is similar to the sound made by throwing gravel against a window, only the tone of it is lower.

A high spark frequency could be described as a high whistling note, and is piercing. A good explanation of that is the difference in the noise made by a typewriter bell and the noise made by the keys. The noise made by the bell does not necessarily have to be of greater volume than that made by the keys in order to be audible. * * * If the commercial machines are of approximately 60 cycles, which they mostly are, the tone of the interference from them will be similar to that of the atmospheric disturbances above mentioned. * * * I should say it was very important to have a high spark frequency. It is necessary to have it that way because outside disturbances are, as a rule, of a low tone, and the high frequency spark is of a high tone, and on account of their being so different, it is possible to read the high frequency spark when it is not possible to read one of a low frequency."

Another operator says:

"The high spark frequency gives a high pitched note, which is readily distinguished from the ordinary disturbances such as static atmospheric and commercial stations or other stations using somewhat lower frequencies. This spark is also easily heard through the noises incidental to the running motor generator set, or the noise made by operating a typewriter in copying these signals."

A third says:

"In trying to read a low frequency spark during a period of static disturbances, it is very difficult, depending merely upon the intensity of the signal, to distinguish it from the static. On the contrary, in reading a high frequency spark, there is such a vast difference in their tone—that is, the tone of the static and the spark—that the signals are practically unobstructed and more easily read through the static than the low frequency spark."

A fourth says:

"In my experience the sounds of the telephone made by static disturbances are usually of a low pitched rumbling character, broken up by sharp snaps and clicks, and are altogether very different from the high musical note produced by a signal of 1,000 sparks per second. This high tone corresponds very closely in pitch to the second C above middle C on the musical scale."

The contrast between the dominant character of a note produced by sparks of high frequency and static and its difference from those produced by low group frequency apparatus is testified to by Dr. Kennelly, who says:

"If the group or spark frequency was down as low as 250 per second, or less, the sound due to lightning merged with and disturbed the sounds due to signals, so that the receiving operator could not separate them in his mind, and became confused. The sounds due to lightning, I may say, have no single or particular frequency. They may be described as producing noise rather than musical tones, in an ordinary telephone receiver, but the noise is of such a growling quality, or relatively low and scattered range of pitch, that group frequencies of 250 per second or less, with the low tones they produce in the receiving telephone (middle C or lower) cannot clearly be distinguished therefrom. On the other hand, the high note in the receiving telephone produced by a high group frequency is of such a character that the ear can readily distinguish it from the rumble, splash, and chatter of lightning disturbances."

And, from another aspect, Pickard, an experienced investigator and operator says:

"A further advantage of this method of wireless signaling is that, even in the absence of atmospheric or electrical disturbances, many wireless receiving stations are unavoidably placed in noisy locations. On shipboard, for example, the operating room is filled with noise from the dashing of the waves about the hull, passengers talking outside the door, the creak of the woodwork

of the vessel and a hundred and one other noises. I have personally noted that under these conditions it is often practically impossible to concentrate the attention upon signals from wireless stations of the ordinary character, while it is an easy matter to read messages from stations equipped with apparatus for the carrying out of this method."

Indeed, the literature of the art recognized the benefits accruing from high spark frequency, and this fact and that the credit thereof was due to American advance, is shown in an article in the *London Electrician* of June, 1909, quoted in the proofs:

"A great change has been taking place during the last few years in the domain of wireless telegraphy, with the result that improvements have been made in two directions, namely, an increase in the range and a considerable improvement in the certainty of working, with which also is included a greater freedom from disturbance. Both improvements have arisen from work that has been done in the United States, and both are due to two very simple technical facts. The first is the abolition of a coherer as a detector in the receiver's circuit and its replacement by an integrating detector. The other is the increase in the impulses in the secondary spark in the sender."

That this latter advance, conceded to have come from the United States, was justly attributable to any particular person other than Fessenden the proofs do not show, and that Fessenden was entitled to it is stated by Dr. Kennelly, who says:

"The second improvement here referred to is the increase in group frequency, forming the gist of the disclosures of the patents 918,306 and 918,307 in suit, in conjunction with nongroup resonant receiving systems and telephone indicators."

From the proofs before us we have reached the same conclusion that the process of the patent was first disclosed by Fessenden.

It is contended, however, that such process is a mere aggregation, that it consisted merely in increasing the speed of existing apparatus, which, as we have seen, was 60 cycle, and that it involves no patentable combination or inventive disclosure. But assuming that 60 cycle machines could have been speeded to 480, and that that would have affected the validity of the patent, such was not the fact. In that regard the proof by one witness is:

"High frequency alternating current generators were very rare and expensive. It would not have been safe to attempt driving a 60 cycle alternating current generator at eight times the normal speed in order to obtain 480 cycles per second frequency, because the centrifugal forces varying as the square of the speed would be increased 64 times above normal."

Another witness testifies:

"A motor generator of less speed could not be speeded up and increase the spark frequency of the oscillating circuit to any degree of increase. These motors are designed to run at a certain predetermined speed by the manufacturers, and are not readily changed without materially changing their construction."

A third, who had both theoretical and practical training in the art, says:

"Special high frequency alternators, not in commercial existence, had to be developed for the purpose of this invention. In fact one familiar with the theory and practice of wireless telegraphy, in the absence of actual trial of this method, would naturally conclude that such frequencies as 1,000 per sec-

and would be disadvantageous. I was personally of this opinion until shortly after the date of the filing of the above patent Professor Fessenden disclosed this method to me and its remarkable operativeness."

So, also, Professor Kintner says, as previously quoted:

"My first personal knowledge of the high frequency resulted from an inquiry that was made of the Westinghouse Company for a high frequency alternator; that is, one of 500 cycles. This inquiry, as I now remember it, came from the United Wireless Telegraph Company, and was made about the year 1908 or 1909. The design of this particular machine did not come in my department, but the designer affected by it, knowing of my having been interested in wireless work, came to me inquiring about the essential characteristics of such machines, as it was decidedly out of the ordinary and very special. I made it my business to inquire at once from some of the engineers of the National Electric Signaling Company of the advantages to be gained by the use of such frequency, and was informed that its advantages lie in the fact that the pure tone of these high frequencies had the property of penetrating through interference and atmospheric disturbances, and produced results far superior to that secured with the low frequency."

Nor does the fact that it was known that high spark frequencies could be used to create high notes detract from the merit of Fessenden's disclosure, for the use of such high group frequencies as was shown, for example, in the patent of Blondell, referred to above, was with a resonant receiving system. But that such combination of high frequency group sending and resonant receiving would not overcome static is clear from the proofs. In that regard Dr. Kennelly says:

"If the receiving telephone apparatus were of such a character as to be resonant to the high group frequency of 1,000 groups per second, then any sudden electrical disturbance due to lightning above a certain strength would inevitably produce a tone of the same pitch as that of the signals, and would therefore be likely to confuse the operator and cause him to make mistakes in interpreting the message. This is for the reason that a tuned or resonant system, whether electric or acoustic, or both, responds eagerly and powerfully to rhythmic impulses of its own frequency; that is, the frequency to which it is resonant. It tends to respond, either not at all, or relatively feebly, to rhythmic impulses of any other frequency. Nevertheless, any single, strong impulse given to the system will cause it to vibrate, and the vibrations will belong to its own pitch. Thus, if a single harp string is stretched in a frame and tuned to a definite frequency, it will readily be set in vibration by sounds in the neighboring air of its own pitch: whereas, it will not vibrate at all, or only very feebly, to sounds of any other pitch. If, however, any strong disturbance, rhythmic or not, reaches the string it will be set in vibration, and the vibration will be that of its own pitch."

Indeed, to us it is apparent that in the proposed use in the prior art of high group frequencies there was no probability of discovering their utility in dominating static, so long as such high group frequencies were used with resonant receivers. On that point it was said by the last-named witness:

"In any such case the lightning disturbances if sufficiently powerful to obtrude themselves, would have the same pitch as the incoming signals, so that the ordinary apparatus of the receiving operator would be incapable of discriminating. On the other hand, in the present application for patent, with the telephone of the ordinary character not selectively tuned to resonance for any one frequency, the receiving operator could readily distinguish the high notes of the signals coming in the high spark frequency from the rattle of atmospheric disturbance, even though the rattle was very loud and the received signals very faint."

To the same effect is the testimony of Lee, who, in answer to the question whether it would be an advantage to use a resonant receiver with high spark frequency, replied:

"No, this would not be an advantage, for the reason that any other signal or interference would affect the receiver, which would respond in the same note and prevent any intelligible signals being read."

It will thus be seen that the prior use of high speed frequency, coupled as it was with resonant receiving, was a misleading hindrance rather than an enlightening help to Fessenden. Its use in that connection cannot therefore justly lessen the originality or patentability of Fessenden's radically different use of such frequency. Indeed no one could have thought of such use in the absence of the discovery of the physiological properties of the ear in relation to high frequencies.

From these considerations it is clear to us that the process shown by Fessenden in his specification was an original disclosure of great merit. The prior trend of the art was to exclude static disturbances, and this centered the hope of improvement in the receiving station. Fessenden's course was that of the pioneer. In substance, he said:

"Your whole theory of aural phenomena is wrong. High frequency will create a dominant and controlling note, and by its use in connection with a nonresonant receiver you may neutralize and overcome the effect of all incoming static influences."

The free admission and absolute neutralization of hostile static influence in wireless system made, in our judgment, a new era in the art. It made the sending station what it should be, the dominant and controlling factor, in the character of electrical transmission, over all other electrical forces in its range; it made the receiving station the recipient of that dominant transmission to the neutralization of all other electric influences. In that regard we think the matter was clearly and fairly stated in the brief of complainant's argument:

"A great many schemes were tried with more or less success before Fessenden conceived the idea set forth in his patents in suit. This new method radically differs from all previous methods in that it contemplated adjustments of frequency at the sending end and not at the receiver, and especially in that it boldly permitted the static disturbances to enter the receiving circuits, and undertook to suppress the evil effects, not by keeping them out of the receiver, but rather by preventing them from affecting the operator's ear, in consequence of what was occurring at the sender. This method was new and entirely different from the wave tuning. It deals mainly with the group frequency, and is dependent upon the definite rate of succession of the spark, and the effect of this rate of succession on the operator's ear. It is based upon Fessenden's discovery that certain supposedly established facts of physics or physiology were not facts at all, but the reverse of the truth; i. e.: (1) That the ear and phone combination was equally sensitive to all audible frequencies of vibration; and (2) that 'high notes are heard with difficulty in the presence of lower ones.'"

It is contended, however, that patent protection for this advance in the art should be denied Fessenden by reason of the proceedings in the patent office during the pending of his application. It is urged: First, that his specification as originally filed did not disclose the invention embodied in the claims now sued on; that it was not until some months later that the element of a nonresonant telephone was disclosed; and

lastly, that the requisite statutory affidavit was not made at the time of these additions. It is therefore contended that under this court's decision in *Hestonville Ry. v. McDuffee*, 185 Fed. 798, 109 C. C. A. 606, and the kindred cases therein relied on, Fessenden's patents are void. Without entering into a discussion of that case, it suffices to say that it is bottomed on the fact

"* * * that his (the patentee's) amended application and later claims constituted a distinct departure from his prior application, and that the claim in question was wrongfully issued."

But the present situation is radically different. The original specification of the method patent was filed July 1, 1907. We have already seen that in December, 1905, apparatus for utilizing Fessenden's method had been installed at the Brant Rock station in Massachusetts, and Fessenden had been advised of his dominant note neutralizing static disturbances in the tropical station at San Juan. The situation was therefore wholly different from the *Hestonville* one. Having thus tested and proved his method by practice, having made it public and established its worth, there was every reason why Fessenden should, and none why he should not, disclose it fully, when he came to file his application 18 months later. To say that he did not so disclose and claim, to say further that he did not know himself then, or believe he had made an invention embodying high spark frequency and non-resonant receiving, is a contention, in view of what he was then practically accomplishing, that requires for its support clear demonstration. Turning again to the original application, we must bear in mind that the specification and drawings are addressed to those familiar with the art. Those so skilled, therefore, were advised by the original application: That Fessenden's "invention relates to the prevention of atmospheric and other disturbances, which is its primary object." That "Fig. 3 shows an arrangement of circuits for use in sending, and Fig. 4 an arrangement of circuits for receiving." That "stations equipped with the usual type of apparatus, as a rule, are unable to work at all for months at a time except at brief intervals, and even in the more northern climates the same difficulties occur during the summer months." That "the invention herein disclosed has for its object the annulling of the effects of disturbances and more particularly atmospheric disturbances." That "63 and 64 are telephone receivers." That:

"In experimenting with a high frequency alternator having a frequency of 80,000, in order to determine the integrating effect of certain types of receivers, it was noted by me that when the trains of wave were broken up into different lengths, it was noted that when the trains succeeded each other at a frequency above the normal frequencies used for alternating current work, the signals become more distinct in the presence of atmospheric disturbances. It was noted, for example, that in a specific case where it is impossible to determine whether the experimental station was sending or not when the sparks succeeded each other at a frequency of 250 (being generated by dynamo of approximately 125 cycles per second), yet the signals could be easily read when the spark frequency was raised to 900, I discovered and experimentally determined that the main reason for this was a physiological phenomenon; i. e., that when the higher frequencies were being used for signaling, the attention of the hearer was concentrated on the higher notes to such an extent that the lower noises made by atmospheric disturbances ceased to affect the

consciousness. On the other hand, when the sparks were produced by alternating currents of the usual frequency, it was impossible to concentrate the hearing upon the signals and reception could not be accomplished.

"This physiological effect was found by experiment to be so marked that messages could be read with the greatest of ease at a spark frequency of 900 per second, when at a spark frequency of 250 per second it is impossible to tell whether the station was sending or not, although with the same setting at a time when there is no atmospheric disturbances both sets of signals were as measured by shunt on the telephone of equal strength"

and finally:

"Having thus describes my invention and illustrated its use, what I claim as new and desire to secure by letters patent is the following: (1) In a system of wireless signaling the production of signals by groups of impulses having a group frequency higher than commercially used alternating current frequencies and within the limits of audition."

To our mind it is clear that to those skilled in the art, these statements and illustrations clearly disclosed Fessenden's proposed method to be the use in the wireless system of group high frequency with a nonresonant receiver. It is true the word "resonant" was not used, but such were the receivers in the "stations equipped with the usual type of apparatus." It was such apparatus to which the application referred, and it likewise showed experimental and successful use in such stations in working the method; and the claim, as we have seen, was "in a system of wireless signaling" which necessarily embodied, as the specification stated, both sending and receiving stations; the object was "the production of signals," and these signals, to be effective, must necessarily be produced at the receiving station; they were to be "within the limits of audition." It is therefore clear that if the patent specification had stood as originally made, and the single broad, inclusive claim of Fessenden been allowed, it would have been infringed by one practicing the method embodied in the claims, subsequently allowed, which are here involved, and this fact shows that the subsequent amendments made and claims allowed were not, as in Hestonville, a "departure from the prior application." And this becomes the clearer when we consider why the amendment was made and the claims changed. This was done, not from the choice of the applicant, but at the insistence of the office and over the protest of Fessenden, who always stood on his right to the original claim, putting on record, as he did, the statement that "in changing the claims therefore, it is not intended to admit that the original claim was met." Turning to the file wrapper, it seems the original claim was rejected on Blondell, No. 824,682, granted June 26, 1906, on the ground it "disclosed transmitting oscillators of a group frequency of 900 per second." That such was the fact is clear from the Blondell patent, but it is equally clear that Blondell's use of a high group frequency was not an anticipation of Fessenden's method, for both in its specification and claims it showed a resonant receiver, a device which would be fatal in Fessenden's method. For as we have seen, and in the then state of aural knowledge, it would have been regarded as destructive to have coupled such high spark frequency with nonresonant receiving. Indeed, that Blondell's device, with its resonant receiver, was of a fundamentally

different type from Fessenden's is clearly proven. To shift the signaling note to a higher plane of frequency, and then by a resonant receiver produce that same tone whenever the receiver was excited by atmospheric disturbance, would have increased, instead of eliminated, confusion. In that regard, a practical and experienced operator, referring to a receiver so adjusted as to resonate to the group frequency of the electro magnetic waves carrying an incoming message, says:

"My experience has been that if the receiving signal was exceedingly loud it would respond, provided there was no atmospheric disturbances or other stations that were louder. * * * Outside interference will always cause the resonator to give off the same tone. It is very difficult to prevent disturbances inside of the room from causing the resonator to respond to those noises, and all interference will cause it to respond to the particular tone to which it is tuned, irrespective of the tone of the interference. * * * I have experimented with these (group responsive or resonating receivers). I have found them impractical on account of their responding to interference, which always gives off the same tone as the signaling tone. Having the same tone, it is impossible to distinguish between them."

To the same effect is the testimony of another operator:

"Q. The receivers you have used in operating the higher spark frequency method in commercial apparatus, were they resonantly responsive to the spark or group frequency, or not? A. No, they were not. Q. Suppose the receiver was resonantly responsive to the group frequency of the waves being sent while you were receiving the message, would this be an advantage or a disadvantage, and why? A. No, this would not be an advantage, for the reason that any other signals or interference would affect the receiver, which would respond in the same note and prevent any intelligible signals being read."

Blondell's process being directed to resonant and Fessenden's to non-resonant receivers, it will be seen that the former's work threw no light on the latter's problems. But as both were using high group frequency, the department properly held that in view of Blondell's use of high group frequency in connection with resonant receivers, Fessenden should restrict himself to nonresonant receivers. It, therefore, came about that Fessenden, as his application proceeded, was constrained to embody in his claims the express description, "and receiving the same with an indicator resonantly unresponsive to said group frequency," and to define "resonantly unresponsive" "to mean an indicator which on being affected by a periodic impulse does not emit a note of the group frequency being used." It will then be seen that the claims allowed, and which are here involved, and which read as follows:

"(1) In the art of wireless signaling, the method of eliminating disturbing impulses which comprises generating waves having a definite frequency, in groups having a definite group frequency above 250 per second, but within the limits of audibility, and receiving the same with an indicator resonantly unresponsive to said group frequency,"

"(3) In the art of wireless signaling, the method of eliminating disturbing impulses which comprises generating waves having a definite frequency, in groups having a definite group frequency of approximately 1,000 per second, and receiving the same with an indicator which is unresponsive, resonantly, to said group frequency"

in no sense depart from the disclosure originally made; but the specific element of the receiver resonantly unresponsive only served to clearly differentiate Fessenden's method from Blondell's apparatus, and justi-

fied the office in issuing the thus more clearly defined claims now before us. Indeed, since the office acquiesced in the contention that with the amendment of Fessenden's claims so as to embody a resonantly unresponsive receiver, Blondell's patent ceased to be a pertinent reference, it would seem that had Fessenden originally confined his application to the claims as finally allowed, they would have been granted without question. The whole course of procedure shows that the claims thus finally allowed were germane to the broad disclosure originally made, and the case in hand is within neither the letter nor the spirit of the Hestonville case, which was a clear attempt to take advantage of the art made during the nine intervening years of a virtually abandoned application.

Holding then, as we do that the claims in question, of these two patents, Nos. 918,306 and 918,307, are valid, the weight of the evidence clearly satisfies us of the infringement thereof by the defendants.

[2, 5] It remains to consider patent No. 928,371 to Fessenden for signaling by electro magnetic waves. The specification says it is addressed "to provision for tuning the circuits in apparatus" for wireless telegraphy. Generally speaking, tuning such apparatus consists in bringing two or more electrical circuits into resonance. Every electric circuit has a natural vibration time of its own, and tuning such circuits consists in giving time-period vibration identity to them. This is well stated in the U. S. Navy Manual:

"By tuning is meant the adjustment of the closed and open sending circuits to the same wave lengths and to any desired wave length within their limits. The wave length assigned to a station might be called its tune."

The principles as well as the electrical agencies used in tuning were, prior to Fessenden's patent, well known. Substantially they might, in a general way, be thus enumerated. Every electric current has a natural period of vibration of its own. Any circuit having capacity and induction can be tuned, provided the resistance of the circuit is less than twice the square root of the inductance divided by the square root of the capacity, and tuning involves the adjustment of capacity and inductance to secure the wave time period or wave time length desired. It will thus be seen the subject-matter of this patent, which all parties agree is wave length, involves a distinctively different field from that of group frequency to which the patents of Fessenden, previously discussed, are addressed.

The basic English patent to Marconi, No. 7777 of 1890, and as well those of an unusual number of later patentees, involved tuning. The field of inventive effort in tuning was therefore narrowed when Fessenden applied for his patent. His specification is vague, if not indeed veiled, so far as enlightening disclosure is concerned. It recites no existing difficulties in the tuning branch of the art, and shows no obstacle or fault which Fessenden's devices overcome. It disclosed no specific, averred improvement he was making. It is of course true that his various claims showed combination of certain elements to effect tuning, but in what respect they were an advance over prior practice, wherein they were novel, useful, or inventive, the specification does not show. Indeed, it seems to us, the call for clarity was all the

greater by reason of the occult nature of the art involved. The whole specification evidences a noncompliance with the statutory requirement, viz., a disclosure in

"* * * such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains * * * to use the same."

In this respect one of defendants' witnesses, himself skilled in electricity, well says:

"There is no statement of invention in the specification, nor any statement of what are the essentials of the thing described and shown; the nearest to it we find is the statement that the supposed improvement 'relates' to 'provision for tuning the circuits,' and that he provides 'a capacity and induction in shunt to each other' in the aerial circuit, and 'a receiver in operative relation to the condenser and inductance circuit.' The claims are all based on this."

Moreover, it is to be observed several different wireless systems effect the tuning of receivers to wave frequency by various methods, different in detail, but all involving electrical tuning by combinations of inductances, of coils and capacities of condensers, involving various arrangements of the circuits. So that at most, as we view it, this patent No. 928,371 of Fessenden is but one of this general type of detail modification of the receiver in circuit.

Without further protracting this opinion by a discussion of these details, we content ourselves with stating that the proofs, the brief, and the oral discussion of complainant's counsel have failed to satisfy us of the inventive character of anything disclosed by Fessenden in this patent. We accordingly hold it invalid.

Passing from these questions of invention to those of a legal character, it will be noted that four patents, all in the art of wireless telegraphy, were originally embraced in this suit. One has since been withdrawn, leaving for consideration Nos. 918,306, 918,307, and 928,371, which we have discussed. The bill was filed on September 17, 1910, and the sole plaintiff was then the National Electric Signaling Company, the assignee of the patents; the other two plaintiffs having come upon the record in December, 1912.

[3] The first matter that challenges attention is the defendant's objection that the signaling company acquired no title as assignee until August 19, 1910, and therefore—since the acts complained of as infringements were committed before that date, and of course before the title passed—the company itself could not have recovered in the present proceeding, nor can the other plaintiffs who depend on the company's right. As noted above, we regard No. 928,371 as void for lack of invention, and for this reason we need not inquire into the right of the signaling company to sue for its infringement.

With reference to Nos. 918,306 and 918,307, the facts are as follows: These two patents issued to Reginald A. Fessenden on April 13, 1909, and on May 1, 1909, Fessenden executed an instrument wherein he did

"* * * hereby sell, assign, and transfer unto said National Electric Signaling Company, its successors and assigns, the entire legal as well as equitable right, title, and interest in and to the said patents Nos. 918,306 and 918,307 and the inventions therein set forth, * * * and in and to all rights of ac-

tion under said patents, and in and to all claims for past infringement of said patents, for its sole use and behoof," etc.

This instrument, although dated May 1, 1909, was not acknowledged until August 19, 1910, and therefore the defendant contends that no title passed to the company until August, and that acts of infringement committed before that date could only be redressed in a suit by Fessenden. If this contention were sustained, it would still be necessary to decide to what point of time in the "past" the assignment of "all claims for past infringement" refers—whether to August, 1910, the date of acknowledgment, or to May, 1909, the date of execution. But we need not consider this clause at all, for the question whether the title to the patents passed in May or in August is not open for discussion in the third circuit. It was settled in *Murray Co. v. Continental Gin Co.*, 149 Fed. 989, 79 C. C. A. 499, where this court held that the acknowledgment of an assignment is merely an alternative method of proving the instrument, and that title passes at the date of execution and delivery. There is no evidence that the assignment now in question was not executed and delivered on the day of its date, May 1, 1909, and therefore in our opinion the complete title passed at that time to the signaling company, carrying with it the right to maintain the present bill, wherein acts of infringement after that date are alone complained of.

[4] But while the suit was in progress the signaling company encountered business troubles, and on July 26, 1912, the United States District Court in New Jersey appointed Samuel M. Kintner and Halsey M. Barrett as receivers. They duly qualified, and on December 18th of the same year, having obtained permission from the District Court for the Eastern District of Pennsylvania, they filed a supplemental bill in the suit brought by the signaling company. In this pleading the receivers averred that they had acquired the entire right, title, and interest to the patents, together with the right to sue for past, present, and future infringements thereof, and that they were entitled to come upon the record and take charge of the proceedings on behalf of the signaling company. The defendant denied these averments, and the receivers' right to maintain the suit is therefore before us for decision. The relevant action of the New Jersey court was as follows: On July 26, 1912, the court appointed Kintner and Barrett

"* * * receivers of all and singular the lands, tenements, and hereditaments of the defendant, and all of its real and personal property, business, shares of stock, rights, patents, applications for patents, inventions, assets, and effects of whatsoever nature and kind, wherever the same may be situated, including all of its contracts, rights, and choses in action and other corporate rights and franchises, and its income and profits."

The court also authorized the receivers

"* * * to take possession of all and singular the properties, business, and assets above described and referred to, wherever situated or found;"

and clothed them with

"* * * full power to demand, sue for, collect, receive, and take into possession, all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books and papers, choses in action, bills, notes, and

property of every kind and description of the said defendant company, and to institute and prosecute suits at law or in equity for the recovery of any asset, property, damages, or demands existing in favor of the said defendant company, and to defend any and all suits," etc.

Still further, apparently in order that there might be no room to question the receivers' right to step into the shoes of the signaling company as completely as possible, the court directed the company forthwith to

"* * * transfer, convey, turn over, and deliver to the receivers, or their duly constituted agents or representatives, all the real and personal property, business, assets, and effects above described or referred to, and all the property and assets of the defendant company, and all books of account, vouchers, deeds, leases, patents, applications for patents, inventions, contracts, bills, notes, accounts, moneys, shares of stock, certificates of stock, bonds, obligations, or other property belonging to the defendant company in his, their, or its hands, or subject to his, their or its control."

In obedience to this order the signaling company, on October 24, 1912, executed and acknowledged an instrument whereby it assigned to the receivers

"* * * all rights, title, and interest in and to the patents and the inventions set forth in the patents and applications in the schedule below listed, including the right to sue for past infringement * * * as fully and completely as said rights would have been enjoyed by the National Electric Signaling Company if this assignment had not been made."

The "schedule below listed" includes the two patents now under consideration. We confess to some difficulty in understanding what more was needed to authorize the receivers to intervene and carry on this litigation. Authority to sue was granted by the District Court of New Jersey; and, since this alone might not be sufficient to support the receivers' right to sue in a foreign jurisdiction, the company was required to assign, and it did assign, all its rights in the patents and in past infringements; and the Pennsylvania District Court, recognizing the receivers' title, authorized them to file the supplemental bill in order to utilize the proceedings already taken, and to prevent delay and expense to both parties. It would be a narrow technicality indeed that would require the receivers to begin a new suit and to go over the same ground again that had already been traversed when the supplemental bill was filed. The subject does not seem to need elaboration; the defendant's objection to the receivers' right to carry on the suit is therefore overruled.

In accordance with these views, the decree of the court below is reversed, and the case remanded, with instructions to enter a decree for complainants, sustaining the validity of the claims involved and ordering an accounting.

GENERAL ELECTRIC CO. et al. v. STEINBERGER.

(District Court, E. D. New York. October 9, 1913. Modification of Opinion, October 16, 1913.)

1. PATENTS (§ 114*)—SUIT TO OBTAIN PATENT—FINDINGS OF PATENT OFFICE.

In a suit in equity to obtain a patent under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), while the court must make its own independent findings, even though the testimony is identical with that before the Patent Office, it must in such case treat the findings of the Commissioner of Patents and the Court of Appeals of the District of Columbia as those of tribunals having jurisdiction with respect to matters properly before them, and their determination should not be disturbed unless shown to be plainly and unmistakably erroneous.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 166; Dec. Dig. § 114.*]

2. PATENTS (§ 92*)—VALIDITY—SUCCESSIVE APPLICATIONS.

No inference of wrongdoing is to be drawn from the filing of a sole application for a patent by one who had previously united with another in a joint application relating to the same subject-matter, unless the circumstances indicate falsehood or deceit.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 124; Dec. Dig. § 92.*]

3. PATENTS (§ 114*)—PERSONS ENTITLED TO PATENTS—DISCLOSURE TO ONE OF JOINT APPLICANTS.

Where two persons filed a joint application for a patent, any disclosure previously made by another to one of the applicants, in the absence of evidence to the contrary, must be presumed to have been made to the other.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 166; Dec. Dig. § 114.*]

4. PATENTS (§ 328*)—PERSON ENTITLED TO PATENT—DISK INSULATOR.

The disk insulator for high power electric lines, having rain-shedding annular corrugations, covered by the claims put in interference by the Patent Office between Hewlett and Steinberger, as a result of which patent No. 904,370 was issued to Steinberger, *held* to have been invented by Hewlett, who, as the inventor first making use of the invention by filing his application, is entitled to the patent therefor based on the counts of the interference proceeding, so limited as not to include a unitary disk insulator with merely nonrain-shedding annular corrugations or with annular corrugations at right angles to the plane of the disk.

5. PATENTS (§ 92*)—DATE OF INVENTION—REFERENCE TO PRIOR APPLICATION.

Where one who united in a joint application for a patent later filed a sole application for the same subject-matter, the joint application is evidence of conception of the invention by the sole applicant at the date of its filing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 124; Dec. Dig. § 92.*]

6. PATENTS (§ 114*)—SUIT TO OBTAIN PATENT—CONTENTS OF DECREE.

While the court, in a suit under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), to obtain the issuance of a patent to complainant for an invention patented to another, may construe the claims in issue, it should not alter such claims, as such alteration would interfere with an action under section 4918.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 166; Dec. Dig. § 114.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the General Electric Company and Edward M. Hewlett against Louis Steinberger. Decree for complainants.

Charles Neave and William G. McKnight, both of New York City, for plaintiffs.

Charles H. Wilson, of New York City, for defendant.

CHATFIELD, District Judge. The present suit is brought under section 4915 of the Revised Statutes (U. S. Comp. St. 1901, p. 3392), by which an applicant is given "remedy by bill in equity" "whenever a patent on application is refused" by the Commissioner or by the court of the District of Columbia "upon appeal." Adverse parties must have notice, and it necessarily follows, if the defeat of the applicant has been the outcome of an interference proceeding, or based upon a determination that some other applicant is the original inventor or is entitled to the patent, that the successful applicant is a necessary party to the bill in equity, and a decree therein in favor of the plaintiff will carry a determination of invalidity or lack of right in the record patentee. *Laas v. Scott* (C. C.) 161 Fed. 122. The resultant proceedings in the Patent Office will necessarily be the issuance of a patent to the plaintiff and a cancellation of the grant by letters patent previously issued.

On appeal to the Circuit Court of Appeals of the District of Columbia from a decision of the Commissioner of Patents, the case is heard in the nature of a review, and the finding of fact of the Commissioner must be considered from the standpoint of the record as made on the appeal.

[1] But, in a proceeding under section 4915, the testimony is taken *de novo*, and, while the record may be identical with that in the Patent Office, nevertheless the court must make its own findings upon the testimony. In so doing, it must treat the conclusions of the Commissioner of Patents and of the Court of Appeals as findings of a tribunal having jurisdiction with respect to the matters determined in the Patent Office, or upon appeal therefrom, and, in so far as these determinations are shown to have been made upon the same facts as those presented to the court in the action under section 4915, they should not be disturbed unless shown to be plainly and unmistakably erroneous. *Laas v. Scott*, *supra*; *Automatic Weighing Machine Co. v. Pneumatic Scale Corporation*, 166 Fed. 288, 92 C. C. A. 206; *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657.

The plaintiff's case has to be proved only by a preponderance of testimony, but it must be testimony which the court believes, and that belief involves proving to the court's satisfaction that the findings of the Patent Office were incorrect. All reasonable doubt must be removed and thorough conviction must be had. Such is believed to be the doctrine expressed by the Supreme Court in the cases of *Coffin v. Ogden*, 18 Wall. (85 U. S.) 120, 21 L. Ed. 821, *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017, and *Morgan v. Daniels*, *supra*.

In the present action a large amount of testimony has been offered to show, upon the present record, the entire transaction and all the

material acts of the parties concerned therewith, both in and out of the Patent Office, and with respect to matters having to do with the rights to the patents involved, even though the Patent Office proceedings did not contain testimony of the same sort. In some instances this additional testimony is offered as newly discovered evidence. In some instances the new testimony is presented to explain and rebut the conclusions of the Patent Office, upon the record which was before it. In some instances the new testimony is offered as to matters which were not thought relevant or necessary for presentation to the Patent Office in the previous hearing.

In general it must be held that all such testimony is competent and must be considered by the court in the action under section 4915, but in so far as the conclusions of the Patent Office, as sustained on appeal, are treated as a fair determination, upon similar testimony, and hence as being valid unless plainly erroneous, and in so far as the parties to the interference proceeding may have been estopped from asserting things inconsistent with their claims before the Patent Office, this court will not use the additional proofs in reaching a conclusion on the right to the patent, until it has determined whether the defeated party is in a position to contest further, or to give additional testimony about, the matters thus previously determined.

So far as the subject-matter of the action is concerned, the record proceedings introduced in evidence, and the discussion of the questions presented therein, it is unnecessary to restate here what has been so well expressed in the various opinions that must be read as a part of the consideration. These opinions show clearly the various record dates and steps of the transactions, and the discussion in the present case will take them up from the evidence in this action, bearing thereon. These various opinions will be used, therefore, as if their statements had been set forth in full. The first Buck & Hewlett application generally will be referred to as the "abandoned Buck & Hewlett application," the patent issued to Steinberger, as the result of the interference (No. 904,370), will be referred to as the "Steinberger patent," and the sole application by Hewlett for certain claims of the Buck & Hewlett application will be called the "Hewlett application."

The earliest of these opinions on the merits of the application was rendered November 2, 1911, by the Examiner of Interferences, after final hearing upon the 13th of April of that year, and determines that Steinberger was not entitled to a patent for the device covered by certain counts which had been put into interference by the office and accepted by both Steinberger and the plaintiffs in the present action.

It will be seen that in the present case these counts broadly apply or can be read upon a structure having annular flanges, corrugations, or rings, projecting from the face of the disk, on opposite sides of the disk, and set at any angle to the face of the disk. But each of these annular flanges, as shown in the exhibits, in the drawings, and in the testimony both before the Patent Office and the court, are slightly thicker at the point of union with the disk, have in general parallel sides, and each pair of flanges, while generally "opposite" one another, yet inclose an angle of substantially 90 degrees between the

sides away from the axis and some 270 degrees between the sides toward the axis instead of being opposite in direction; that is, 180 degrees away from each other.

It appears that Steinberger, in the Exhibit Y5, as well as in other patents issued to him, and as shown in various patents of the prior art, understood and used the water-shedding properties of such a flange, and that he, or any other person with the intelligence of an ordinary mechanic, could have appreciated the effect of two such flanges upon opposite sides of the disk, as distinguished from two flanges opposite to each other; that is, in the same general plane or extending at an angle of 180 degrees from each other.

As has been said, the drawing Y5 and the claims of the Steinberger patent as actually issued and as finally allowed by the Patent Office point out this fact. In the same way the Hewlett application and the Hewlett drawing (Exhibit 10c), as also the abandoned Buck & Hewlett application, show what are called "obliquely projecting flanges on opposite sides of the periphery," and the drawings of the abandoned Buck & Hewlett application contain (Figs. 5, 6, 8, and 9) these obliquely placed flanges, and also other flanges or annular rings, at a right angle to the face of the disk and nearer the center than the oblique flanges, on the "opposite" side of the disk from the corresponding flange of similar angle. Of these annular flanges or rings, however, in the Steinberger patent and in the abandoned Buck & Hewlett application, the obliquely placed flanges do not extend in exact opposite directions from each other, and the original Buck & Hewlett abandoned application, claims 4 and 5, called, in a general way, for "rain-shedding flanges" or "means for deflecting rain."

When the interference was suggested, the counts ultimately used and accepted by all parties, and which ultimately appear as claims 9, 10, and 11 of the Steinberger patent, were therefore broadly interpreted to include the obliquely set rings, as well as rings substantially opposite to each other in direction, and hence to cover exactly the disclosures of the Steinberger specifications and drawings, as well as those of the abandoned Buck & Hewlett application and the single Hewlett application, of which the claims were then in interference.

But the claims of the patent must be read in the light of the disclosures of the patent when tested by the prior art and cannot be interpreted so broadly as to protect the old devices of corrugations alone. The original claim 15 of the Steinberger patent was in language broad enough to cover mere corrugations. This was rejected by the Patent Office as "inaccurate" and "not presenting patentable matter." This action was acquiesced in by Steinberger and was correct. The present claims, therefore, cannot be read so broadly as to cover and to be held as having allowed this unpatentable structure. *Condit Electrical Mfg. Co. v. Westinghouse Electric & Mfg. Co.*, 200 Fed. 144, 118 C. C. A. 474; *Cotto-Waxo Chemical Co. v. Perolin Co. of America*, 185 Fed. 267, 107 C. C. A. 373; *Simplex Electric Heating Co. v. Leonard*, 200 Fed. 581.

Another peculiarity which must be noted at this time is that the effect of the obliquely set flanges, so far as the quality of shedding

rain is concerned, was also plainly shown by the specifications and drawings of the Steinberger application, as ultimately embodied in his claim 6, in which the central disk or disk plane is carried out so as to extend between the obliquely set flanges in a manner not considered or suggested by Hewlett or Buck and not indicated in the commercial structure, Exhibit 16, introduced upon the trial. Claims 7 and 8 also show sets of annular flanges in particular combinations but in general modified or typified by claims 9, 10, and 11.

It was admitted upon the trial by all the parties that these claims (6, 7, and 8) of the Steinberger patent would necessarily infringe claims 9, 10, and 11 if those claims (9, 10, and 11) had been allowed to Hewlett instead of to Steinberger, because Steinberger had not sought to patent the form of disk described in claim 6 or the general flanges of claims 7 and 8 in any way except in conjunction with the obliquely placed rings of claims 9, 10 and 11. It was further admitted by all of the parties, and is apparent from the record, that no attack in this suit can be made upon the Steinberger claims upon the ground that they are too broad. They have been used by all of the parties to fit the disclosures of the patent, and the issue is as to the right to the allowance of the counts of the interference on the assumption that they are proper claims to cover the structure. If Hewlett was entitled to be granted a patent upon his application, then Steinberger would, so far as this case is concerned, lose all of the claims under which insulators with the obliquely set flanges could be constructed and hence would have no claims (for the disk with such flanges) upon which a patent could be granted to him, after the Hewlett patent was issued.

The matters of record upon the merits of the case are recited in the opinions of the Examiner of Interferences, decided November 2, 1911, the decision of the Examiners in Chief April 29, 1912, the decision of the First Assistant Commissioner dated August 6, 1912, and of the Court of Appeals of the District of Columbia upon the 25th of April, 1913. In addition, upon May 25, 1912, an opinion was rendered by the Assistant Commissioner deferring consideration of a petition to dissolve the interference between Steinberger and Hewlett's assignee, on the ground of alleged fraud and irregularity by Hewlett, for the reason that material questions were presented which would be considered upon the appeal then pending. This opinion, therefore, presents no decision of any point here involved.

An opinion filed by the Assistant Commissioner upon the 13th day of January, 1913, asking for the recall from the record in the Circuit Court of Appeals of a certified copy of the interference record, for the purpose of eliminating three patents included by request of the plaintiffs in the present action, and in which opinion the conduct of counsel for Hewlett, in obtaining the certification of these papers, was harshly criticised, can be considered by this court only in so far as the facts reviewed by the Commissioner and shown in the record may bear upon the question of credibility or motive of the parties affected. The conclusion of the Commissioner that criticism was deserved has no bearing, by itself, upon the issue here.

The solicitor for Hewlett contended that any patent relating to the subject-matter of the application, and presumptively considered by the Patent Office, could be brought particularly to the Examiner's notice or used before the Commissioner or court upon appeal. Upon an assumption that the Examiner had considered such patent and that the Court of Appeals might do so, the Commissioner was asked to make it a part of the record. Even if included in the printed record, the court could have disregarded as a part of the record below any paper which that record did not show had been actually considered by the Patent Office, or could have determined for itself whether it would use the paper in its own deliberations. And it would seem the Assistant Commissioner's personal opinion that counsel had tried to deceive the office had no bearing upon the question as to whether the Court of Appeals would exclude these patents from the record, in its consideration.

Upon the 26th day of July, 1913, a further motion to strike the Hewlett application from the files of the Patent Office, or to refuse the issuance of a patent thereon, upon the alleged ground of fraud, was denied by the Commissioner, without prejudice to renewal after the termination of the present action in equity, and presents no decision upon any of the points involved herein.

So in this court the only bearing of the matter is with respect to the question of credibility of the persons involved therein. The court finds no issue raised with respect to the determination of the Patent Office that the counts in the interference proceeding covered a patentable invention, and must accept the conclusion of the Patent Office on that point, unless it appears clearly erroneous upon the face of the record. But the record in this court clearly shows such patentable invention, independent of the conclusion of the Patent Office, and hence no discussion is necessary except to analyze the actual invention.

It appears that disk insulators and disks on insulators were old in the art (Steinberger, No. 786,691, April 4, 1905; Ball, No. 698,097, April 22, 1902; Buck, No. 876,939, January 21, 1908; Locke, No. 520,367, May 22, 1894).

It appears that strain insulators were old in the art (Van Sands, No. 362,682, May 10, 1887; Ball, No. 530,498, December 11, 1894; Steinberger, No. 786,691, April 4, 1905; Sachs, No. 778,507, December 27, 1904).

The use of a plurality of insulators in series (of either the pin type or of the strain type) was old (Barry, No. 717,322, December 30, 1902 [line 68]; Van Sands, No. 362,682; Ball, No. 530,498; Sachs, No. 778,507; English Patent to Richardson, No. 9517, March 23, 1905).

The idea of strengthening the structure by making either the hub or support of the insulator integral with the surface, whether skirt or disk, was old (Ball, No. 530,498; Steinberger, No. 786,691; and most pin insulators).

The massing or thickening of material to furnish greater strength in an integral body was old and illustrated by the formation of all pin insulators.

The idea of extending the insulating surface by corrugations, or by the interposition of a skirt or flange, was old (Sachs, No. 778,507; Bain, No. 443,187, December 23, 1890; Locke, No. 573,092; McCarthy, No. 756,181, March 29, 1904; Van Sands, No. 362,682).

The idea of using a flange or skirt or annular ring to cause the shedding of water, either by draining off the water vertically or (if the axis be horizontal) by causing it to follow around the channel of the flange, and thus to drop off at some point, at least as far from the axis as the length of the radius of the channel, was old (Buck, No. 876,939; Ball, No. 698,097; McCarthy, No. 756,181; and the old pin insulators).

The patentable idea, as recognized by the Patent Office, was a unitary disk strain insulator; that is, an integral insulator capable of being used as a complete unit in a series and showing, in one structure, a combination of parts, all previously well known both in form and functions, but which, by the new combination, would meet conditions and produce results that had never before been provided for in a single or unitary structure, in the way in which the result was accomplished in the structure shown both by the Steinberger application and by the Hewlett.

Any development of the pin-type insulator, or of a suspension insulator, with eyebolts or links substituted for the pin, which involved merely the old idea of shedding rain and furnishing protection to the surface portions under the eaves or skirts of the insulator, fell far short of disclosing the cheap, commercially practicable, and simple insulator formed by combining the two annular flanges or obliquely set rings in such positions, upon the opposite sides of the insulator, that under all usually expected conditions substantially the entire amount of moisture would have to be deflected by one flange or the other from the inner or under surface of that flange.

The Exhibits Y1, Y2, and Y3 (the existence of which is traced back to the year 1904, prior to a change in the Electro-se Manufacturing Company's organization) with Y7 filed in the office of Munn & Co. on October 18, 1905, present the designs shown in the Steinberger patent, No. 913,439, application for which was filed November 27, 1905, and No. 859,703, application filed May 1, 1906.

It is clear that the idea of increasing the surface to prevent surface leakage, the idea of shedding water to protect the under surface of the water-shedding rings, as well as the idea of placing these rings upon both sides of the disk of a so-called disk insulator, and of thus protecting the entire circumference of the under surface, which might be surrounded by any ring, were present in Steinberger's mind before October 18, 1905, and were acted upon by him with proper diligence when applied to vertical or pin-type insulators.

The next sketch, Y4, contains the exact idea communicated by Steinberger to Buck, and upon which the alleged disclosure of the patentable idea was given to Buck and Hewlett.

The sketches Y3 and Y4 both show appreciation by Steinberger of the availability of a link insulator for suspension in a horizontal position, and Y4 is substantially the same as the small sketch marked Ex-

hibit 21b upon this trial and sent in the letter from Steinberger to Buck upon the 7th day of October, 1905.

Although the entire record in the Patent Office and every issue presented in the present action is set forth in the various opinions above referred to, it will be necessary to state, in sufficient proximity to carry them in mind, some of the dates from which the rights of the parties are established, and it will be further necessary, in a consideration of the present case, to refer to the testimony presented in court and to discuss this in its bearing upon the questions accurately outlined in the decisions quoted above.

The defendant Steinberger, during the years between 1892 and 1905, had been president of the Electro-se Manufacturing Company and had been interested in the use of the material called electro-se for insulating purposes. He had taken out a number of patents which, in connection with the prior art, show (as has been already stated) full appreciation on his part of the increase in electrical resistance by an extension of the intervening surface, such as is afforded by corrugations, by the interposition of a skirt or hood, or by enlargement of the insulator. The factor of expense, in connection with the use of larger devices and more material and in the manufacture of complicated forms, was well known to him. It also appears that he thoroughly understood and appreciated the interference with insulation against electric currents of high potential, caused by a flow of water, and by the presence of moisture upon the surface of the insulating material. He appreciated fully the necessity of providing some protected surface when an insulator was exposed either to continuous streams of water from heavy rainfall or to the formation of a surface film of moisture on the under surfaces when the insulator was subjected to rain or storm from different directions than from directly overhead.

Steinberger knew, and every one acquainted with the art knew, that upon any form of so-called pin insulator the surrounding and protecting skirt or flange had the effect of a hood, like the eaves upon a house, and furnished a dry space under this skirt or projection, and that this not only caused the water to be shed but prevented the capillary spread of a film of moisture and led off all water, except that retained around the rim of the skirt, at at least as great a distance from the conductor as was furnished by the depth of the under surface of this skirt, and that the width of this dry surface, as well as the length of path, was increased by enlargement of the circumference and the resultant lengthening of the skirt.

Steinberger knew, and it was old in the art, that if a skirt or annular flange or corrugation or disk was placed upon a horizontal axis supporting a conductor, such as was shown in the Buck patent, No. 876,939, and the Steinberger patent, No. 853,745, water falling upon the insulator would be led around in the channel of the annular ring and would fall to the ground either at the greatest horizontal diameter of the channel or at its lowest point. Such flowing water would not rise over the outer circumference of the disk, and the length of the insulating medium would be increased, except as against leakage or creepage

by way of the film of water which would form from rain falling upon all of the disks or corrugations at the same time and from the continuous stream of water running off at the lowest point of the channel and out to the circumference of both faces of each disk upon its lower side.

Steinberger knew from his experiments that disks of electrose 14 inches in diameter, and of reasonable thickness, would not be punctured by a current of exceedingly high potential, even of some 250,000 volts; and he knew that such a disk, with an integral hub or central portion, could be made to furnish means of suspension of considerable strength.

Steinberger knew that means of suspension, in the form of eyebolts or of links with conical bases, partially surrounding each other (so to furnish a compressing strain), or apertures through which a cable or wire could be passed, would allow the insulating disks to be used in series, or one at a time, and he also knew that strain insulators, such as those shown by his own patent No. 735,611, the patent to Ball, No. 530,498, the patent to Sachs, No. 778,507, or the English patent to Richardson, No. 9517, of 1905, could be suspended in any position, or at any angle, and no invention would be involved in the mere use of such an insulator in a different position or for a different purpose without change of function.

One of the oldest patents cited, that to Van Sands, No. 362,682, shows a suspension insulator, capable of use as a unit, having a "flaring shield" extending entirely around the axis (that is, around the conductor), with at the same time a "flaring guard" inside the circumference of the flaring shield and extending nearly at a right angle thereto but not coming in contact with the underside thereof. This had been expressly designed for use in connection with electric light wires to shed water, to prevent the entrance of moisture, and to afford a sufficient surface insulation. This was not a disk insulator, and the annular flanges or obliquely set circular shields did not project from the opposite sides of the disk in any such way as to show the simple, cheap, and practical unitary commercial form of either the Hewlett or Steinberger design, and hence was not an anticipation of the claims in interference.

But these patents of Van Sands, Ball, and Steinberger, and the admitted unpatentability of a simple disk, as added to the Ball and Steinberger spheroidal or circular insulator, or the use of simple corrugations to increase surface, must be borne in mind when considering what (as the Patent Office correctly found) was invention, as represented by the counts in interference, and must be considered in connection with all of the transactions between Steinberger and Buck or Hewlett as to any disclosures of patentable invention.

Buck had been in the employment of the Niagara Falls Power Company as an engineer. He had had considerable correspondence with Steinberger during the years 1902 and 1903 and was in general familiar with the use of electrose and the form of insulators patented and placed upon the market by Steinberger. He had made tests upon them and up to the 17th of August, 1905, had received from Steinberger in-

formation generally as to all of Steinberger's ideas which had been reduced to practice. On the 17th of August, 1905, while interested in the construction of a transmission line by the Niagara Falls Power Company with currents of exceedingly high potential, Buck talked with Hewlett, whom he had previously known while both were employed by the General Electric Company, and an agreement was reached between Buck and Hewlett that they would collaborate in working out a system of transmission. This conversation took place at Niagara Falls, after a meeting of engineers, attended by Hewlett, and there seems to be no reasonable ground for doubting that it occurred, as stated by Hewlett and Buck. The tangible evidence of that conversation is a sketch, partially drawn by Buck and partially drawn by Hewlett, marked Exhibit 7 in this case, in which certain towers for sustaining the conductors are outlined, and the conductors themselves are indicated as sustained by three tension members placed substantially 120 degrees apart.

One of Buck's suggestions for these tension members or insulating means is shown upon the drawing to be a corrugated stick, and his testimony is to the effect that he had been experimenting with such corrugated hickory sticks a few days before.

The old idea of a string or series of insulators or hoods, which had been previously shown in the various patents, such as Locke, No. 779,659, and which later was brought in as a reference by the Patent Office, and in the Scholes patent, No. 876,596 (this particular reference was unavailing because of the date of the Scholes application), was made use of by Hewlett and acquiesced in by Buck. This string or series of insulators show disks suspended vertically, one under the other, by eyebolts or loops and with each disk protected by the usual skirt or hood.

The ordinary knowledge of Buck and Hewlett as to the needs of the structure (and as indicated by the other sketches on Exhibit 7) with the series of hood insulators suspended at different angles around the entire circumference in the plane of suspension show that both men had in mind protection, by hoods or flanges set at different angles, in conjunction with the skirt or flange of the old pin insulators, and the necessity of protecting from rain and surface moisture at the angles at which the disks would be suspended. They put Buck and Hewlett in the exact position where the invention claimed in this suit was desirable and could readily be conceived by the man to whom the idea should occur.

Hewlett went back to Schenectady and, as appears from the testimony, experimented upon the construction of insulators for the purpose desired, particularly as his line of work with the General Electric Company was that of insulation.

Some confusion has resulted and contradiction has occurred in the proceedings before the Patent Office and in this suit with respect to just what Hewlett did. In the affidavit filed in the interference proceeding, he has stated that his drawings were made upon the 17th of November, 1905, but that he made a model and experimented during

October, 1905, along the lines of the drawing shown, which has been called Exhibit 10c in this case.

Other testimony which is persuasive would indicate that Hewlett had been experimenting and had attempted to use a so-called "saddle" form of porcelain insulator, which did have the interlocking apertures or loopholes for the insertion of the conductor, as in the Hewlett structure, and did have an integral enlarged central mass or portion integrally molded with a disk portion which was turned into the shape of a saddle and is shown in Fig. 3 of the patent to Brooks, No. 578,542. Hewlett was also experimenting with metallic bands around disk surfaces and, if the testimony of himself and his witnesses is to be believed, had arrived at a point, by the 17th of November, 1905, where he wrote to Buck, in reply to one of Buck's communications, that he acquiesced in all of Buck's ideas except the form of insulator, and that he inclosed a sketch of a design for an insulator which he thought would serve the purpose desired by both. In drawing this sketch Hewlett says that, according to custom, he placed several sheets of paper, with carbon sheets between, under the paper upon which he made the sketch. Although Buck has been unable to identify or to produce with satisfactory identification the sketch sent to him or the letter accompanying it, the plaintiff has produced a paper purporting to be this original sketch, and at least two of the carbon duplicates, and they show the precise design subsequently used in the Buck & Hewlett application, and later the sole Hewlett application upon which interference was declared with Steinberger.

A few days after the 17th of November, 1905, Buck came to Schenectady, according to the statements in his letters, and there saw experiments conducted with certain disk insulators, which had been made by the Electrose Manufacturing Company substantially along the line of the plain disk insulator contained in the sketch of Buck & Hewlett, of August 17, 1905 (this part of the sketch having been made by Buck). These experiments were not entirely satisfactory, but Buck is positive that up to that time he had not seen a model of the insulator suggested by Hewlett, and his conduct and recollection of this visit show that the Hewlett sketch did not convey to his mind the desirability of the Hewlett form of insulator, and that he did not relinquish his own ideas until after his visit to Schenectady.

The attorney for the General Electric Company prepared specifications and application for a patent for the transmission line by Buck & Hewlett, and this application was signed and verified by both Buck and Hewlett and filed on February 15, 1906, in the Patent Office. The claims presented in that application included claims for the disk insulator set forth in the Hewlett sketch of November 17, 1905, as a separate invention, and yet both Buck and Hewlett verified the application, stating that it was the belief of each that the matters contained therein were joint inventions.

The proceedings in the Patent Office which immediately followed called for some communication from Buck, in which, in order to save the patent, he suggested further attempts to perfect the claims for the insulator structure, but without questioning his own title as joint in-

ventor. Hewlett also participated in the discussion about the actions of the Patent Office, and it should be noted that both Hewlett and Buck had assigned their rights in the particular application to the General Electric Company at the time of filing.

In the fall of 1906 Hewlett found that the insulators (which had in practice been simplified by the removal of the inner annular flange set at right angles to the face of the disk) could be used commercially for other purposes than the high-power transmission line, as described in their patent application, and actually sold some of these commercial devices, thus giving to the world any ideas contained therein, not covered by the applications under consideration in this case, inasmuch as no other patents were applied for within the space of two years. In 1907 both Buck and Hewlett described, at a meeting of the Society of Electrical Engineers, the details of their plan for a transmission line, as well as Hewlett's type of insulator. This came to the attention of Steinberger, who testifies that he then told Buck that this Hewlett insulator was really his (Steinberger's) invention and that Buck did not deny this. Buck testifies that he does not remember the interview, and there is some confusion as to where his office was at the time. But the question is only illustrative of a certain amount of indefiniteness in Buck's recollection as to many matters as to which he was questioned, and does not conclusively prove anything as to the priority or originality of the Hewlett device. Steinberger then looked into the question of his own drawings and ideas and also his communications to Buck and apparently arrived at the conclusion that he was not only the inventor of a form of insulator which comprised all of the elements of the Hewlett device but that his correspondence and communications to Buck had been the source of the design perfected by Hewlett and included by him and Buck in their application for a patent.

Considerable argument has been had by the Board of Examiners and by the Commissioner of Patents, as well as by the Court of Appeals of the district, with respect to the effect of any disclosure by Steinberger to Buck. It appears from the present record that whatever disclosure was made by Steinberger to Buck was known to Hewlett, with the possible exception of what has been called drawing No. 2 of Exhibit 24. As to this, Hewlett denies that the particular design was ever transmitted to him, although he did receive the insulators for experiment, comprising an integral mass with imbedded eyebolts, attached to a disk 14 inches in diameter, slightly thinner at the periphery than where joining the central portion, and made of electrose, as ordered by Buck from Steinberger for the purpose of experiment, after Buck and Hewlett had jointly undertaken to work out the transmission line.

The correspondence between Buck and Steinberger shows that Steinberger called to Buck's attention the use of corrugated rings, three or four in number, upon each side of the disk, as ordered by Buck; that the purpose of these corrugations, as stated by Steinberger, was to increase the insulating service, and that they could be varied in details to meet any requirements.

Steinberger claims that his knowledge, the same as that of Buck

and Hewlett, was sufficient at that time to thus protect any advantages or uses to which it might subsequently appear a variation of this form of device might be put. He claims, and his expert in this trial has presented, a drawing to show that the corrugated rings upon the disk, if enlarged, would form annular flanges, performing the functions of those disclosed in both the Steinberger and Hewlett patents. He reads upon the structure shown in this drawing, Exhibit 24b, the counts of the interference, and the only point as to which argument can be had is whether the broad words of this count, viz., "annular flanges extending in opposite directions," would be anticipated by a device showing corrugations or rings enlarged into flanges and extending at right angles to the face of the disk.

It must be admitted that such an enlarged corrugating ring would be an infringement against the claim shown in the interference count, if this could be considered as including every form of corrugating flange or water-shedding annular ring, even if such form was old in the art. Both the Examiner of Interferences and the Commissioner of Patents have discussed at considerable length in their opinions the question whether the counts of the interference should be construed so broadly as to include the Steinberger drawing (Exhibit 21b) or should be limited to the ideas presented in the specifications and drawings of the Hewlett and Steinberger applications.

If the Patent Office had limited the counts suggested in the interference to the claims as presented by Hewlett or to the structure actually shown by the specifications and drawings of Steinberger, the question would not arise. But Steinberger and Hewlett have brought this action, and the decisions of the Patent Office have been based upon the assumption that the counts of the interference and the claims finally allowed in the Steinberger patent are an accurate description of water-shedding flanges or flanges set at an oblique angle, with an annular channel or ring surrounding them on the outer side. If the precise form of this claim should be corrected and modified by the Patent Office before final allowance, after this trial, that is nothing with which the court should concern itself and would remove the necessity for this argument.

It cannot be held that an enlarged corrugating ring or annular flange, which merely increases the path or extends the resisting surface, would be an anticipation of the claims which should be allowed to Steinberger or Hewlett; nor can it be held that Steinberger's statement as to such corrugating rings would be a disclosure of the patentable idea.

The commercial use of the modified insulator from the Buck & Hewlett application is stated by Hewlett to have caused him to question Mr. Davis, the general patent counsel of the company, who had prepared the Buck & Hewlett joint application, as to the advisability of attempting to patent the insulator separately as Hewlett's invention and as to the effect upon his claimed invention of the application by Buck & Hewlett, in which it was claimed to be the joint production of both. Buck was not consulted, but investigation by the office led to the preparation of an individual application by Hewlett for a

patent for this particular insulator. This application states expressly and in detail the availability of the annular flange placed obliquely on opposite sides of the disk for the purpose of shedding water and preventing the formation of a damp film; or, in other words, the preservation of some dry surface, under the effect of rain from any direction. The same purposes had been stated in the joint application, but the claims were differently worded.

Hewlett made an affidavit that he was the sole inventor, and no mention was made of the Buck & Hewlett prior affidavits as to joint invention. The counsel for the General Electric Company forwarded this application to the Patent Office and instructed his own office to look into the circumstances to see whether Hewlett was entitled to the sole invention. He thereby made it possible to prosecute both applications in the Patent Office, and (unless they happened to come before the same Examiner or be in the same division) it might not result in the declaration of an interference between the joint application and the Hewlett application until such time as some one in the Patent Office became cognizant of both applications.

It appears that the result of such contradictory applications could be only disposed of by an interference as between the parties, and the Patent Office in practice bases its ultimate action as between the parties upon a determination of who is really entitled to the patent.

[2] No inference of wrongdoing is drawn from the separation of the claims by the individual or his change of position from that indicated in the joint application unless the circumstances indicate falsehood or deceit. These matters enter into the determination of fact as to who is really entitled; and, even where the joint application and the individual application are for exactly the same structure, the rights of the parties are determined from the facts and the patent issues accordingly. In *re* Application of Crocker, vol. 4, Manuscript Decisions, p. 269, June 5, 1869, and many others, down to *Gilbert v. Gilbert & Lindley*, C. D. 1910, 211, 1600 G. 775; *De Laval Separator Co. v. Vermont Farm Machine Co.*, 135 Fed. 772, 68 C. C. A. 474.

In the present instance Buck ultimately learned of the claim by Hewlett and the application filed by him. Buck is uncertain in his testimony as to how and just when he learned this. He stated on the trial that it was after certain correspondence, but none was produced, and Buck was finally asked by the General Electric Company to sign a new application for a joint patent for the transmission system but with the particular claims for the insulator eliminated. This he did, and, as was stated by the Examiner in his decision, Buck did acquiesce in Hewlett's claim of invention and would have so testified in the interference proceeding, if he had been called.

It may be assumed that, if Buck and Hewlett were wrongdoers, Buck would have acquiesced, especially as he had assigned his claim to the application. But his attitude is as consistent with innocence as it is with wrongdoing, and no inference can be drawn either way from this fact alone.

The second joint application was directed by the counsel, Mr. Davis, according to his testimony, to be filed as a continuing application, and this counsel also testifies that he instructed his subordinates to mark the first application "abandoned" upon the company's books, and that he so considered it. He was compelled to admit, however, that subsequent thereto steps had been taken to prosecute the first joint application, in the way of answering references cited by the Patent Office, and (even after Steinberger's application had been filed, and after the second joint application by Buck & Hewlett) communications were had with the Patent Office in which the existence and even the furtherance of the first joint application was brought to Mr. Davis' attention, and he took no steps to notify the Patent Office that the first joint application had been abandoned or that the insulator structure had been claimed as a separate invention by Hewlett.

Mr. Davis admitted upon the trial that if any of these acts on his part were likely to mislead the Patent Office, or if he had realized that an incorrect state of facts was inferred from his action, he should have informed the Patent Office of the situation. His explanation is that, as between Buck and Hewlett, he did not consider that any one was interested except Buck and Hewlett, and that he assumed the officials in the Patent Office knew of the applications on file. He also states that certain developments in the transmission system made it seem advisable to file a continuing application, or a new application, based upon the same invention, so far as the joint invention of Buck and Hewlett was concerned, rather than to attempt to patent the new ideas, either as an improvement or as further invention.

With this we have nothing to do, inasmuch as the second joint application of Buck & Hewlett, after comparison with the first joint application, was ultimately found by the Patent Office to be allowable, and the first joint application was ultimately marked "abandoned" by the Patent Office, for lack of prosecution, in November, 1910.

Mr. Davis further admits that he left matters to his subordinates, for which he and his clients were responsible, and which have resulted in the anomalous or contradictory position in which the matter was placed by the fact that the Steinberger application brought in other interests than those of Buck and Hewlett and their assignee, and that careful personal consideration of these matters on his part would have shown to him the danger of creating a wrongful appearance as to his acts and the possibility of an inference by Steinberger that deception or concealment was intended.

Steinberger, after discovering in the summer of 1907 that Hewlett was claiming the invention of the insulator under discussion, looked into the situation and on January 20, 1908, filed his application, in which he describes the construction and use of the water-shedding and moisture-preventing flanges, with full appreciation of the disclosures and invention which he now contends were apparent in his correspondence and from his drawings submitted to Buck at the time the sample disks were ordered by Buck from Steinberger, which were subsequently tested by Hewlett at Schenectady, and in connection

with which the corrugated form of disk was indicated in the drawing, Exhibit 21b.

This brings us to the further contention that the General Electric Company, as assignee, and Hewlett, when claiming to be the sole inventor of the insulator, are estopped, through having filed the joint application for the same structure, from claiming that a disclosure to Buck was not in fact communicated to Hewlett, or that Hewlett and his assignee were not bound by the disclosures made to Buck, if these appeared in the joint invention as claimed.

[3] The Board of Interference Examiners and the Commissioner of Patents, in reviewing their decision, held that a disclosure to one of two alleged joint inventors was a disclosure to both. They also held that, in the absence of explanation or testimony by Hewlett, it must be presumed that any disclosure to Buck, which appeared in the joint invention, was also a disclosure which would bind Hewlett. This finding was affirmed by the Court of Appeals of the district and is manifestly correct. The Board of Examiners found that the disclosure of Steinberger to Buck did not show and would not teach the invention described in the counts of the interference proceeding. The Commissioner, however, reversed this finding and came to the conclusion that Steinberger's communications to Buck did disclose this invention and necessarily, from his ruling as to the effect of such a disclosure, held that, in the absence of explanation, Hewlett was bound thereby. This last ruling of the Commissioner was also affirmed by the Court of Appeals, and he and they base their conclusion not only upon the failure of Hewlett and Buck to appear and explain or offer testimony on this point but they also base the conclusion upon a patent to Steinberger, No. 913,439, on an application filed November 27, 1905.

Steinberger showed by persuasive testimony that his complete sketch for the purpose of filing this application was made by him at least as early as October 16, 1905, which date would anticipate any date of completed conception by Hewlett. This application was used in this way by the Commissioner for the reason that Steinberger therein states in his specifications that he provides the annular corrugations or ribs upon the under side of the disks in this structure for the purpose of providing increased surface for surface leakage and to facilitate the draining of moisture in certain directions so as to render the moisture harmless. The Commissioner concludes that Steinberger therefore had, as early as October 7, 1905 (the date of sending the sketch 21b to Buck), a complete understanding of all the advantages to be gained by a form of structure which would accomplish these results, through the use of annular flanges, and that, as it is the thing rather than words which he is patenting, he was entitled to the benefit of all such disclosures.

In support of this contention, Steinberger has introduced a number of drawings which have been referred to above, and which were marked Exhibits Y1, Y2, and Y3, which he shows were in existence as early as April, 1904, and in which he indicated the use of such

annular corrugations for the purpose above stated. He then introduced a drawing which was in existence also upon October 16, 1905, and which has been called Exhibit Y5, which is substantially identical in design with the drawings and specifications of the Steinberger patent, No. 904,370, which was then put into interference and in which the counts of the interference proceeding were allowed to Steinberger by the decision of the Commissioner and as affirmed by the Court of Appeals.

[4] Upon the question of priority, therefore, it is evident that Steinberger's drawing Y5 places the formation of the concept of the patent in suit in his mind and, as reproduced upon paper and shown to his business associates, at a date earlier than any date which can be successfully claimed by Hewlett or Buck.

The Examiner, as well as the Board of Examiners, the Commissioner, and the Court of Appeals, however, have all held that the mere concept, as exemplified in a drawing not followed by application, would not prevent the issuance of a patent to Hewlett, if Hewlett reached the same conception and first made use thereof, with an application to the Patent Office for a patent, before Steinberger's application was filed. *Christie v. Seybold*, 55 Fed. 69, 5 C. C. A. 33.

It is shown that Hewlett made use of his conception in the joint application of Buck & Hewlett in the spring of 1906, made commercial use thereof in the fall of 1906, and in the spring of 1907 filed his individual application in the Patent Office.

[5] It appears that Hewlett referred to the joint application of himself and Buck, as filed in the Patent Office, to show earlier date of invention, when reference was made by the Patent Office to Steinberger's patent, No. 859,703, for which the application was filed May 1, 1906. While Steinberger strenuously objects to any use by Hewlett of the joint application of Buck & Hewlett, which was later repudiated by Hewlett's individual application, nevertheless it must be held that the existence of the papers can be used to fix the date at which Hewlett had a full understanding of the matters disclosed, in determining the question of priority of invention, as compared with Steinberger's patent, No. 859,703. And it must also be held that the disclosures of Steinberger's patent, No. 859,703, do not show any reduction to practice by Steinberger of the invention contained in the drawing Y5 any more than this invention was disclosed by the corrugated disk described to Buck in the drawing Exhibit 24b. On the other hand, it must be held that the filing of a joint application, ultimately determined to be void, as not the joint invention of the parties, would be of little avail in attempting to show diligence in reduction to practice.

But to return to patent No. 913,439, which the Commissioner held showed application by Steinberger of the principles disclosed in the drawing Y5, it is evident that the Commissioner was mistaken. This insulator is a pin insulator, designed and described for use in a vertical position. It shows no more use of the principles under consideration in the counts of the interference proceeding than do a number of the patents of the prior art, such as *McCarthy*, No. 756,181, *Warner*, No.

593,625, and the old glass or porcelain pin insulator with the protecting hood or skirt in an annular form around the means of support.

As a matter of fact, Steinberger, as late as May 1, 1906, in applying for patent No. 859,703, as well as in the application for patent No. 913,439, indicates by the description used in his specification that he had failed to appreciate the advantage and value of the concept disclosed in the drawing Y5, and this concept remained unappreciated by him until the summer of June, 1907, when brought to a realization thereof by public description of the Hewlett insulator. Up to that time as well, he had made no use or disclosure of any thing or structure embodying this concept.

We have therefore a concept by Steinberger in October, 1905, not acted upon or disclosed by him in such a way as to be available for his benefit until January, 1908, as opposed to a concept, completed in Hewlett's mind and reduced to paper on November 17, 1905, and worked out in the form of an experimental model at about the same time, or shortly thereafter, and followed by use in a joint application in February, 1906, and in an individual application on April 20, 1907.

The defendant has called attention to the contradictions and indefiniteness in Hewlett's testimony, the lack of memory and failure to produce drawings and letters by Buck, coupled with the circumstances attending Mr. Davis' handling of the various proceedings in the Patent Office, as proof that the evidence on behalf of the plaintiff herein is not worthy of belief. He has referred to the requests by Buck of Steinberger for drawings of all Steinberger's types of insulators and to the procuring of insulators from Steinberger for the purpose of experiment, as well as to an inquiry from the General Electric Company of Steinberger as to the cost of 10,000 insulators of the disk type, to prove bad faith on the part of Buck and the General Electric Company.

The request for prices, although it was not followed by any order, would seem to indicate an attempt to obtain information as to mercantile competition or cost rather than as having any bearing upon the question of invention, and all of the arguments on these points by the defense are summed up in the proposition that a situation indicating bad faith or fraud or responsibility for the effect of the disclosure to one of two joint inventors is of itself sufficient proof, in the absence of explanation, for a finding by the court against the plaintiff, without actual proof of the mental conditions indicated thereby. Such prima facie evidence of wrongdoing, unless explained, would justify the court in resolving all doubts against the party failing to explain and would be a basis for a conclusion that the party failing to explain could give no testimony to rebut the presumption. The application of this principle was made by the Commissioner of Patents and the Court of Appeals to the failure of Hewlett or Buck and the General Electric Company to offer the evidence of either Hewlett or Buck during the interference proceedings, and the defendant seeks to draw a like inference from the fact that Mr. Bartlett, who was Mr. Davis' assistant in the proceedings before the Patent Office, was not called upon the present trial.

If Mr. Bartlett's testimony could be held to be necessary to explain anything left in doubt upon the testimony of Mr. Davis, such an inference would be justified. But upon the present trial evidence to rebut these presumptions has been presented. It is incorrect to assume that a presumption, even if so strong as to be conclusive when uncontradicted, cannot be disproved by affirmative evidence. In spite of the multitude of matters needing explanation in order to justify the plaintiffs' position in the present action, it must be held that upon the entire case these points have been met as has been indicated in this opinion. Upon the question of priority, Hewlett has been shown to be entitled to the issuance of a patent containing claims based upon the counts of the interference proceeding, as modified or limited, so as not to include a unitary disk insulator with mere nonrain-shedding annular corrugations or with annular corrugations at right angles to the plane of the disk.

As to the question of originality, it must be held that Hewlett was the original inventor as to the claims considered allowable by the Patent Office in his application, and as to the question of alleged forfeiture, through the proceedings in the Patent Office and upon the joint application of Buck & Hewlett, the present record has shown that such forfeiture has not been established and that the plaintiffs are entitled to a decree.

Modification of Opinion.

[6] In considering the decree in the above-entitled matter, the attention of the court has been called to the provisions of section 4918, R. S. (U. S. Comp. St. 1901, p. 3394). It appears that an application to have any claims of the Steinberger patent, No. 904,370, as issued, declared void or invalid must be brought under this section, and that further action by the Patent Office against the Steinberger patent is precluded by the wording of this statute. The suit which has been tried under section 4915 determines merely the rights of the parties with respect to the questions passed upon by the Commissioner of Patents in the interference proceedings. This was done in spite of the fact that a patent "had been inadvertently issued to Steinberger."

The interference proceedings were instituted by the Patent Office and participated in by Steinberger, Hewlett, and the General Electric Company, but the Steinberger patent was left of record and still exists as it was then recognized.

This court has found that the claims of the Steinberger patent, as put into interference and as interpreted by Steinberger, were broad enough *in language* to cover flanges which might be called "corrugations" upon a disk insulator, if nothing but the shape and size of the flanges was being considered. This interpretation seems to be in accord with the decision of the Commissioner of Patents and of the Circuit Court of Appeals. The Board of Examiners, however, had discussed the language of the Steinberger claims at some length, and particularly with respect to the claim of invention by combining a disk with flanges and a central mass of insulating material. As was said by the board, the form of those projections is not in any way related to the anchoring of the supports in the material of the disks.

They therefore found that a broad interpretation, based upon the ability to read these patents upon any kind of a structure made in the form of flanges or corrugations on a disk, could not be supported. Nor did they agree with Hewlett that the claims of the interference should be so narrowly read as to exclude every structure upon which could be read the language of claim 2 of the later Steinberger patent, No. 913,439, as follows:

"A disk insulator, comprising a disk of insulating material and provided with two faces, and further provided with annular corrugations upon both of said faces, said disk being further provided with means whereby it may be mounted."

They limited the latter claim to a structure which could be directly identified as having "annular corrugations" upon the disks of a pin insulator and not as being a unitary arrangement of annular flanges or collars, in connection with the hub and disk, as disclosed by the claims in interference.

The Examiners distinguished between "corrugations" and "flanges," when viewed from the standpoint of the disclosures and specifications of the Steinberger application, as presented in the interference record. The Commissioner of Patents and the Court of Appeals, however, decided that invention could not be based upon mere matters of enlargement or questions of degree. They therefore came to the conclusion that annular corrugations were the equivalent of annular flanges, even though the arrangement of parts and use of the device made it impossible to exchange one for the other.

This court in its opinion just rendered held that the patentable invention (which was exactly that upheld by the Examiner and by the Board of Examiners on appeal) lay in the use of annular flanges, which would accomplish water-shedding and insulating area-protecting purposes, under the conditions described in the drawings and specifications of the applicants.

It appears that not only was the form of a disk insulator old but the sketch of August 17, 1905, which is earlier than any established conception by Steinberger as to the patent in suit, shows a drawing, partly made by Buck and partly made by Hewlett, of a disk insulator containing everything of the Steinberger disclosure except the addition of corrugations.

Because of all the foregoing, this court held (upon pages 702 and 703 of its opinion) that the claims of the Steinberger patent could not be broadly interpreted so as to include the unpatentable form of a disk insulator with mere corrugations; that this was the basis of the action of the Patent Office and had been accepted by both parties to the interference. Upon page 717 the opinion said that Hewlett was entitled to the issuance of a patent containing claims based upon the counts of the interference proceeding as modified or limited so as not to include a unitary disk insulator, with mere nonrain-shedding annular corrugations, or with annular corrugations at right angles to the plane of the disk.

It might have been added to the previous opinion that the presence of obliquely set annular channels around the outer side of the an-

nular flanges or corrugations would in effect produce the oblique angle or rain-shedding qualities sought and employed in the patentable structure. Such channels would seem to make it impossible to describe the flanges as corrugations but might allow the use of diametrically opposite flanges or right-angle flanges such as those illustrated by the witness Day. But whatever be the interpretation of the allowed claims, or whatever may be the proper method to establish that which is patentable thereunder, the language of the claim must be held limited to the patentable invention specified and defined on page 717 of the opinion.

With this modification and statement of interpretation, it will be seen that if read strictly upon the claims of the interference proceeding, as those claims must be read by both Steinberger and Hewlett, in order to make out any valid invention, the claims of the interference proceeding may be allowed to stand so as to avoid conflict between the remedies provided by section 4915 and section 4918, R. S., and the questions may be completely disposed of upon the present trial without action by the Patent Office in the form of modification or amendment of the claims of the patent to be issued to Hewlett from the counts of the interference proceeding.

GENERAL ELECTRIC CO. v. YOST ELECTRIC MFG. CO.

(District Court, N. D. Ohio, W. D. June 11, 1913.)

No. 16.

1. PATENTS (§ 289*)—SUIT FOR INFRINGEMENT—LACHES.

The owner of a patent *held* barred by laches from maintaining a suit for its infringement where defendant had been making and extensively selling the alleged infringing article for seven years prior to the commencement of the suit, to complainant's knowledge, and during all of such time the parties were in litigation over other patents but no claim of infringement of the one in suit was made by complainant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 467-469; Dec. Dig. § 289.*]

2. EQUITY (§ 67*)—"LACHES."

The defense of laches is not tested by time alone. A comparatively short time may constitute laches when the conduct of the slothful is such as to induce others in good faith to expend money and take the risks of enterprise.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191-196; Dec. Dig. § 67.*]

For other definitions, see Words and Phrases, vol. 5, pp. 3969-3972; vol. 8, p. 7700.]

In Equity. Suit by the General Electric Company against the Yost Electric Manufacturing Company. On final hearing. Decree for defendant.

Samuel O. Edmonds, of New York City, and Julian H. Tyler, of Toledo, Ohio, for complainant.

Wilber A. Owen, of Toledo, Ohio, and Robert H. Parkinson, of Chicago, Ill., for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

KILLITS, District Judge. The bill in this case was filed August 16, 1909. It alleges that the complainant, a corporation, is the assignee of letters patent for improvements in electric lamp sockets, granted to one Sargent in January, 1901, and that the defendant, a corporation, is infringing the claims of this grant.

The Sargent patent has been adjudicated in the Third Circuit in the case of General Electric Co. v. E. H. Freeman Electric Co., 190 Fed. 34, affirmed 191 Fed. 169, 111 C. C. A. 646. The defense in that case was not as extensive as in the case before us; the additions here being of such character as to require the court, were it necessary to a decision here, to re-examine the question of the validity of the Sargent patent. As we consider the record before us, however, we need not pass upon the defense that the Sargent patent is invalid.

It is alleged that the defendant infringes three claims, which read as follows:

"(1) In an article of substantially the character described, the combination with a cap provided with interior retaining means, of an insulating-lining made yieldable so that it can be forced over the retaining means, which lining is held thereby in the interior of the cap."

"(11) In an article of substantially the character described, the combination with a cap, of projections extending in the interior thereof, and an insulating-lining adapted to be sprung over said projections, said lining being held by said projections within the cap."

"(15) In an article of substantially the character described, the combination with a cap, having a hole in its crown for the passage of the wires leading to the lamp, of projections extending in the interior of the cap, and an insulating-lining having a hole registering with the hole in the cap, said lining being held by said projections within the cap."

We find little difficulty in deciding that there is no infringement, in defendant's construction, of claims 11 and 15. The alleged invention protected by the Sargent patent consists of supporting in the cap of a lamp socket a thin wall of insulating fiber by means of "projections extending in the interior" of the cap, to quote from claims 11 and 15. The defendant uses a similar thin sheet of insulating fiber in its cap and supports it by pressing it into the cap so that its circumference engages the hollow of an annular bead extending outwardly from the cap. No portion of this bead extends within the cap itself; both the upper and lower continuations of the bead with the walls of the cap having no less diameter than the cap itself at its greatest circumference. We are decidedly not able to say, upon the consideration so far given, that the complainant has removed the burden of proof and has, by a preponderance of the evidence, established that the defendant is, in its construction, infringing claim 1, although, broadly considering such claim, it may be plausibly argued that defendant is within the terms thereof.

However, the Sargent specification uses language tending to compel the court to construe the claims somewhat narrowly and almost requiring that they be applied to constructions which are mechanically similar to that employed by the patentee, for these specifications say:

*"For the purpose of this invention the arms C are provided with shoulders S near their lower ends, and * * * the insulating lining A is cut away at T, so as to fit the arms above these shoulders."*

Nothing of this sort, nor anything nearly like it, appears in defendant's construction. We leave open, however, the determination of the scope of claim 1, because in our judgment, the question of its application, so far as this defendant is concerned, must be disposed of on another proposition.

Defendant amended its answer by adding the following defense:

"(16) Defendant, further answering, says that it is the successor of the Yost Electric Manufacturing Company, a corporation of West Virginia; that said company was the successor to the Yost-Miller Company, a corporation of Ohio, and that the business of manufacturing and selling electric lamp sockets has been carried on continuously in Toledo, Ohio, by defendant and its predecessors since prior to the year 1902; that the device now complained of was, without objection from complainant, adopted in 1902 by defendant's predecessors as a substitute for a prior device which complainant had charged to be an infringement of said Sargent patent and has been manufactured and sold continuously and extensively by defendant and its predecessors since its said adoption and down to the filing of this suit, and in the belief that they had the right so to do, and without objection by complainant until shortly prior to the commencement of this suit; that defendant and its predecessors have with the full knowledge of complainant been manufacturing the device against which the charge of infringement is made continuously since the latter part of 1902 down to the filing of this suit and have during said entire period sold the same openly and notoriously and have built up an extensive business throughout the United States in the sockets containing the same; that complainant asserted no adverse right under the patent here in suit with respect to said manufacture of defendant and its predecessors until shortly prior to the filing of this suit; and that complainant is now estopped by its long acquiescence in said manufacture from asserting that the same is an infringement of the patent in suit, and has been guilty of such laches as concludes it against any right of relief in equity."

We take it as fundamental that one enjoying a monopoly involved in the grant of a patent must be reasonably diligent in protecting that monopoly and must not pursue that course with reference to it which may mislead others into positions of disadvantage when he would choose to conceive broader rights in his grant with a resultant change of conduct on his part.

That a patentee may sleep upon his rights and may lose his right to insist on his monopoly is well settled by the cases hereinafter cited, and it remains for the court to consider whether the facts in this case bring it within that principle of estoppel.

For a period of more than six years, possibly more than seven years, complainant and defendant and defendant's predecessors had been engaged in litigation directly or indirectly touching defendant's manufacture of lamp sockets and the insulation thereof by means of insulating fiber, before the beginning of this suit.

In 1902 the Perkins Electric Switch Manufacturing Company, an associate of complainant in the Manufacturers' Association, sued Buchanan & Co., a customer of defendant's predecessor, for infringing on the Perkins patent for insulating lamp sockets, in the Eastern District of Pennsylvania, where that patent was adjudicated. 129 Fed. 134. In the same year complainant notified the Yost-Miller Company, defendant's predecessor, that the manufacture of the Dixon socket by the Yost-Miller Company was an infringement of the Sargent patent, whereupon the manufacturer of the Dixon socket was discontin-

ued by the Yost-Miller Company, and the construction substantially now complained of in the particulars involved in this case was placed upon the market by the Yost-Miller Company and was continued to be manufactured in large numbers and placed upon the trade quite generally during the seven years intervening before this suit was brought.

In 1903 the complainant, being the assignee of a patent granted to one Painter, sued, within a month after the grant, the defendant, which had succeeded to the Yost-Miller Company, in the Circuit Court of the Southern District of New York for infringement of the Painter patent in the manufacture by defendant of sockets substantially embodying the construction now complained of. In this suit the Painter patent was declared invalid. (C. C.) 131 Fed. 874; 139 Fed. 568, 71 C. C. A. 552.

In April, 1904, the Painter litigation still subsisting, the Perkins Electric Switch Manufacturing Company sued the defendant in this court, alleging infringement of the Perkins patent by defendant's manufacture of sockets substantially embodying the construction now sued on. This case was heard in this court in June, 1909, and was thereafter passed upon by the Circuit Court of Appeals adversely to the complainant therein, whose rights had been succeeded to by the present complainant. 179 Fed. 511, 103 C. C. A. 116.

The facts convince the court clearly that during this period prior to August, 1909, the complainant should be charged with knowledge both that defendant was manufacturing the socket under dispute in large quantities and also from time to time enlarging and extending its investments and marketing its product in increasing quantities, and we hold that complainant was charged with a duty, in fairness towards defendant, to have exercised its plain right in the practice to join with its case on the Painter patent, in 1903, its claims under the Sargent patent, if it then conceived it had such claims as it is asserting now, or to have asserted such claims under the Sargent patent at some time considerably anterior to August, 1909, and that its conduct, especially in suing on the Painter patent without alleging any infringement of the Sargent patent, after vindicating the Sargent invention as against the Dixon construction, might well have been interpreted by the defendant as being the view of the complainant that this Sargent claim No. 1 was not considered by it to extend to such construction as that employed by defendant.

Complainant's conduct since the beginning of this action does not tend to repel the impression that its previous nonaction should be imputed to it for laches. It rested for nearly two years in this court without pressing a demand for a temporary injunction against defendant to stop the manufacture of the disputed construction. Just a short time previous to the beginning of this action complainant had brought an action against a customer of defendant in the Southern District of New York, joining defendant therein on the theory that such customer was defendant's agent. The action was soon dismissed against this defendant for want of jurisdiction, whereupon the present case in this court was commenced. Thereafter nothing was done in the New

York case either until in 1911, when, failing to have its belated application for temporary order here promptly allowed, it became active in the eastern proceeding; pressing a motion therein for a temporary order. The dilatory tactics of complainant impelled defendant to obtain an order of this court to proceed with the taking of testimony, nothing having been done again even to expedite the New York hearing after the obtaining of a temporary order against defendant's customer. The peremptory order here to complete the case for submission apparently caused complainant to revive an interest in the other case, and the two actions thereafter proceeded to completion practically together. Thereupon, for some reason which does not, whatever it is, appeal to this court to excuse the dilatory tactics employed, the complainant seemed to prefer, and apparently bent all its energies to obtain, adjudication first in the case in New York; many excuses having been offered for delay in the final hearing here which apparently had no other relation except to the New York situation.

We refused a temporary injunction in October, 1911, without opinion, on the feeling that complainant was even then unduly delaying its assertion of right, and that feeling was but intensified by the tactics employed subsequent thereto; the hearing finally being had as the result wholly of the activities of the defendant.

The explanation for the delay attempted by counsel for complainant in his brief, based on the pendency of the Freeman Case in the District of New Jersey (190 Fed. 34), is not satisfactory to the court, knowing, as we do, that such delays were resented by defendant, whose counsel at no time acquiesced in the use of the New Jersey case as the means of delaying action in the instant case.

Were complainant's rights clearly infringed, we would not attempt to say that its conduct amounted to such laches extending over a sufficient time to defeat its right of action, but, as we have suggested, the Sargent patent is not only in its terms susceptible to the construction which defendant has placed upon it, but its terms are also consistent with an entertainable impression that complainant, in ignoring for so many years defendant's manufacture of its socket, also so narrowly construed the claims. As Judge Mayer, in *Mosler v. Lurie*, 200 Fed. 433-439, observes:

[2] "The defense of laches is not tested by time alone. Lapse of time may be well explained; but, on the other hand, even a comparatively short time may constitute laches when the conduct of the slothful is such as to induce others in good faith to expend money and take the risks of enterprise."

Here complainant cannot well explain the lapse of time even, and its conduct generally, as noted above, is such as to make it entirely possible that a comparatively short lapse of time would be sufficient to create an estoppel.

The Circuit Court of Appeals of this circuit in *Woodmanse & Hewitt Manufacturing Co. v. Williams*, 68 Fed. 489, say, at page 493, 15 C. C. A. 520, at page 524:

"One who invokes the protection of equity must be 'prompt, eager, and ready' in the enforcement of his rights. Equity will not encourage a suitor who has long slept over his rights."

The court then quotes with approval the language of Judge Coxe in *Kittle v. Hall* (C. C.) 29 Fed. 511, that:

"Long acquiescence and laches can only be excused by proof showing excusable ignorance or positive inability to proceed on the part of the complainant, or that he is the victim of fraud or concealment on the part of others."

It is manifest in the instant case that complainant cannot plead, upon the facts before us, "excusable ignorance" that defendant and its predecessors were manufacturing the disputed construction, or "positive inability to proceed" against defendant, or that it was "the victim of fraud or concealment on the part of defendant." None of the essentials of an excuse for complainant's failing to act on its Sargent patent for so many years while it was asserting its rights on other grants is presented here.

Cases on this line, as applied to patent suits, are numerous. *Westinghouse v. Wagner* (C. C.) 129 Fed. 604, doctrine approved by Circuit Court of Appeals in 173 Fed. 361, 97 C. C. A. 621; *American Tube Works v. Bridgewater Iron Works*, 132 Fed. 16, 65 C. C. A. 636; *McGill v. Whitehead & Hoag Co.* (C. C.) 137 Fed. 97; *Germer v. Twentieth Century Heating & Ventilating Co.* (C. C.) 157 Fed. 842; *Richardson v. Osborne Co.*, 93 Fed. 829, 36 C. C. A. 610; *Westinghouse Air Brake Co. v. New York Air Brake Co.* (C. C.) 111 Fed. 741; *Starrett v. Stevens* (C. C.) 96 Fed. 244; *National Cash Register Co. v. Union Computing Co.* (C. C.) 143 Fed. 342.

We feel that the complainant, as against the defendant, is not entitled to a decree of infringement of its claim 1 because of the circumstances above alluded to, and that the bill should therefore be dismissed at the costs of complainant.

THE FRED E. SANDER.

(District Court, W. D. Washington, N. D. October 20, 1913.)

No. 2,540.

1. SEAMEN (§ 29*)—WORKMEN'S COMPENSATION ACT—SCOPE—JURISDICTION OF ADMIRALTY COURTS.

The Workmen's Compensation Act (Laws Wash. 1911, c. 74) which abolishes civil actions for the recovery of damages by workmen for personal injuries received on account of negligence of employers, does not withdraw from a workman injured while employed on a vessel his remedy by proceeding in rem in admiralty against the vessel to enforce the lien given by the maritime law for his injury.

[Ed. Note.—For other cases, see *Seamen*, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

2. ADMIRALTY (§ 1*)—JURISDICTION—EFFECT OF STATE STATUTE.

A state is without power to abolish or limit the jurisdiction of courts of admiralty over maritime torts conferred by the Constitution.

[Ed. Note.—For other cases, see *Admiralty*, Cent. Dig. §§ 1-17; Dec. Dig. § 1.*]

In Admiralty. Suit by John A. Thompson against the sailing schooner Fred E. Sander. On exceptions to libel. Exceptions overruled.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

S. A. Bostwick and J. Y. Kennedy, both of Everett, Wash., for libelant.

Ballinger, Battle, Hulbert & Shorts, of Seattle, Wash., for claimant.

NETERER, District Judge. This is an action in admiralty against the schooner Fred E. Sander for personal injuries sustained by the plaintiff November 15, 1912, at Everett, Wash., while employed by the master in loading and storing away piling in the hold of the schooner. The libel alleges that the Fred E. Sander is a sailing schooner, plying between the port of San Francisco and Puget Sound points, in the state of Washington, and that the schooner is within the jurisdiction of the court. Damages in the sum of \$5,000 are alleged to have been caused libelant by reason of the negligence of the owners and those in charge of the schooner; and the prayer is "that the said vessel be condemned and sold to pay libelant's claim and costs." The libel was filed August 29, 1913, and the schooner attached by the United States Marshal August 30th following. On September 6th George E. Billings intervened in said action and, as agent of the owners, made claim to the schooner, her tackle, apparel, furniture, etc., and prayed "to defend accordingly." On the same day a stipulation for costs was filed by the claimant, as was also a bond for the release of the vessel.

[1] On September 19th the claimant filed exceptions to the libel, in which it is alleged that the Legislature of Washington had passed an act, known as the "Workmen's Compensation Act," which took effect as between employers and workmen on October 1, 1911, and:

"That this court is without jurisdiction to entertain, hear or determine this action, for the reason that all actions and causes for such personal injuries, and the jurisdiction of courts over such cases, were and are expressly abolished by said act, which act provides sure and certain relief and compensation for such injured workmen, regardless of questions of fault, and to the exclusion of every other remedy, proceeding, or compensation."

The Workmen's Compensation Act (chapter 74, Laws of Washington 1911), declares:

"Section 1. The common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wageworker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

Stoll v. Pacific Coast Steamship Co. (D. C.) 205 Fed. 169, decided by District Judge Cushman, is cited in support of the objection to the

court's jurisdiction. In that action the constitutionality of the Washington Workmen's Compensation Act was attacked. That was not an action in admiralty, but was an action where the plaintiff sought to enforce a common-law remedy against the owner of the vessel on which he received his injury, and the court's jurisdiction was based upon diversity of citizenship. Judge Cushman adopted the view of the Washington Supreme Court in *State ex rel. Davis-Smith v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, as to the constitutionality of the act. The *Stoll Case* is distinguishable from this, in that this is an action in admiralty where the injured party has elected to pursue his remedy against the vessel rather than enforce a common-law liability against the owners of the vessel. The issue here is: Does the state act abolishing civil actions for the recovery of damages by workmen for personal injuries received on account of negligence of employers supersede all remedies and withdraw from workmen their remedy to proceed against the vessel in admiralty for the wrong sustained?

That a person injured within the admiralty jurisdiction has a lien upon the ship, and a right to proceed in rem against the offending vessel, is concisely stated in *Benedict's Admiralty* as follows:

"Sec. 131. * * * The maritime lien is an appropriation of the ship as a security for a debt or claim, such appropriation being made by the law; the law creates a remedy for the claim against the ship herself and vests in the creditor a special property in her, which subsists from the moment the debt arises, and follows the ship into the hands of an innocent purchaser. * * * And in cases of maritime tort, the same law considers that the wrong gives to the person who has suffered thereby a right to look to the ship for his remedy, gives him a proprietary interest in her as security for his redress, and hence gives to him what is called a maritime lien upon the ship." *The Anaces*, 93 Fed. 240, 34 C. C. A. 558; *The Slingsby* (D. C.) 116 Fed. 227.

An examination of the Workmen's Compensation Act must determine the intent of the Washington Legislature in enacting this law. Section 1 of the Washington act declares, among other things:

"The common-law system * * * is inconsistent with modern industrial conditions."

[2] No other system is mentioned or referred to in the act. The statement that "all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished," when used in connection with the words "common-law system," limits the phrase "all civil actions and civil cause of action" to causes at common law, and precludes the conclusion that there was any intention to reach beyond such remedies or to include any other right of which the injured party might avail himself. This conclusion is further strengthened when it is remembered that the Constitution of the United States provides that judicial power shall be vested in the Supreme Courts and inferior courts to be established, and that judicial power shall extend to all causes of admiralty.

Article 3, § 2, of the Constitution:

"The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

Section 24, Judicial Code of the United States (Act March 3, 1911, c. 231, 36 Stat. 1091 [U. S. Comp. St. Supp. 1911, p. 135]), provides:

"The district courts shall have original jurisdiction as follows: * * * Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

Section 256, Judicial Code:

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states: * * * Third. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it."

Benedict's Admiralty, § 128, says:

"The common-law remedy here mentioned is the right of a plaintiff to proceed in personam against a defendant, which remedy the common law is competent to give. * * * But the right to proceed in rem is distinctly an admiralty remedy, and hence exclusively within the control of the United States courts; no state can confer jurisdiction upon its courts to proceed in rem."

The nature of admiralty jurisdiction as being exclusive of state legislation was discussed by the Supreme Court of the United States in *The Moses Taylor*, 4 Wall. 411, 18 L. Ed. 397, in which it was held that a statute of California giving a right to proceed in rem for breach of a maritime contract was repugnant to the act of Congress investing the United States courts with exclusive jurisdiction of cases of admiralty. In referring to the clause which saves to suitors "the right of a common-law remedy, where the common law is competent to give it," the court said:

"It is not a remedy in the common-law courts which is saved, but a common-law remedy."

In the case of *The Hine v. Trevor*, 4 Wall. 555, 571, 572 (18 L. Ed. 451), which arose from a collision of steamboats on the Mississippi river, the court held that a statute of Iowa giving a right to proceed in rem was void, and said:

"But it could not have been the intention of Congress, by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by state statutes, for this would have enabled the states to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the federal courts would be defeated."

How then can it be said that legislation by a state providing for the abolishment of all common-law remedies in cases of personal injuries to servants, and establishing, in lieu thereof, a remedy purely statutory and unknown to the common law, comes within the clause "saving to suitors in all cases the right of a common-law remedy; where the common law is competent to give it?" Yet it is manifest that, if this clause had not been inserted as a proviso to the grant of *exclusive* jurisdiction, the states would be powerless to exercise any jurisdiction in reference to admiralty cases, since the Constitution of the United States provides that "the judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction." It is contended

that the state statute provides a remedy unknown to the common law, and undertakes to make it not merely concurrent with that provided by the maritime law but the sole remedy, abolishing a jurisdiction conferred, not by congressional enactment alone but by the Constitution, upon the courts of the United States.

In the case of *The Belfast*, 7 Wall. 624, 19 L. Ed. 266, the court held void a statute of Alabama similar to those above referred to; and, in reference to an attempt to make the jurisdiction in admiralty depend upon the power to regulate interstate commerce, said:

"Difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred, in the Constitution, by separate and distinct grants. * * * Congress may regulate commerce with foreign nations and among the several states, but the judicial power, which, among other things, extends to all cases of admiralty and maritime jurisdiction, was conferred upon the federal government by the Constitution, and Congress cannot enlarge it, not even to suit the wants of commerce, nor for the more convenient execution of its commercial regulations."

If Congress may not enlarge this jurisdiction by including within it cases admittedly not cognizable in admiralty at the time of the adoption of the Constitution, then may a state contract it by withdrawing from the District Courts power to hear and determine causes concededly cognizable in admiralty before and since the adoption of the Constitution?

In *The Lottawanna*, 21 Wall. 558, 576 (22 L. Ed. 654), the court quotes Chief Justice Taney in *The St. Lawrence*, 1 Black, 526, 17 L. Ed. 180, in reference to the difficulty of determining the boundaries of admiralty jurisdiction, and with relation to which he said:

"But certainly no state law can enlarge it, nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits."

On page 576 of 21 Wall. (22 L. Ed. 654), the court says:

"The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no state law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be."

That an action for personal injuries sustained on board a vessel is within the admiralty jurisdiction is so well recognized that a citation of any of the numerous cases where it has been so held would be superfluous.

On page 576 of 21 Wall. (22 L. Ed. 654), the court further says:

"The Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

In *Butler v. Boston Steamship Co.*, 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017, the court on page 556 of 130 U. S. (9 Sup. Ct. 612, 32 L. Ed. 1017), quotes with approval the above excerpt from the *Lottawanna Case*, and on page 557 of 130 U. S., on page 619 of 9 Sup. Ct. (32 L. Ed. 1017), says:

"As the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction,' and this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national Legislature, and not in the state Legislatures."

These decisions prepare the way for the celebrated case of *Workman v. New York City*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, which was an action in admiralty against the city and others for injuries caused to a vessel by a steam fireboat under the control of a department of the municipal government. The fireboat had been called to extinguish a fire and struck the other vessel, which was moored to a dock. The District Court entered a decree against the city, which was reversed by the Circuit Court of Appeals, on the ground that by the common law a municipal corporation was not liable for the negligence or want of skill of officers selected to perform a public service for the general welfare of the inhabitants or the community, and that by the decisions of the Court of Appeals of New York the city in the operation of the fireboat performed a governmental and not a corporate function. In a strong opinion by Justice White the Supreme Court held that the liability of the city should be determined by the principles of admiralty, and that these could not be controlled or modified by state decisions or state legislation. On page 558 of 179 U. S., on page 214 of 21 Sup. Ct. (45 L. Ed. 314), the court uses the following vigorous language:

"The practical destruction of a uniform maritime law which must arise from this premise is made manifest when it is considered that, if it be true that the principles of the general maritime law giving relief for every character of maritime tort where the wrongdoer is subject to the jurisdiction of admiralty courts can be overthrown by conflicting decisions of state courts, it would follow that there would be no general maritime law for the redress of wrongs, as such law would be necessarily one thing in one state and one in another; one thing in one port of the United States and a different thing in some other port. As the power to change state laws or state decisions rests with the state authorities by which such laws are enacted or decisions rendered, it would come to pass that the maritime law affording relief for wrongs done, instead of being general and ever abiding, would be purely local—would be one thing to-day and another thing to-morrow. That the confusion to result would amount to the abrogation of a uniform maritime law is at once patent. And the principle by which the maritime law would be thus in part practically destroyed would besides apply to other subjects specially confided by the Constitution to the federal government. Thus, if the local law may control the maritime law, it must also govern in the decision of cases arising under the patent, copyright, and commerce clauses of the Constitution."

And on page 561 of 179 U. S., on page 215 of 21 Sup. Ct. (45 L. Ed. 314), the court quotes with approval the following remarks of Justice Bradley in *The Lottawanna*, 21 Wall. 558, 22 L. Ed. 654:

"One thing, however, is unquestionable: The Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the

rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states."

That it was the intention of the Legislature in passing the Workmen's Compensation Act not to come in conflict with congressional enactments or to impinge upon the exclusive jurisdiction of the federal courts is made further manifest by section 18 of the act, which provides:

"The provisions of this act shall apply to employers and workmen engaged in intrastate and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that any such employer and any of his workmen working only in this state may, with the approval of the department, *and so far as not forbidden by any act of Congress*, voluntarily accept the provisions of this act by filing written acceptances with the department."

Thus, to those engaged in interstate commerce for whom a rule of liability has been established by federal law, the act does not apply unless written acceptances have been filed, and such acceptances *must not be inconsistent with any act of Congress*.

Under the authorities cited it is manifest that the state Legislature could not have abolished the jurisdiction of the United States District Courts over actions for maritime torts, even had it undertaken so to do. It is a familiar rule of construction that a legislative act will never be so construed as to impute to the Legislature an intent to enact legislation contrary to constitutional provisions or in conflict with paramount federal enactments.

An order denying the exceptions may be entered.

ISAAC McLEAN SONS CO. v. WILLIAM S. BUTLER & CO., Inc.

In re GILCHRIST CO.

(District Court, D. Massachusetts. October 6, 1913.)

No. 396 Equity.

RECEIVERS (§ 152*)—LIABILITY OF FUNDS IN HANDS OF RECEIVER—ESTABLISHMENT OF TRUST.

Intervening petitioners entered into contracts with defendant company, for which receivers were afterward appointed, by which goods of petitioners, severally, were to be placed in defendant's store for sale. The management and control of the goods until sold, of the persons employed to sell them, and of the making of the sales, remained wholly with petitioners; but the contracts provided that "all sales and cash are to be handled in the same way that all other sales and cash are handled in the company's store," and that defendant should account and pay over monthly to each petitioner the receipts from sales after making certain deductions. The proceeds received from sales were mingled by defendant with its own funds, and at the time of the receivership certain of such pro-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ceeds had not been accounted for, but were traceable into specific funds of defendant which passed into the hands of the receivers. *Held*, that there was nothing in the contracts which established a trust relation between the parties with respect to the money received or which gave petitioners any greater rights in the funds in which it was included than other contract creditors.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 272-275, 278; Dec. Dig. § 152.*]

In Equity. Suit by Isaac McLean Sons Company against William S. Butler & Company, Incorporated. In the matter of Gilchrist Company. On intervening petitions of Chauncy G. Shaw and Enoch E. Fletcher. Petitions dismissed.

Frederick H. Nash, of Boston, Mass., for receiver.

Lee M. Friedman, of Boston, Mass., for Chauncy G. Shaw.

Eldredge & Peirce, of Boston, Mass., for Enoch E. Fletcher.

DODGE, Circuit Judge. Each petitioner had a contract with the Gilchrist Company. Shaw's was in writing, dated July 2, 1912. Fletcher's was oral, but its terms are evidenced, as is agreed, by an unsigned draft produced in evidence. It also dates from July 2, 1912. Under these contracts the parties had acted for several weeks preceding November 7, 1912, the date upon which receivers were appointed in the above-entitled case of the Gilchrist Company and its assets.

On November 7, 1912, the Gilchrist Company stood charged on its own books for amounts due the petitioners on account of sales made in its store of the petitioners' property in accordance with the above agreements; the proceeds of said sales having been received by the company as in the agreements provided.

The petitioners ask for an accounting of the proceeds so received and for an order that the receivers turn over to them respectively the moneys found due them. Each petitioner claims that the company was holding the money due him as above on November 7, 1912, in a fiduciary capacity, and that he stands with regard to it, not in the position of an ordinary creditor, but entitled in equity to follow and recover the amount due him, out of the funds held by the receivers. In both cases the company intermingled the moneys received from the above sales with its own funds; but, if their contracts were such as to give the petitioners a specific interest in and an equitable charge upon those moneys, I see nothing to prevent them from tracing or identifying them sufficiently for the purpose of the recovery they seek. The moneys do not seem to me to have been so dealt with since their receipt as to make impossible a distinction between what the company received in exchange for the petitioners' goods and its funds derived from other sources. The facts agreed identify specific funds as including specific amounts derived from sales under the agreements and show each such specific fund to have been at all times of greater amount than the amount of such proceeds now included in it.

The agreements called for monthly settlements and provided for deduction by the company of expenditures which it authorized the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

company to make on the petitioners' account, also for deduction in addition of 15 per cent. upon the gross proceeds of sales, for the company itself. The company agreed to pay the balances so ascertained to the petitioners respectively. Under the Shaw agreement everything had been thus settled up to October 21, 1912, and only proceeds received after that date and before November 7th are in question. Under the Fletcher agreement all accounts had been settled up to October 1st.

The company's liability to the petitioners thus rests upon its express agreement to pay them monthly the balance of a monthly accounting to be made upon agreed terms. It can be regarded as liable to them otherwise than to any other contract creditor for an ascertained amount, only in case sufficient indication can be found, in the terms of the agreements, that the parties so intended.

The agreements contemplate no management or control by the company of anything beyond the proceeds of the sales, either in cash or credits, after the petitioners themselves had completed the sales. The entire management and control of the goods until they had been sold, of the persons employed to sell them, and of the making of the sales, remained wholly with the petitioners. The goods were not in the company's hands to be sold and accounted for. No liability in connection with them was assumed by the company until the petitioners, through their own employes, had put the proceeds of sales into the company's hands. There was no undertaking to account for and pay over "net profits as such," as in *Pratt v. Tuttle*, 136 Mass. 233.

The company's duty with regard to the proceeds so received was only that of accounting for them at the agreed times and on the agreed terms. It undertook nothing in regard to the safe-keeping of what it received, except what can be implied from the agreement to account, or from the express provision in both agreements that "all sales and cash are to be handled in the same way that all other sales and cash are handled in the company's store." It was therefore not only free to mingle these proceeds with its own funds instead of keeping them in a separate fund, but that it should so mingle them was expressly stipulated. The proceeds were to remain part of its own funds, subject only to the obligation of accounting for them at the agreed times. I do not see how it can be said to have assumed any duty of custody or management regarding these proceeds, differing from that which it owed to all its creditors as to its own funds in general. Nothing in the nature of investment for the petitioners' benefit can fairly be said to have been contemplated.

Each petitioner, it is true, made the company his agent to refund from the proceeds in its hands what it thought right to dissatisfied customers; but each agreed in advance to be bound by the company's exercise of discretion in such cases, and a refund could have raised no question except as to the amount in fact allowed.

In the agreement with Shaw is contained a provision not found in that with Fletcher, viz.:

"Charges to customers * * * must be authorized and assumed by said company, and settlements of such charge accounts must be made with said Shaw in the regular monthly cash settlement."

If any such charges to customers were in fact assumed by the company, they clearly belonged thereafter to the company, and the company owed Shaw their amount at the next accounting. If such credits were to become the company's property, it would seem that no different result could have followed as to the cash credited to this petitioner in the same account.

I am, on the whole, unable to find any implied trust established by the terms of the agreements, and must therefore rule that the petitions cannot be maintained.

Both petitions are dismissed.

UNITED STATES v. GREAT LAKES TOWING CO. et al.

(District Court, N. D. Ohio, E. D. February 11, 1913.)

No. 8,003.

1. MONOPOLIES (§ 12*)—ANTI-TRUST ACT—"COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE."

A combination formed for the express purpose and with the express intent of eliminating the natural and existing competition in interstate commerce, and of monopolizing and restraining such commerce by the employment of unusual and abnormal methods of business, or which places the direct instrumentalities of interstate commerce in such a relation as to create a single dominating control in one corporation, whereby natural and existing competition in such commerce is unduly restricted or suppressed, is one in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*

For other definitions, see Words and Phrases, vol. 2, pp. 1275, 1276; vol. 8, p. 7606.]

2. COMMERCE (§ 17*)—INSTRUMENTALITIES OF INTERSTATE COMMERCE—TOWING TUGS.

Tugs employed in the business of towing into and out of harbors and between ports vessels engaged in interstate commerce, and in the lightering and wrecking of vessels so engaged, are themselves instrumentalities of interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 10, 11; Dec. Dig. § 17.*]

3. MONOPOLIES (§ 12*)—CONTRACTS IN RESTRAINT OF INTERSTATE COMMERCE—ANTI-TRUST ACT—"UNREASONABLE RESTRAINT OF TRADE."

While the sale of a business and the surrender of the good will pertaining thereto and an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as part of the sale of the business, and not as a device to control or monopolize interstate commerce, is not within federal Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), the imposition of a restraint greater than necessary to afford fair protection to the legitimate interests of the purchaser constitutes an unreasonable restraint within the act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*

For other definitions, see Words and Phrases, vol. 7, pp. 6185, 6186.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. MONOPOLIES (§§ 12, 16*)—ANTI-TRUST ACT—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE.

The Great Lakes Towing Company was organized in 1899, and shortly afterward acquired in its own name, or that of controlled companies, the property and good will of practically all local tug operators in 14 of the principal lake ports, not including Lake Ontario. These purchases were made under contracts which bound the sellers not to engage in the towing or wrecking business on any of the Great Lakes except Ontario for a period of five years. In this manner the company acquired some 120 tugs. It also made a contract with another owner whose tugs were not bought, by which he bound himself, in consideration of an annual payment to him in cash, not to do any towing on the Great Lakes for a term of five years. Whenever local competition later developed, the company at least met any cut rates at that port, even at a serious loss, until competition was ended, after which rates were restored. It adopted a system of exclusive contracts with vessel owners by which, in consideration of their giving it all their towing and wrecking business throughout one or more seasons at all ports where it did business, it gave them a large discount from its tariff rates, with a guaranty that the contract rates, taken together, should not exceed the sum of the rates they might otherwise obtain by reason of the cutting of rates by competitors. By means of such contracts it obtained control of 90 per cent. or more of the towing business at such ports, and, together with the other means stated, acquired a practical monopoly of such business. *Held*, that such company and its controlled companies were clearly organized and operated with the purpose and effect of securing a monopoly, and constituted a combination in restraint of interstate and foreign commerce in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 10, 12; Dec. Dig. §§ 12, 16.*]

In Equity. Suit by the United States against the Great Lakes Towing Company and 51 other defendants. Hearing on pleadings and proofs. Decree for complainant.

U. G. Denman, U. S. Atty., of Cleveland, Ohio, and E. P. Chamberlin, Sp. Asst. U. S. Atty., of Bellefontaine, Ohio, for complainant.

Goulder, Day, White & Garry, and Hoyt, Dustin, Kelley, McKeehan & Andrews, all of Cleveland, Ohio (Harvey D. Goulder and Hermon A. Kelley, both of Cleveland, Ohio, of counsel), for defendants.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. The United States filed its petition in equity against the Great Lakes Towing Company, the Dunham Towing & Wrecking Company, the Union Towing & Wrecking Company, the Thompson Towing & Wrecking Association, the Hand & Johnson Tug Line, the Pittsburgh Steamship Company, and 46 other defendants, corporate and individual, charging the maintenance of a monopoly in transportation of persons and property in commerce between the States and with Canada, and a combination in restraint of such commerce, in violation of Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), known as the "Sherman Act." The specific monopoly and restraint charged relate to the business of vessel towing on the Great Lakes; the proofs being specially directed to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

harbors of Duluth, Sault Ste. Marie (Michigan), Port Huron, Detroit, Chicago (embracing South Chicago, Gary, Whiting, and Indiana Harbor), Toledo, Sandusky, Lorain, Cleveland, Fairport, Ashtabula, Conneaut, Erie, and Buffalo (including Tonawanda and Black Rock).

Previous to and in the year 1899 the towing into and out of the harbors mentioned of vessels engaged in commerce on the Great Lakes was done by independent tug or towing companies, or individuals operating each at only one port, or, at most, at two or three ports in the immediate vicinity of each other. These tug operators were, generally speaking, in active competition with other operators (if any) at the same port, although competition was sometimes and in some places suspended by arrangements for operation on joint account, or for division of business. At Chicago were the Dunham Towing & Wrecking Company, with 17 tugs and a wrecking outfit, the Barry Bros. Towing Line, with 10 tugs, and the Hausler & Lutz Towing & Dock Company, with 3 tugs; at Buffalo, the Hand & Johnson Tug Line and the Maytham Tug Line, each with 7 tugs and a one-half ownership in a fifteenth tug; at Tonawanda were Hartman and others, with 5 tugs; at Erie and Conneaut, Ash and his associates, with 3 tugs; at Duluth, the White Line Towing Company, with 8 tugs, one lighter, and one scow, and the Inman Tug Company, with 8 tugs; at Cleveland, the Vessel Owners' Towing Company, with 10 tugs, the Cleveland Tug Company, with 5 tugs, and J. C. Gilchrist, 1 tug; at Toledo, Sullivan, usually with at least 8 tugs, and Nagle, with usually 3 tugs; at Ashtabula, the Ashtabula Tug Company, with 6 tugs; at Port Huron, the Thompson Towing & Wrecking Association, with 12 tugs and 3 lighters; at Bay City, James Davidson, with 2 tugs; at Huron, Dewhirst and others, with 2 tugs; at Fairport, the American Transportation Company, with 2 tugs; at Escanaba, the Escanaba Towing & Wrecking Company, one tug and wrecking appliances; at Sault Ste. Marie, Mich., the Soo River Lighter & Wrecking Company, with two lighters; at Detroit, the Westcott Wrecking Company, Limited, with one steamer, and the Isaac Watt Wrecking Company, Limited, with one steamer; at Cheboygan, the Swayne Wrecking Company, with one steamer. While the list above given is not absolutely complete, it is nearly so, and is sufficiently complete for present purposes.

In the spring of 1899 the Great Lakes Towing Syndicate was formed, for the purpose of acquiring towing and wrecking properties, a committee of this syndicate being sent out to inspect, appraise, and take options on such properties. The Great Lakes Towing Company was organized July 6, 1899, under the laws of New Jersey, with an authorized capital stock of \$5,000,000, the first of the purposes stated in the certificate of incorporation being—

"to do a general towing, wrecking, salvage, dredging and contracting business on the Great Lakes, in all the harbors thereof, and in all streams and waters tributary thereto, or connected therewith and elsewhere."

The promoters of this organization were largely, if not exclusively, persons heavily interested, directly or by representation, in transportation on the Great Lakes (notably of coal, oil, and ore); some being

interested in producing as well as in vessel owning and operating, others being interested in docking facilities. Through this syndicate, and on or before August 22, 1899, the Great Lakes Towing Company purchased the properties (in case of corporate vendors, their entire capital stocks or properties, or both) of the various tug owners and operators mentioned in the margin of this opinion,¹ these purchases embracing 74 tugs, 6 lighters, and 1 scow. The aggregate net purchase price paid for these properties, as indicated by journal entries on the books of the Great Lakes Towing Company, was \$3,112,930.92, the vendors receiving, in cash value, much less than the prices so indicated, in many cases receiving preferred stock in whole or in part payment, and not usually any considerable amount of common stock, which latter carried the voting power; the control being held by the promoters and those having like interests. Later in 1899 and in the early part of 1900, the Great Lakes Towing Company bought the properties of still other tug owners and operators, whose names are given in the margin,² such added purchases aggregating 34 tugs and 1 steamer. The Great Lakes Towing Company (which we shall hereafter call the Towing Company) thus immediately acquired all the properties of all the prominent towing operators at each of the 14 ports in question, except those of Nagle and Sullivan, at Toledo, and the two steamers of the Swayne and Isaac Watt Wrecking Companies, respectively. It will be seen that the control of these properties was soon afterwards acquired by the Towing Company, either by purchase or by contract.

The Union Towing & Wrecking Company was incorporated after the organization of the Great Lakes Towing Company, and was practically the successor of the Inman Tug Company and the White Line Tug Company, both of Duluth. It took over the properties of these two companies, as well as those of the Independent Towing Company, the Escanaba Towing & Wrecking Company, and the Soo River Lighter & Wrecking Company. The property of Barry Bros. (Chicago) was ultimately conveyed to the Dunham Towing & Wrecking Company. The properties of the Maytham Tug Line and one or more other companies were conveyed to the Hand & Johnson Tug Line. The properties operated at the lower lake ports were, for the most part, conveyed to the Great Lakes Towing Company, which also took, and has always held, the entire of the capital stock of the Hand & Johnson Tug Line, the Thompson Towing & Wrecking Association, the Union Towing & Wrecking Company, the Dunham Towing & Wrecking Company, and the Great Lakes Towing Company, Limited. All five

¹ The Maytham Tug Line, the Hand & Johnson Tug Line, Ash, and others, Ashtabula Tug Company, Vessel Owners' Towing Company, Thompson Towing & Wrecking Association, Soo River Lighter & Wrecking Company, James Davidson, White Line Towing Company, Inman Tug Company, and Barry Bros., Independent Tug Line.

² The Cleveland Tug Company, the American Transportation Company, the Westcott Wrecking Company, Ltd. (whose name was thereupon changed to the Great Lakes Towing Company, Ltd.), the Dunham Towing & Wrecking Company, the Escanaba Towing & Wrecking Company, Dewhurst, and others, Sault Ste. Marie Tug Company, Hartman, and others, and Gilchrist.

of these last-named companies have been kept alive, but the policy and activities of each of them, in all the ports in which they respectively do business, have at all times been absolutely controlled by the Great Lakes Towing Company, through boards of directors and otherwise. The other corporations whose stocks and properties were bought by the Towing Company have been treated as defunct, although they have not been formally wound up.

In connection with each of the purchases made by the Towing Company, whether in 1899 or subsequently, the vendors (and if corporate, usually their managers and principal stockholders as well) were required to and did agree in writing that during the succeeding five years they would "in all proper ways in their power, aid and assist the party of the second part (the Towing Company), its nominees, successors and assigns, in retaining, extending and successfully prosecuting the business" formerly conducted by the vendor; and that during the same period of five years they would not "directly or as shareholders, in or by or through any interest in any corporation, partnership or association, engage in or be interested, directly or indirectly, in the business of *towing and wrecking* or in any branch thereof, *upon the Great Lakes*, their harbors, connecting and tributary waters (except Lake Ontario and its harbors and the waters east thereof), excepting only and so far as they, or either of them, shall be interested in or with the party of the second part, as shareholder or employee." The Towing Company, at and within a few months following its organization, bought apparently more tugs than needed to do all the business required at the 14 ports, if properly distributed. Occasionally the Towing Company made sales of tugs, but always under agreement of the purchasers (and with attempt to make such agreement follow the title) that the tugs should not be used in vessel towing *at any of the 14 ports in question*; other ports as well being usually included in the restriction.

In 1900 Maytham's Towing & Wrecking Company was organized at Buffalo, and after a bitter and expensive competition with the Towing Company, its property, including 18 tugs, was in the following year bought by the Towing Company. Soon thereafter, and in 1901, the Independent Towing Company was organized at Buffalo, and after a long and aggressive competition (which in three months of 1903 cost the Towing Company \$20,000, as compared with earnings in 1901) its property, likewise, was in 1903 bought by the Towing Company, and its manager taken into the latter's employ.

In connection with the purchase of the Independent Tug Company's property and business, an agreement was made with Sullivan for carrying on the towing business at Toledo and in the Detroit and St. Clair rivers on joint account, for a period of five years from January 1, 1904, each operator contributing an equal number of tugs, the business being conducted in the name of the Great Lakes Towing Company, with Sullivan as manager, under salary; the Towing Company agreeing not to do any other towing business at Toledo, and Sullivan agreeing not to do *any towing* except under the agreement in question, either alone or in association with others. This agreement was subsequently extended

to January 1, 1910. In April, 1904, an agreement was made with Nagle whereby, in consideration of a fixed payment of \$2,000 per year for five years, he agreed that none of his three tugs should, during that period, be used "in vessel towing business on the Great Lakes, their harbors, tributary and connecting waters" (there being, however, no restriction upon Nagle's use of the tugs for other than towing business), Nagle calling this annual payment "alimony," and an officer of the Towing Company characterizing it as "blackmail." This payment of \$2,000 per year was made to Nagle solely to get rid of his competition (without buying his tugs), and without the requirement of any active service. In 1905 an agreement was made with the owners of three tugs, whereby one or the other of two tugs named was to be used on joint account with the Towing Company in wrecking and other work in the vicinity of Detroit, the owners agreeing that the third tug (which was not included in the joint account operation) should during the life of the contract do no wrecking work or vessel towing in Detroit river or elsewhere, with the same restrictions as to the first and second tugs (except upon request of the Towing Company), when not employed under the contract; the towing of dredges or scows and the towing of vessels in Canadian ports other than Anherstberg (where the Towing Company did business) being excepted. Other contracts for joint operation were made, but they are less significant than those to which we have called attention.

As early as 1900 the Towing Company adopted a tariff of service rates. For the first few years after 1899 there was occasional competition at various of the ports where the Towing Company operated. That at Buffalo has already been referred to. The Sullivan and Nagle arrangements grew out of competition at Toledo. At Duluth there was more or less competition as late as 1903, and at Chicago until 1905, and to a slight extent later. The record of correspondence between officers of the Towing Company and officers and managers of its subsidiaries, from 1899 on, abounds with expressions of determination to wipe out all injurious competition, and such policy was vigorously and aggressively pursued. Wherever rates were cut by competitors the cut was at least met. After competition ceased the rates were restored. We are not satisfied that the Towing Company started general rate cutting, and it may be that it did not cut below its competitors. Indeed, it would generally seem unnecessary that it should do so. Its policy, however, was "not to lose any business on account of not making the necessary rate to get it." Competitive practices were not limited to general rate cutting, but embraced special concessions in various forms, where necessary to get business away from the opposition.

The Towing Company adopted, as early as 1900, a system of exclusive contracts, by which, in consideration of the vessel owners employing *throughout the entire season* the Towing Company's *tug and wrecking* service at all ports covered by its tariffs (so far as the vessel owner had occasion for such service), a large discount was given from tariff rates. In 1910 a flat discount of 20 per cent. was given on all bills. The discount was at no time less than 20 per cent., and in later years

it varied with the class of service, ranging in 1910 from 20 per cent. on lake towing, boiler work, wrecking service, harbor towing of line boats, and first-class coarse-freight carriers, to 30 per cent. on lumber boats. No discounts were allowed except under such exclusive contracts. The vessel owner, moreover, was guaranteed that his contract rates, taken together, should not exceed the sum of the "cut rates" made to meet competition. As expressed by the Towing Company's president:

"The advantage of the contract to the vessel owner is that it saves him 20 per cent. on the tariff at all points, and even though there may be competition at some, and they cut rates, on the whole he would make a saving by doing business with us. And, again, should he be of opinion that there will be competition all along the line and the cut rates less than our contract rates, our contract protects him against that."

The Towing Company has long had a practical monopoly of harbor towing at the 14 ports. In May, 1900, its president advised the Buffalo manager that:

"Notwithstanding the heroic efforts made by the opposition company, we have secured practically all of the package freight boats, all of the ore and grain boats, and many of the lumber carriers, in all something like 500 boats, which we estimate represent fully 75 per cent. of the towing in dollars and cents which will be done on the Lakes this season. * * * As near as we can figure, if all the uncontracted towing was done by the opposition; they still would not earn sufficient money to pay their operating expenses."

As written by the Towing Company's secretary in April of the same year:

"I believe we now have about enough of the ore boats pledged to us so that the opposition could not put a tug into Lorain, or any other Lake Erie points between Cleveland and Buffalo, and half make living expenses."

In the same month the Towing Company's president wrote the president of the Union Towing & Wrecking Company, at Duluth:

"It seems to us now that there will be no occasion to make a general cut in rates unless it is for the lumber trade, and if we can fix it so that we do not have to open up the rates in the lumber business, I think we can put the other fellows to sleep and not impair our own revenue."

In June of the same year the Towing Company's secretary wrote a Canadian vessel owner, in soliciting him to make an exclusive contract:

"We have contracts now with about 80 per cent. or 90 per cent. of all the boats using tugs on the Great Lakes, for all their service."

The lumber carrying vessels were the hardest to secure. To this end an aggressive campaign was made through the Lumber Carriers' Association. In July, 1903, the president of the Towing Company was claiming that "over 90 per cent. of the entire lumber tonnage has contracted with us to do all of their work for from one to five years"; and in November, 1903, upon the purchase of the Independent Towing Company at Buffalo, and the making of the contract with Sullivan respecting the Toledo situation, the Towing Company's president reported to its executive committee that "this eliminates all the opposition the Great Lakes Towing Company has that looks at all dangerous." It is entirely safe to say that since 1904 the Great Lakes Towing Com-

pany has had no real competition in harbor towing at either of the 14 ports, except to a limited extent at Chicago for a little later period, and that it now controls 95 per cent. of the harbor towing on the Great Lakes at the 14 ports concerned.

The Towing Company does not monopolize the wrecking business as completely as that of harbor towing. There are several wrecking companies doing an active business, especially under employment by underwriters, who, having no need of towing service, are of course unaffected by the exclusive contracts employed by the Towing Company. The Towing Company's port to port towing business amounts to but about 2 per cent. of its total business, although in dollars and cents aggregating a substantial amount.

The Towing Company contends that the combination represented by it does not constitute an unreasonable restraint upon or monopoly over commerce, and thus is not within the condemnation of the Sherman act; that it is in effect merely a protective association organized for the mutual benefit of its members and promoters, whose principal expectation of gain lay in the benefits expected to accrue from improvement of the towing and wrecking service rendered their vessels, and whose purpose was not to create a monopoly nor to restrain commerce, but to facilitate it. It is shown that the size of steam vessels carrying bulk freight on the Great Lakes increased, during the five-year period preceding 1900, from 300 to 500 feet in length, and from 3,000 to 4,000 tons to 7,000 or 8,000 tons carrying capacity (a further increase having taken place since); that a similar increase took place with respect to the size and capacity of passenger steamers; that the increase in the size of freighters was accompanied by a corresponding increase in facilities for loading and unloading, through the substitution of the clam shell (and its predecessor, the scoop bucket) for the former slow method of raising by crane or derrick buckets filled by hand in the vessel's hold. Defendants contend that the towing and wrecking facilities furnished at the important ports on the Great Lakes were totally inadequate to meet this increase in the size and number of vessels; that while there were frequently tugs enough in commission, if they could be utilized, to meet the demands for harbor towing, at many of the ports a ruinous system of cut-throat competition existed, whereby the larger tugs were used for "scout service" in meeting vessels many miles from the harbor, leaving small and insufficient tugs to do the actual harbor towing, this resulting in lack of system for furnishing tugs, absence of system of delivering orders to ships, and of uniform system for notifying incoming vessels where they belonged, accompanied by graft, lack of fixed tariffs, and by other demoralizing incidents; that at times competing concerns made arrangements for division of business, whereby each tug line was to do all the towing of vessels belonging to certain owners, the latter having nothing to say as to what tugs should serve them; that many of the tug companies were financially irresponsible, and vessel owners were thus left without adequate remedy for negligent or unskillful towing; that before the formation of the Great Lakes Towing Company some of the larger vessel interests were considering forming individual tug lines for their own

service. It is also contended that the ice breaking tug service at the great grain ports of Duluth, Chicago, and Buffalo was inadequate. It is shown that, in the organization of the Great Lakes Towing Company, vessel owners contributed allotted amounts and took corresponding portions of stock, the vessel owners being expected to give their business to the new association; that the promoters tried first to buy out all tug operators at ports where bulk freighters did much business, instead of driving such operators out of business. It is also shown that the Towing Company has so increased the power and changed the construction of ice breaking tugs as to lengthen the navigation period at the great grain ports by three weeks each year; that harbor towing service has been improved, delays largely eliminated, the delivering of orders systematized, and a responsible concern substituted for a number of concerns, some of whom were not responsible. Finally, it is urged that in the towing service a natural monopoly is impossible; that the organization of the Towing Company is practically a mere unification of the system of harbor towing, analogous to railway terminal service, and that in the absence of a natural monopoly such mere unification is not objectionable, the language of the decision in the St. Louis Terminal Case being invoked as decisive of the legality of the Towing Company's status.

[1] The general propositions applicable to the facts presented are too well settled to justify much discussion. The Sherman act in terms declares illegal every combination, in whatever form and of whatever nature, which directly or necessarily operates in restraint of trade or commerce among the several states or with foreign nations. *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679, and cases there cited. While by its later decisions the Supreme Court has interpreted the statute as not restraining the "power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose," and has declared that the words "restraint of trade" should be given a meaning which would not destroy the individual right of contract and render difficult, if not impossible, any movement of trade in interstate commerce, the free movement of which it was the purpose of the statute to protect (*Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734; *United States v. American Tobacco Co.*, 221 U. S. 106, 179, 31 Sup. Ct. 632, 55 L. Ed. 663; *United States v. Reading Co.*, 226 U. S. 324, 33 Sup. Ct. 90, 57 L. Ed. 243), it may yet be regarded as well settled that a combination formed for the express purpose and with the express intent of eliminating natural and existing competition in interstate commerce, and of monopolizing and restraining such interstate commerce, by the employment of unusual and abnormal methods of business, constitutes undue restraint or suppression, and so offends against the anti-trust act (*Standard Oil Co.*, *supra*; *American Tobacco Co.*, *supra*; *Reading Case*, *supra*); and that a combination which places the direct instrumentalities of interstate commerce in such a relation as to create a single dominating control in one corporation, whereby natural and existing competition in interstate

commerce is unduly restricted or suppressed, is within the condemnation of the act (Standard Oil Co. Case, *supra*; American Tobacco Co. Case, *supra*).

[2] We entertain no doubt that tugs employed in the business of towing, into and out of harbors and between ports, of vessels engaged in interstate commerce, and in the lightering and wrecking of vessels so engaged, are themselves instrumentalities of interstate commerce. *Foster v. Davenport*, 63 U. S. (22 How.) 244, 16 L. Ed. 248; *Moran v. New Orleans*, 112 U. S. 69, 5 Sup. Ct. 38, 28 L. Ed. 653; *Harmon v. Chicago*, 147 U. S. 396, 13 Sup. Ct. 306, 37 L. Ed. 216. It inevitably follows that any undue restraint upon such business of towing and wrecking offends against the Sherman act.

[4] The intention of the Great Lakes Towing Company and its promoters to obtain complete control of the towing and wrecking service in at least the 14 ports mentioned is, we think, clearly established by the considerations to which we have referred. Referring to the more prominent of those considerations:

[3] While the sale of a business and the surrender of the good will pertaining thereto, and an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as part of the sale of a business, and not as a device to control commerce, is not within the federal Anti-Trust Law (see authorities cited in *Darius Cole Transp. Co. v. White Star Line* [C. C. A. 6] 186 Fed. 63, 65, 108 C. C. A. 165), the imposition of a restraint greater than necessary to afford fair protection to the legitimate interests of the purchaser, or contractor, constitutes an unreasonable restraint under the Sherman act. *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865. The fact that the restraint of competition was not limited to the locality where the seller was doing business, but was made to extend to *all harbors* upon the Great Lakes (except Lake Ontario), tends to show an intention on the part of the Towing Company to get more than reasonable protection incidental to the good will of the business sold. Likewise the restrictions upon competition imposed in the case of all the joint operating contracts referred to were greater than necessary for the protection of the Towing Company's legitimate business interests at the *local service* points covered by such contracts. No more effective method could well be devised for unifying the towing interests in question than by combining in one corporation the stocks of a large number of other corporations creating such a comparatively vast capitalization and influence. Such unification, unexplained, justifies a presumption of an intent to dominate and control the towing facilities. *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. The fact that the policy of the Towing Company's promoters was to buy out competitors, rather than to buy new tugs, and by competition compel the loss to other tug owners of their property, does not tend to negative an intent to create a monopoly. Such course, as avoiding expensive competition, was entirely consistent with an intent exclusively to occupy the field. A

wicked purpose to wreck the property and business of those then engaged in towing is not essential to a violation of the statute.

The Towing Company's object in employing the system of customers' exclusive contracts was clearly to make successful competition impossible. As written by the Towing Company's president during the competition at Buffalo in 1903:

"Some of the line managers, and a very large per cent. of the vessel owners, have been induced to contract with this company, with the understanding that those who remained outside when the opposition was destroyed would have to pay the full tariff rates."

That these contracts greatly contributed to the suppression of competition is likewise clear. They enabled the Towing Company to do each year a profitable business, despite competition at certain localities which would have been ruinous to an operator in that one locality, for rate cutting at one port did not affect the regular tariff rates at any of the other ports. As expressed by the Towing Company's secretary in 1900:

"As a matter of fact * * * these contracts are what are saving us from having the business entirely demoralized at all points."

It is true that the Towing Company has not attempted to do business on Lake Ontario or at any of the nearly 40 other harbors on the Great Lakes enumerated in the margin.³ But this fact has nothing to do with the question of defendants' attempt to monopolize business at the 14 ports in question. It is not necessary to a violation of the federal statute that a complete monopoly of all towing on the Great Lakes be effected. *Northern Securities Co. v. United States*, 193 U. S. 197, 332, 24 Sup. Ct. 436, 48 L. Ed. 679. A monopoly in 14 ports is as offensive against the act as a monopoly in 50 ports. We may remark, in passing, that we are satisfied that the business at none of the ports outside the 14 in question (unless it be Milwaukee) was such as to be attractive to the Towing Company.

We do not doubt that in 1899 the tug service, both towing and wrecking, at certain of the lake ports in question was unsatisfactory, although from the fact that no new tugs were built by the Towing Company for 7 years thereafter (and but four in 10 years) and no new lighters or wrecking appliances acquired during the first four years, it would appear that there was in 1899 no great dearth of tugs, or even of tugs of sufficient size, if properly employed. The question is whether the unsatisfactory towing facilities, including their practical operation, justified the making of this combination. Of the claim that the Towing Company was merely a mutual protective association, it is enough to say that defendants' contentions in this regard are not sustained. Not all, or even nearly all, vessel owners needing the service

³ Two Harbors, Minnesota; Ft. William, Port Arthur, Michipicoten, Parry Sound, Depot Harbor, Midland, Collingwood, Owen Sound, Kincardin, Goderich, Port Dalhousie, Canada; Ontonagon, Houghton and Hancock, Manistique, Gladstone, Cheboygan, Petoskey, Traverse City, Manistee, Ludington, Muskegon, Grand Haven, Holland, South Haven, Benton Harbor, Alpena, Saginaw, Bay City, Harbor Beach, Mich.; Menominee, Green Bay, Two Rivers, Manitowoc, Sheboygan, Milwaukee, Racine, Kenosha, Waukegan, Wis.

in question were included as (or even invited to become) members of the association. Nor can we assent to the suggestion that the combination was not organized for profit. The betterment of the service was unquestionably one of its attractive features, and probably the leading one; but we are satisfied the promoters confidently anticipated a profitable operation, and that but for such anticipation the combination would not have been formed. Cogent evidence of this conclusion is found in the declaration of the Towing Company's directors on August 16, 1899, that the properties proposed to be taken by the syndicate—

"had made net earnings which in the aggregate would pay a fair interest on \$3,500,000 [much more than was proposed to be paid for the properties], which net earnings will undoubtedly be largely increased as a result of single management and of combined operation of the properties."

It is also to be noted that the officers reported to the stockholders in 1901 that the company had earned during the season of 1900, "in spite of a bitter competition" (principally the Maytham competition, it would seem), a net undivided profit of over \$90,000, after paying 7 per cent. on the preferred stock. The dividend was passed, however, so as to leave the company strong to meet such competition the next season. We are satisfied that the Towing Company's operations have proved financially profitable to its stockholders.

The fact that the towing and wrecking service has been improved under the Towing Company's administration cannot legalize the combination if otherwise unlawful. Not only do good motives furnish no defense to a violation of the anti-trust act (Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 33 Sup. Ct. 9, 57 L. Ed. 107), but we have no right to assume that the unsatisfactory conditions existing in 1899 could not have been eliminated by lawful and normal methods.

Has the Towing Company acquired this domination of the towing and wrecking service by normal methods alone; or, as otherwise stated, has it unduly restrained or suppressed competition? We think it clear that the Towing Company's domination does not result from normal methods alone. Whatever may be the views of individual economists, under the federal statutory policy normal and healthy competition is the law of trade; and such evils as may result from such competition must be considered less than those liable to follow a complete unification of interests and the power such unification gives. The evil of unification lies in the temptation to higher rates and lessened regard for the public interests; and the tendency to this evil result must be recognized, even though not in a given case yet realized in actual experience. *United States v. Union Pacific R. R. Co.*, 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124; *Joint Traffic Association Case*, 171 U. S. 505, 576, 19 Sup. Ct. 25, 43 L. Ed. 259; *Standard Sanitary Mfg. Co. v. United States*, *supra*. Even competitive practices, of a nature which as between business rivals standing practically on equal terms may be normal and lawful, yet when employed by a powerful monopolistic combination with the ability to crush, and for the purpose of crushing, a weak rival, may become abnormal and unlawful. It needs no discussion to demonstrate that complete unification of the

towing and wrecking facilities at 14 principal ports, accompanied by restraints with respect to competition imposed upon the sellers of towing properties in excess of the legitimate protection necessary to the preservation of the business purchased, excessive restrictions against competition under joint operating contracts and on sales of tugs, bitter rate wars, and a system of exclusive contracts with customers such as is found here, all adopted or engaged in for the purpose of effectuating monopolistic control, are abnormal methods of doing business and eliminating competition, and that a restraint of natural competition by such means is undue restraint. We think the St. Louis Terminal Case (224 U. S. 383, 32 Sup. Ct. 507, 56 L. Ed. 810), so far from sustaining the legality of the combination maintained by the Towing Company, contains a direct denial of such legality. It was there held that the unification of substantially every terminal railroad facility by which the traffic of St. Louis is served constituted a combination in restraint of trade. It is true that the court, speaking through Mr. Justice Lurton, there said:

"It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals. But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact"

—the fact referred to being the "physical or topographical conditions peculiar to the locality"; the route exclusively occupied by the combination being the only practical route for entering the city. It was also held that the terminal was not under a "common control and ownership," because all needing its use were not admitted to an "equal control and management upon an equal basis with the present proprietary companies." To our minds there is a strong analogy between the "physical or topographical conditions" existing in the St. Louis Terminal Case and the artificial condition created by the Towing Company. A prominent vice of the situation before us is that there are here involved 14 separate "terminals," no one "terminal" being allowed to stand by itself; that the towing facilities furnished at each "terminal" (speaking more especially with respect to prices) are not furnished to all on equal terms as respects the service at that "terminal," but discrimination is made for or against a customer according to whether he does or does not give the Towing Company all his business (not merely towing, but wrecking as well) at each of the other "terminals" covered by the Towing Company's tariffs. No more effective obstacle to successful competition could well be devised than is found in this exclusive contract system. It is manifest that no competitor doing business at less than all 14 of the ports could compete with the Towing Company on anything like equal terms. With the field already occupied by a strong combination, with a large patronage fixedly secured through stockholding interests, the formation of another company equipped to do business at all 14 ports would seem a commercial and financial impossibility. The Towing Company seems to have ap-

preciated this condition, for as early as April, 1900, its president wrote the local manager at Buffalo:

"I think you can safely assert that there is no one concern or combination of concerns that can carry out promises and take care of the vessel towing at all the ports all the time without at least 60 tugs. Taking all the tugs, outside our own, engaged in the vessel towing business, there is not one third of this number, including the poor ones, which are in a majority"

—and in August of that year, during the Maytham competition at Buffalo, the Towing Company's president did not believe that the Maythams, "notwithstanding their good reputation and conservative business principles," could "possibly induce capital to invest to the extent of \$200,000." Yet several times that sum was paid on the very first purchase of towing facilities made by the Towing Company.

It is urged that all vessel owners already enjoy all the rights which by the decree in the St. Louis Terminal Case were given outside railroads, in that all such vessel owners are at liberty to buy stock in the Towing Company, upon the market, and thereby participate in the ownership and management of that company's business. But all may not be able to acquire large stock interests, and the rights of minority stockholders may well fail to assure that "equal control and management upon an equal basis" with all other vessel owners, including the stockholders in the Towing Company, which would be necessary to make the relief analogous to that required in the Terminal Case. We see, however, no substantial analogy in this respect between the vessel owners here and the railroads in the Terminal Case. The analogy is rather between the railroads there and the tug companies here.

We conclude that the Towing Company and the corporations controlled by it constitute a combination denounced by the anti-trust act. We thus come to the question of the remedy to be applied. The general principles affecting this subject are that the continuation of the prohibited acts should be forbidden, and that the combination should be so dissolved as to neutralize the force of the unlawful power; that this result should be accomplished with as little injury as possible to the interests of the general public, and with due regard to vested property interests innocently acquired. In cases where the illegality of the combination results alone from purely administrative conditions, which may be effectively eliminated, a prohibition of the offending practices may be sufficient to vindicate the statute. *Standard Oil Case*, *supra*; *St. Louis Terminal Case*, *supra*; *Union Pacific R. R. Case*, *supra*.

The complete elimination of the offending administrative practices to which attention has been called, including (as the more prominent) customers' exclusive contracts and destructive rate competition (especially as applied to temporary rate reductions in particular harbors), and including all unfair advantages possessed by the Towing Company by reason of its size, financial strength or connections, accompanied by the according of equal and "most favored" treatment to all vessel owners, regardless of the amount of their business, and whether or not they are stockholders in the Towing Company, and whether or not they in fact exclusively patronize that company wherever it does

business (thus, and in all other ways, safeguarding the rights of all others engaged or wishing to engage in towing), would greatly lessen the presently existing evils, and possibly might substantially remove them. But, having in mind the magnitude of the combination and the extent of its activities, and the fact that it was organized to secure a monopoly, as well as for the benefit and profit of its members, together with its present practical occupancy of the territory, thereby placing all would-be competitors at such great disadvantage as practically to deter them, in large measure, from entering the field; together with the further fact that the decree of this court commanding the cessation of purely administrative practices would not be self-executing—it seems unlikely that a decree merely enjoining administrative practices would give complete relief, in the absence of radical change in fundamental principles upon which the Towing Company is organized and operated.

If the Towing Company shall present a feasible and satisfactory plan whereby its service shall be given for the equal benefit of all requiring the same (accompanied by a complete elimination of the offending administrative practices mentioned), so that the company becomes in truth “the bona fide agent and servant” of every vessel owner who shall use or need its facilities, and so that the rights of competitors are completely safeguarded, the injunction need only forbid continued operation except in full compliance with the terms of such plan; and the Towing Company is given 30 days for presenting such plan, if it cares to do so. Otherwise, the parties will be heard upon a plan for the dissolution of the combination, and upon the form of a decree for injunction, and receivership if necessary, to effectuate such dissolution. The question against what ones of the defendants injunction should issue is reserved until the precise form of relief is determined.

The proof does not show that the Pittsburgh Steamship Company has been a party to the combination charged, and counsel for complainant so concedes. As to that defendant the bill of complaint should be dismissed with costs.

No decree or order under this opinion will be entered until further directions.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.
and three other causes.

In re METROPOLITAN EXPRESS CO.

Nos. 2—9, 2—33, 2—149, and 3—37.

(District Court, S. D. New York. September 23, 1913.)

1. STREET RAILROADS (§ 49*)—CONSTRUCTION OF LEASE—LIABILITIES OF LESSEE.

A lease of street railroad lines provided that “the lessee shall also from time to time pay or cause to be paid all rentals and other sums of money which are or may be or become due or payable under or by reason of any leases and other contracts to which the lessor is a party or to which

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

any of the demised property is or may be subject, and the lessee assumes all the obligations of the lessor under all such leases and contracts." *Held*, that such assumption clause did not cover the liability of the lessor for breach of a contract to furnish cars and facilities for the use of an express company for which it was to receive instead of to pay rent.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

2. STREET RAILROADS (§ 49*)—CONSTRUCTION OF LEASE—LIABILITY OF LESSEE.

By the habendum clause of a lease of a street railroad system, the lessor demised, inter alia, all its benefits and rights under a contract by which it agreed to furnish cars and other facilities to an express company for a term of years subject to the burdens and conditions imposed on it by such contract. The lease further provided that in case of default by the lessee in payment of rent or performance of any other conditions, continuing for a stated time, it should terminate at once. The lessee performed the contract and received the rental provided therein until it became insolvent, and receivers were appointed for its property, and the receivers thereafter performed it until the lease was terminated. *Held*, that the assignment of the contract effected by the lease was subject to the forfeiture clause therein to which the express company must be deemed to have assented, and that the lessee was not liable for damages for nonperformance after the lease was terminated.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

3. CARRIERS (§ 15*)—CONTRACTS WITH EXPRESS COMPANIES—ACTION FOR BREACH—DAMAGES.

Evidence *held* insufficient to establish substantial damages for breach of a contract, by the defendant street railroad company to furnish cars and facilities to an express company for a term of years.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 25-27; Dec. Dig. § 15.*]

This cause comes here on exceptions to a report of Special Master William L. Turner.

See, also, 188 Fed. 339; 198 Fed. 735, 117 C. C. A. 503; 208 Fed. 757, 777.

The following is the opinion of the special master:

This claim was remanded by the Circuit Court of Appeals with instructions to allow it for nominal damages and for such substantial damages as upon further hearing might be established. These instructions are to be interpreted in the light of the principles expressed in the opinion of the court as to the nature and extent of proof required to establish damages and of the answering proofs. The opinion (198 Fed. 745), so far as it relates to the damages, is as follows; the italics being mine:

"In the present case it is manifest that the contract was entered into with a view of future profits. That was its object. It looked to the increase and development of the business. Although the claimant did not find the contract profitable when it operated it itself, it is apparent that it contained such elements of prospective value that a responsible corporation was willing to take it off its hands and guarantee a large profit. It appears also that this corporation actually found the contract profitable, for *it made nearly \$30,000 a year out of it for the three years prior to the receivership.*

"It may be that, standing by itself, the terms of the contract with the third person—the American Express Company—would not afford a measure of its value. The assignment might overestimate or underestimate and would not be binding. The contract, however, permitted an assignment *and the fact that it was assigned at a substantial profit tended to show that it had a salable value. There was evidence of substantial damage.*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"It is no reason for denying the claimant damage that some years before the receivership it operated under the contract at a loss. Nor is there any justification for limiting it to such profits as it might show that it could make under its own management. As already stated, the contract permitted assignment and it was assigned. *The assignees made large profits.* Prima facie they would have continued at the same rate, and it was for the receivers to show that such conclusion did not follow, and that they arose from peculiar facilities of the American Express Company, as distinguished from other possible assignees, not within the contemplation of the parties when they made the agreement and authorized its assignment.

"The claimant limits its claim for damages to reimbursement for its loss through the termination of the assignment agreement with the American Express Company, and, consequently, the damages assessed cannot exceed such amount."

This is clearly a determination that the evidence then before the court made out a prima facie case for damages for the full amount claimed. That same evidence, somewhat amplified, is again before the court. The Metropolitan receiver has not attempted to meet it in any of the ways pointed out in the opinion, but so far as the amount of profits is concerned rests the case upon a criticism of the method adopted in ascertaining them. That method is, however, the identical method which was before the court when it said that the American Express Company made nearly \$30,000 a year out of the contract for the three years before the receivership. It must, I think, be assumed that every criticism made or which might have been made of that method was disposed of by the court in favor of the claimant and that the matter has been sent back not for the purpose of giving it an opportunity to supply any defects in its own proofs, but for the purpose of permitting the receiver to submit countervailing proofs. Clearly the claimant is under no obligation to submit new or additional proof of damages as part of its main case, and just as clearly the criticism of counsel for the Metropolitan receiver, which so far as it is destructive of the claimant's proofs of the amount of damage is a mere denial of their legal sufficiency, must be held to have been resolved in claimant's favor.

Even, however, if claimant's method of ascertaining the terminal expense were open to examination—and it is the only factor in the determination of profits at which criticism is directed—it cannot, as it seems to me, be condemned as legally insufficient. Briefly stated, it consists in applying a percentage—deduced by dividing the total receipts from the services involved in receiving and forwarding express matter in a given locality into the actual expenditures for terminal facilities in that locality—to that portion of such gross receipts from any particular part of the business done there that may be under examination. Experience extending over 20 years had shown that the terminal expense of the American Express Company in the city of New York determined in this way was something less than 30 per cent. As the local business (i. e., wholly in Manhattan and the Bronx) done over Metropolitan lines during its period of operation which furnished fully 90 per cent. of its gross receipts from that source, involved two termini within the locality the American Express Company doubled this percentage and deducted 60 per cent. of such gross receipts for terminal expenses. Pointing out that the evidence shows that the through packages and the trolley packages were handled indiscriminately by the same wagons, men, and office equipment, counsel insists that as this method gives the trolley business the benefit of the larger gross receipts of all other business done by the American Express Company in this locality, it is not only arbitrary and uncertain, but obviously illogical and incorrect. That the Metropolitan express matter was intermingled with the other matter is, of course, the reason why some basis of apportioning has to be suggested, and it is obvious that any theory is open to the charge of inexactness. An alternate theory suggested by the receiver is that the trolley business should be charged with the same average terminal cost per package as the other business, but this is not convincing. It would put the grand piano and the hand-satchel on a basis of equality so far as cost of moving goes. It may or may not suggest a closer approach to exactness than the one

adopted does, but no one can say that such result must follow. The theory adopted, while obviously not exact, is the method used for years by this company as well as others in making comparative estimates of its profits from business done in localities scattered throughout the world, and the evidence shows that it used it for its own purposes in making estimates of the profits from this very Metropolitan business long before litigation threatened and that it then accepted the result as profitable. Moreover, it has, I think, the sanction of authority, for the courts have sustained contentions that profits for which the contending party would otherwise be accountable may be diminished by charging the profit derived from the unlawful part of the business with a pro rata of expenses determined by applying the ratio of expenses to receipts for the entire business. *Tremaine v. Hitchcock*, 23 Wall. (90 U. S.) 518, 23 L. Ed. 97; *Cutter v. Gudebrod Bros. Co.*, 190 N. Y. 252, 83 N. E. 16.

In these cases the ruling was obtained at the instance of the offending party and surely it may be invoked by the party aggrieved. Then, too, the margin between the \$30,000 of yearly profit determined in this way, to which the claimant might have been entitled under the rule of damages which controls, and the \$10,000 per annum to which it is limited by its demand, suggests a leeway sufficient to offset much inexactness in any calculation that might be suggested.

It was developed on cross-examination of claimant's witnesses that of the nine express stations in Manhattan and the Bronx used during the time that the express companies were operating under the contract, four were owned by the Metropolitan Express Company and one leased by the American Express Company, and that these five stations were connected with the tracks on which they abutted by spurs which were constructed by the railroad company owning such tracks or its lessee. They were devoted exclusively to express business while the other four were railroad depots in the sense in which that term is understood, similarly connected, in which the Express Companies were given accommodations. It is insisted, on the authority of *Hatfield v. Straus*, 189 N. Y. 208, 82 N. E. 172, that the spurs into these first five stations were illegally constructed and a nuisance, and on the strength of this assumption of law it is argued that the absence of legal authority to use the spurs necessarily impairs the right to damages for breaches of the contract and that such damages may not be awarded on the theory that these nuisances would be allowed to continue. The criticism is not leveled at any of the four spurs running into railroad depots, although those depots were in part used in connection with the express business. This is an altogether new answer to the demand of claimant, not suggested by anything contained in the record before the Appellate Court, and I have much doubt as to whether it is within the narrowed scope of the inquiry which it has directed; but it is very earnestly and fully urged by counsel for the Metropolitan receiver and discussed in the answering briefs on the theory that it is open for decision, and for that reason I express an opinion concerning it.

Counsel concedes that the railway companies constructing and maintaining the spurs into three of the five express stations which abut on the lines of such companies possess a franchise to move express matter as well as passengers, but denies that the Ninth Avenue Railway Company on the lines of which the express station at 178 Washington street abuts and the Union Railway Company as to its Webster Avenue franchise enjoy such privilege. With reference to the companies whose franchise is conceded, the contention amounts to this: That *Hatfield v. Straus* decides that a railway corporation possessing a legislative grant to construct in a city a railway with the necessary connections to which the consent of the local authority required by the Constitution has been given, over which property as well as passengers may be moved may not connect abutting premises devoted exclusively to the freight or express business of the company by the spur track necessary to the convenient transaction of such business and that such a spur is an unauthorized nuisance. I do not think that the *Straus Case* decides anything of the kind. That case decides that a private individual—owner of a great department store—may not, without or with the consent of local authorities, in this case the board of estimate and apportionment of the city of New York, for his

private purposes construct and maintain a spur in the public street which is reserved exclusively for public purposes, connecting his property with the tracks of the railway company on which it abuts, although that company possess the privilege of moving freight and desires the connection. This is a very different thing from saying that a street railway company enjoying the privilege and subject to the duty of moving freight may not connect its track with such building or buildings as may be reasonably necessary for the transaction of its freight business. The duty that the carrier owes is a public duty and the incidental use of the street a public use as distinguished from the private use condemned in the Straus Case. That case both in the Appellate Division and in the Court of Appeals presents much conflict of opinion, but neither in the Appellate Division nor in the Court of Appeals, except possibly in the opinion of Judge Bartlett, who as to it spoke only for himself, is the right of street railways to move freight questioned, for in the dissenting opinion of the higher court written for three of its members it is asserted and in the prevailing opinion conceded. Given the power, the connections necessary to its reasonable exercise surely go with it and, what is more, the consent of local authorities to the construction of lines by a company possessing such power is in my opinion a consent to just such connections. The right to them would be implied if it were not expressed. Its denial would mean the loading of freight cars and storage of freight on the street itself—a *reductio ad absurdum*.

The question suggested as to the charter powers of the Ninth Avenue Company and Union Railway Company is raised to establish the illegality of the connection with the Washington or Dey Street station and with the Webster Avenue station in the Bronx of which the American Express Company was lessee, and the evidence shows that the express business done between these stations constituted a large if not the larger part of the total business done. I think that there is no question as to the power of the Union Railway Company upon whose lines in the Bronx the Webster Avenue station abutted to move freight matter over its tracks on Webster avenue. That power is expressly given by subdivision 7 of section 28 of the Railroad Act of 1850 with which power thus conferred the Union Railway Company is expressly vested by the act incorporating it (chapter 361 of Laws of 1863). Section 34 of the Railroad Act, from the operation of which that company is excepted by the later act, simply relieves it from the obligation to carry the mails, but does not deprive it of the power to move freight as the receiver urges. Respecting the assertion that the Ninth Avenue Railway Company lacks this power, it is by no means clear that it does not possess it; but there are controlling considerations why the question should not be passed upon collaterally. The evidence shows that the spur is there under color of right and put there by the Metropolitan Street Railway Company itself. It has been maintained since 1900 both by that company, its lessee, and the receivers themselves, and there is no evidence that the right to maintain it has ever been questioned by authority state or local or by any adjoining owner. The Ninth Avenue Company is not a party to this proceeding. Under such circumstances I do not think that the federal court will assume the occupation to be otherwise than lawful. The law of the state is that the usurpation of a franchise or its unlawful exercise or under color of right may not be collaterally questioned (*Lamming v. Galusha*, 151 N. Y. 648, 45 N. E. 1132), and where, as here, property rights are involved, such rule is strictly regarded by the federal courts (*Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359).

In the footnote to the statement of facts, made by the Appellate Court, attention is called to the fact that the contract between the two express companies covered other contracts than that between the Metropolitan Railway and the Express Companies, and it is said that it was assumed from the presentation of the case that that was the only one of substantial value. It is also said that if the assumption is incorrect a complication would arise to be dealt with on this hearing. Among the contracts referred to are the so-called subsidiary contracts between the Metropolitan Express Company and the five railroad companies in the Bronx and between that company and the Forty-Second Street, etc., Railway Company in Manhattan. I do not understand from his brief that counsel for the City receiver contends that the

contracts assigned other than these had any value, and the claimant has affirmatively shown, I think, that they had not; but he does contend that the subsidiary contracts had very great value, notably that with the Union Railway Company in the Bronx, and that as the \$10,000 per annum promised in consideration of the assignment of the contract is not apportioned either by the contract or by any evidence offered, claimant's demand must fail. By the original contract, however, the Metropolitan Railway Company grants the Express Company "to the fullest extent that it can lawfully do so" the exclusive right to do the express business over its lines, and it defines them as "all main lines, branches leased and controlled lines." These "subsidiary" contracts were with companies "controlled" by stock ownership at the time of the making of this contract on March 4, 1901, and the Railway Company undertook to give an exclusive right for the contract period over these lines as clearly as it did over those it owned or leased; it being agreed to pay the \$10,000 for the privilege over such lines as well as over the others which suggest no dispute. The contracts were, I think, subsidiary to this main contract and such as either the Metropolitan or later the City Company was bound by its agreement to secure if it became necessary to do so, and that, it would seem, was the reason why the Metropolitan Railway Company did secure them.

The remaining contention urged by counsel for the City receiver is that the City Company is not responsible for the breach as the contract was really repudiated by the Metropolitan receivers subsequent to any date that the covenants in the lease can be held to bind the City estate; but I think that the opinion of the Circuit Court of Appeals disposes of this contention adversely. It clearly holds that the claim is not contingent and that the breach occurred on September 24, 1907, when the receivers of the City Company were appointed.

Claimant asks that a ruling be suggested to the court that the City Company became primarily and the Metropolitan Company secondarily responsible for the performance of the contract. This suggests a question which was not argued before the Circuit Court of Appeals and for which no rule was laid down for the guidance of the court below, and which was not argued pro et contra on this hearing. It turns upon the question whether the City Company's liability springs from the assumption clause, which, in its statement of facts, the court cites as the basis of the City Company's liability. That that or some clause imposed upon the City Company's liabilities respecting the contract was assumed by counsel and the court for the purposes of that appeal, but that the relative liability of the two estates was left for decision, seems to be clear from the footnote at the end of the opinion. Thus Judge Noyes says: "That no substantial question is raised in the brief as to there being any difference in the liability of the two estates upon the contract in question and that matter is accordingly not discussed." If, then, this is to be regarded as an intimation that the matter is still open and I am permitted to express an opinion concerning it, I should say that the contract is not within the assumption clause at all. That clause reads as follows:

"The lessee shall also from time to time pay or cause to be paid all rentals and other sums of money which are or may be or become due or payable under or by reason of any leases and other contracts to which the lessor is a party or to which any of the demised property is or may be subject and the lessee assumes all the obligations of the lessor under all *such* leases and contracts * * * provided that the lessee shall not be required to pay the principal of any funded obligations of the lessor or of its subsidiary companies except as hereinafter provided."

The contract in question does not call for the payment of any sums of money whatever by the Metropolitan Railway Company, lessor, by way of rental or otherwise and is surely not within this language. The "obligations" assumed are "under *such* leases and contracts," i. e., as require the payment of rentals and other sums of money. The Metropolitan was to receive money, not to pay it. As Judge Noyes points out, the breach of this contract is "like the case of a lessor (not lessee) whose trustee drives the tenant out of possession and then insists that the lease was never broken." The obligation of the Railway Company was to furnish cars and transit facilities over its lines, but not to pay money, and that obligation is certainly not within a covenant

which the Appellate Court has recently construed to be essentially a rent covenant. *Matter of Hemphill v. N. Y. City Railway Co.*, 204 Fed. 513. The liability of the City Company is to be sought in other language of the lease and is apparently contained in the habendum clause which grants, leases, and demises "all the benefits and rights arising from all and any contracts, leases, and agreements which the lessor now has * * * all of which franchises, rights, powers, privileges, contracts, leases, agreements and other property so leased are subject to the various burdens and conditions by which they are held by the lessor." The contract in question provides that "it shall bind the successors, assigns, lessees and transferees respectively," and the Metropolitan-City lease clearly operates as an assignment of the contract, subject as stated. Such assignment the City Company by furnishing the facilities and receiving the payments, and the Express Company by using the facilities and making the payments, accepted, until the assignment terminated. The assignment was, however, subject to the right of the Metropolitan to terminate it and to re-enter upon the properties covered by the lease and contract which is contained in paragraph 21 of the lease and of this right the Express Company must be deemed to have had full knowledge when it accepted the City Company as lessee and assignee of the Metropolitan Railway Company. That clause is as follows:

"In case the lessee shall fail at any time to pay the rent provided for in this indenture of lease, or any part thereof, as the same shall accrue, or shall fail at any time to keep and perform any of the agreements or covenants contained in this indenture of lease, and any such default in the payment of rent or in the performance of the covenants hereof shall continue for the period of twelve months after written demand and notice from the lessor to the lessee, then and in any such case, at the option of the lessor, the estate hereby demised shall cease and determine, and all right, title and interest of the lessee in the railroads and premises hereby demised and the leases hereby assigned, shall absolutely cease and determine; and the lessor shall thereupon become and be entitled to re-enter into and upon the railroads and premises hereby demised, and from thenceforth to have, hold, possess and enjoy the same and every part thereof, as of its first and former estate therein, anything to the contrary herein contained notwithstanding, which right shall not be affected by any waiver of a prior default by implication or agreement, and no re-entry by the lessor shall impair the claims of the lessor for any rentals and other payments hereunder which shall be due and unpaid. The right of re-entry for default shall not, however, extend to any of the property hereby transferred absolutely to the lessee."

Very early in these proceedings Judge Lacombe said, on the authority of the Quincy Case (145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632), that the year's period of grace here reserved would be deemed to have been waived and that the court would not have hesitated to have authorized a re-entry before its expiration at the demand of the lessor. More recently the Circuit Court of Appeals, in the "Termination of Lease" proceeding (198 Fed. 747, 117 C. C. A. 503), decided that after September 24, 1907, the receivers must be held to have been operating for the benefit of the Metropolitan estate, and still more recently the same court has said that as between the parties to the lease all idea of continuing operation under it must have been given up prior to February, 1908. *Hemphill v. City Company*. This means that prior to that date there was a re-entry under the clause quoted, and by the very terms of the assignment an end of the City Company's liability under the Express Company's contract and a resumption of that of the Metropolitan. Acting upon this latest intimation from the court, I have said in the Second Avenue Company's breach of lease proceeding against the City Company for the reasons there indicated that October 1, 1907, would be suggested as the date when the lease terminated as between the parties, and while that suggestion has not yet been passed upon, the same recommendation will be made here. In any event the date cannot be much later. This means that as by the lease the City Company did not expressly assume the Express Company's contract for the balance of its term, but simply took an assignment of it subject to its conditions and the right of the Metropolitan to re-enter; its lia-

bility respecting that contract ended on October 1st, 1907. Accordingly of the total damage of \$129,704.32 sustained by the claimant, the City estate will be liable for that portion suggested by the ratio which the week from September 24, 1907, when the obligation was broken by the appointment of receivers for the City Company, to October 1, 1907, bears to the unexpired term of the contract of 12 years, 11 months and 22 days and the Metropolitan estate will be liable for the balance.

Claimant may present and serve a proposed report in the Metropolitan matter and the City receiver a similar report in the City Company matter on May 27, 1913, exceptions thereto and proposed amendments thereof to be served two days later and passed on at a hearing to be fixed at convenience of counsel.

J. Parker Kirlin, of New York City, for Metropolitan St. Ry. Co.

James L. Quackenbush, of New York City (Jas. T. Mason, of New York City, of counsel), for New York City Ry. Co.

Dexter, Osborn & Fleming, of New York City (M. C. Fleming, of New York City, of counsel), for receiver of New York City Ry. Co.

Byrne & Cutcheon, of New York City (Chas. M. Travis, of New York City, of counsel), for Pennsylvania Steel Co. and Degnon Contracting Co.

Davies, Auerbach & Cornell, of New York City (B. Tolles, of New York City, of counsel), for Guaranty Trust Co. of New York, Second Ave. R. Co., and Lynch, as receiver.

Chas. T. Payne and Geller, Rolston & Horan, all of New York City, for Farmers' Loan & Trust Co.

Geo. N. Hamlin and O'Brien, Boardman & Platt, all of New York City, for committee of contract creditors of New York City Ry. Co.

Charles Benner, of New York City, for committee of tort creditors of New York City Ry. Co.

Simpson, Thacher & Bartlett, of New York City, for committee under Metropolitan St. Ry. Co. stockholders' protective agreement.

Strong & Mellen, of New York City (Mr. Chase, of counsel), for Central Park, N. & E. R. R. Co.

Chas. H. Tuttle, of New York City, for Cornell and Belt Line Ry. Corp.

Richard Reid Rogers, of New York City (Jas. T. Mason, of New York City, of counsel), for Central Crosstown R. Co. and New York Rys. Co.

L. C. Krauthoff and J. P. Cotton, Jr., both of New York City, for committee acting under a plan of reorganization of Metropolitan St. Ry. Co.

Masten & Nichols, of New York City (Arthur H. Masten, of New York City, of counsel), for receiver of Metropolitan St. Ry. Co.

Page, Crawford & Tuska, of New York City (Wm. H. Page and Gilbert H. Crawford, both of New York City, of counsel), for Metropolitan Express Co.

LACOMBE, Circuit Judge. It is unnecessary to rehearse the general statement of facts, they are very fully set forth in the master's opinion.

Apparently, under the opinion of the Court of Appeals when these claims were considered by it, the question whether or not there should be nominal damages awarded is no longer open here. Upon the whole record, however, as it now stands this court is to inquire whether there is sufficient proof to warrant a finding of any particular sum as fairly representing substantial damages sustained by claimant.

[1, 2] In the case of the City Company, this court fully concurs in the master's conclusions that the subject-matter of this claim is not covered by the assumption clause (3) of its lease and that under the habendum clause its obligation to afford facilities for the transaction of the express business of claimant or its assignee continued only until the termination of the lease. The master erred, however, in awarding \$192.31 damages against the City Railway Company, being the proportion of what he found to be the whole damages for the week from September 24 to October 1, 1907. For the purposes of this case it

makes no difference whether the date of termination of the lease is taken to be September 24, 1907, or October 1, 1907, or January 12, 1908, when the Third avenue and its leased and controlled roads were cut out of the system, or February 28, 1908, when receivers notified claimant that they would discontinue the operation of express cars, or March 15, 1908, the date fixed by them for such discontinuance. The service stipulated for in claimant's contract was, in fact, fully performed and all it bargained for it received until the last-named date. It may be correct as a legal theory to say that when receivers decline to assume an existing contract, the declination dates back to the day of their own appointment. But it is a very different thing to hold that the other party to the contract sustained actual substantial damage from its breach during the intermediate time when, during that whole time its provisions were being complied with and such party was receiving all that had been promised to it.

The special master's conclusions of law should be modified by substituting for the fourth the following:

"That the claimant is entitled to no more than nominal damages against the New York City Railway Company for the breach of its agreement with the Metropolitan Street Railway Company of March 4, 1901."

In order that no more may be decided on this hearing than is necessary to dispose of this particular claim the last words of the first conclusion of law should be changed from "on October 1, 1907," to "some time prior to February 28, 1908."

The findings of fact need not be modified unless the disposition to be made of the claim against the Metropolitan Company makes it necessary to avoid any discrepancy between the findings in the two cases. The exceptions of claimant to the findings and conclusions are overruled.

[3] In the latter case of the Metropolitan road the Court of Appeals has held that the claimant is entitled to nominal damages, and in addition to such substantial damages as might be shown by satisfactory proof. The special master has found the damages to be \$129,704.32, but the testimony does not seem to me to warrant that conclusion. The contract which is the basis of the claim was entered into March 4, 1901, by the Metropolitan Express Company and Metropolitan Railway Company, the latter agreeing for 20 years to furnish cars and give express facilities over its main lines, purchased lines and controlled lines, and also all lines it might thereafter purchase or acquire control of. Claimant operated under this contract for three years at a loss, and on July 15, 1904, assigned this contract and several others to the American Express Company for a lump sum of \$10,000 a year. Testimony was introduced tending to show that for some time before receivership the latter company made a profit out of its operation of about \$30,000 a year. There is some criticism as to the sufficiency of this testimony—being in part averages and estimates—but courts are usually liberal when absolute accuracy in such matters is inherently impossible. Upon this evidence the special master has held that the contract was actually worth \$10,000 a year for the unexpired term of nearly thirteen years. The difficulty with the calculation lies in its assumption that the \$10,000 a year which the American Company agreed to pay was wholly for this contract of

March 4, 1901. That consideration, however, was for the assignment not only of this but also of many other contracts and leases. As to some of these the master has found that they were of no substantial value; but there are others which were undoubtedly of substantial value. As we have seen, the contract of March 4, 1901, covered not only lines owned by the Metropolitan Railway Company, but all "controlled" lines. Among such lines controlled through stock ownership were the Union Railway, Forty-Second Street, Manhattanville & St. Nicholas Avenue Railway, Yonkers Railroad, Southern Boulevard Railroad, Westchester Electric Railroad, and Tarrytown, White Plains & Mamaroneck Railway. The contract of March 4, 1901, contained no covenant that this control of these railroads should continue in the Metropolitan. It may be that while such control still existed the Metropolitan might have been compelled to secure from each of the companies thus controlled a concession to the express company similar to the one it had itself given; but if it parted with the control of either of them it would be powerless to obtain such concession for the express company. To that extent the value of the original contract would shrink and, there being no covenant for a continuance of control, the express company could maintain no claim for damages for such shrinkage. Whether or not the American Company would have agreed to pay \$10,000 or \$10 a year for the original contract does not appear. Before it took its assignments the weak point in that contract was covered; the controlled companies enumerated above had each of them made an independent contract with the Metropolitan Express Company similar in its terms to the contract of 1901. Thereafter the holder of *all these contracts* was secured in the use for express purposes for the period named, of all the lines which the Metropolitan owned or controlled when the first contract was made. All these later contracts were included with the original one in the assignment to the American Company. The master has not found that these were "of no substantial value"; that they were, some of them at least, of substantial value must be apparent to any one who is familiar with the intricacies of the street railway system in Manhattan and the Bronx. There was no apportionment of the \$10,000 among the several parcels covered by the assignment and there is nothing in proof by which such apportionment could possibly be made. It seems to me, therefore, impossible to determine what sum of money would fairly represent the damages resulting from the breach of this contract which stipulated for no continuance of control. For the breaches of their several contracts the roads formerly controlled by the Metropolitan may or may not be responsible, but the finding of substantial damages against the last-named road is not confirmed.

These conclusions call for a disaffirmance of findings of fact numbered 7, 8, 9, and 14 and of the conclusion of law.

The eleventh finding goes too far in holding that the contracts referred to therein "ceased to have any substantial value" upon the breach of the contract with the Metropolitan. The most that can be said is that their value was substantially impaired. The finding should be modified accordingly. In order that all the points raised on the hearing may be disposed of all other exceptions to the report are **pro forma overruled**.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.
and three other causes.

In re SECOND AVE. R. CO. et al.

Nos. 2—9, 2—33, 2—149, and 3—37.

(District Court, S. D. of New York. September 26, 1913.)

1. STREET RAILROADS (§ 49*)—LEASE—INSOLVENCY OF LESSEE—ACCOUNTING BETWEEN PARTIES.

A lease of a street railroad required the lessee to do certain reconstruction work, the cost of which was to be repaid by the lessor, which had the option to pay in its bonds, issued under an existing mortgage, at their face value. In some cases payment was so made, and the lessee, after writing its guaranty on the bonds, sold them at a premium. *Held*, that it could not be required to account to the lessor for the amount of such premiums.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

2. STREET RAILROADS (§ 49*)—LEASE—INSOLVENCY OF LESSEE—ACCOUNTING BETWEEN PARTIES.

On an accounting between the parties, the lessee was entitled to interest on the sums advanced by it during the period of reconstruction.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

3. STREET RAILROADS (§ 49*)—LEASE—INSOLVENCY OF LESSEE—ACCOUNTING BETWEEN PARTIES.

Where a lease of a street railroad provided that the lessee should receive certain cash in the treasury of the lessor, but in case of termination of the lease for its default the money should be considered as a loan and returned with the other property of the lessor, such money must be considered on a termination of the lease as a part of the property leased, compensation for the use of which was covered by the rent reserved, and the lessee is not chargeable with interest thereon.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

4. STREET RAILROADS (§ 49*)—LEASE—INSOLVENCY OF LESSEE—ACCOUNTING BETWEEN PARTIES.

By a lease of a street railroad the lessee assumed and agreed to pay all debts and liabilities of the lessor not incurred to the lessee. By a further provision the lessee was authorized, if it should deem it expedient, to change the motive power in use, and for the amount so expended it was to receive bonds of the lessor to be secured by a subordinate mortgage. Prior to the insolvency of the lessee and the termination of the lease, it had changed the motive power of certain parts of the leased lines, but had not demanded or received the bonds to which it was entitled therefor. *Held*, that such indebtedness of the lessor was not included in that assumed by the lessee, and that on an accounting between the parties it was entitled to credit for the amount so expended.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

5. STREET RAILROADS (§ 49*)—LEASE—INSOLVENCY OF LESSEE—ACCOUNTING BETWEEN PARTIES.

Various items of debit and credit considered on an accounting between lessor and lessee of a street railroad on the termination of the lease through the insolvency of the lessee.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

This cause comes here upon exceptions to report of special master. See, also, 208 Fed. 747, 777.

The following are the opinions of the special master:

Since the memorandum was written in this proceeding, the Guaranty Trust Company has filed its petition for a reopening of the case, asking that either the Metropolitan receiver or it be given an opportunity to show more definitely the amount of construction expenditures on the Second Avenue line after July 1, 1902. As the petition in substance withdrew the demand that the Metropolitan estate account for \$50,187.83 proceeds of the bonds in question based on the tables of debits and credits set forth in the memorandum, the prayer of the petition was granted because the final settlement of December 31, 1906, acted on at the meeting of the Second Avenue directors, on its face purported to cover a period from July 1, 1902, to that date, and this overlapped the next prior statement of August 31, 1904, an account of receipts from bonds and expenditures for construction to that time. The receiver, accepting the burden imposed on it, introduced the testimony of his auditor based on a comparison of the statements referred to with the reports of the Second Avenue Company to the Railroad Commissioners and such of the Metropolitan books as were in his possession. Without going into the details, the result, in my judgment, was such as to establish a substantial accord between the final statement of account of December 31, 1906, on which the Second Avenue directors acted at the meeting of June 27, 1907, and said reports and books.

Counsel for claimants states that he does not claim that the 590 bonds referred to in the memorandum and the item of \$704,600 should both be charged to the Metropolitan Company, but makes objections to the credit of \$750,000 for the power house contract and to certain adjustments of accrued interest on bonds, which latter are in addition to objections already disposed of, but renewed, relating to interest on construction advances and to proceeds of bonds which will not be again considered. Respecting adjustments relieving the Metropolitan from charges of interest accrued on bonds, in addition to their proceeds, it may be stated that, apart from the fact that such adjustments were accepted by the Second Avenue directors, so that the account became stated, there is nothing on the face of the transaction to suggest unfairness to the Second Avenue Company. By the terms of the lease the Metropolitan was itself bound to pay this accrued interest as rent, so that it does not appear that there was any unfairness in cancelling any credit erroneously given to the Second Avenue Company; accrued interest not ordinarily being regarded as proceeds of bond sales.

The other matter relating to the power house rights has not been passed on, and since the credit claimed by the Metropolitan enters into the account of December 31, 1906, it becomes necessary to consider it. The receiver has introduced evidence showing the approximate value of the Metropolitan power house and apparatus as of January 1, 1908, to be \$4,095,349, and of its various substations \$1,823,595, and that the cost of reproducing as of March 8, 1900, a power house properly equipped with the necessary apparatus and with the connecting substations required for the Second Avenue lines, would be \$1,152,500. It is also shown that the Second Avenue mileage in the spring of 1908 was 11 per cent. of the total Metropolitan mileage; the Third Avenue system having been separated. The power house contract was among the contracts ratified at the stockholders' meeting of April 2, 1900. It seems to me, as I intimated in the previous memorandum, that the circumstances at the time this contract was made are such as to make it extremely difficult for the court to stamp the transaction as on its face fraudulent. If the contract was unusual, it cannot be regarded as unfair in its inception and would doubtless have proved of distinct advantage to the Second Avenue Company if the Metropolitan had remained a strong and solvent company. Let the accounts as to the proceeds of these bonds be stated in accordance with the statements on which the action of the Second Avenue directors was based as contained in the record.

Proposed reports in accordance with memoranda may be presented on Monday, June 30, 1913, 2 p. m.

On the 20th day of January, 1898, the Second Avenue Railroad Company made a mortgage of all its properties then owned or thereafter to be acquired to secure a proposed issue of \$7,000,000 of its bonds to the Guaranty Trust Company. On the 28th day of January, 1898, it leased all these properties, subject to the mortgage, which the lessee assumed and agreed to pay to the Metropolitan Street Railway Company. On the 14th of February, 1902, the Metropolitan Company leased its properties, in which were included its interest in the lease from the Second Avenue Company, by a lease which went into effect on April 1, 1902, to the New York City Railway Company. On the 24th of September, 1907, the City Company was insolvent, and this court appointed receivers of its properties, and thereafter appointed a special master, with whom it directed that claims against the estate of said City Company should be filed on or before December 10, 1907. On October 1, 1907, the Metropolitan Company was insolvent and the court appointed receivers of its estate and directed that claims against such estate be filed on or before January 15, 1908. On September 18, 1908, an action was begun by the Guaranty Trust Company in the Supreme Court of New York to foreclose the Second Avenue Company's mortgage of January 28, 1898, above referred to, and on January 19, 1908, that court appointed its receiver of the mortgaged properties. On July 23, 1908, this court directed the surrender to its Metropolitan receivers by the City receivers of the properties of the Metropolitan Company covered by the lease to the City Company, and on October 9, 1908, instructed its Metropolitan receivers not to adopt the lease from the Second Avenue Company and to deliver its properties to the receiver appointed by the state court at midnight between November 12 and 13, 1908. On February 21, 1910, this court made its order directing the filing with the special master of claims by the Second Avenue Company, the Guaranty Trust Company, and the receiver of the property mortgaged by the Second Avenue Company against the Metropolitan estate on or before March 1, 1910, and of those by the same claimants against the City estate on or before said date. On February 28, 1910, claims against each estate were duly filed with the master by said claimants, and on January 3, 1913, the court made further orders directing that the claims so filed should be deemed to have been filed nunc pro tunc as of the dates originally fixed for the filing of claims against each estate, i. e., that the claims against the Metropolitan estate should be deemed to have been filed as of January 15, 1908, and the claims against the City estate as of December 10, 1907.

The claims filed against the Metropolitan estate are for damages for breaches by the Metropolitan Company of its covenants contained in the Second Avenue lease to it. The claims of the Second Avenue Company are, of course, primary, and those of its receiver and of the Trust Company derivative, and the breaches alleged are the bases of the claims of each. The claim as filed against the City estate by the same claimants set forth the same breaches with one exception, of the same covenants contained in the same lease, the liability of the City Company being based on the assertion contained in the claim as filed, that on February 14, 1902, the lease was assigned to it and that it accepted the assignment and agreed to perform the covenants. The exception referred to is an item of \$41,000 of cash alleged to have been turned over by the Second Avenue Company to the Metropolitan Company on the making of the lease, which it is claimed the latter company promised to return on its termination.

It will be convenient to pass first upon the items of damages in the order in which they are set out in the claim filed against the Metropolitan estate, reserving the consideration of the items of claim against the City estate, which suggest different legal contentions, for consideration after the suggestions respecting such items to be made to the court have been indicated. Such items in the claim as filed aggregated \$10,953,746.39, exclusive of a sum representing a balance of proceeds suspected, but not known, of the bonds above mentioned, asserted to have been unaccounted for. This

aggregate has been reduced under the decisions of the court and of the Circuit Court of Appeals in these proceedings, so that the aggregate amount of all items now claimed by counsel in the brief is \$2,015,634.12.

It will be necessary therefore to consider only the evidence and the contentions it suggests respecting items going to make up this latter sum.

1. Failure to keep track, roadbed, and special work in good working order, condition, and repair, \$502,665.48.

The language of the covenants, the breach of which resulted in damage to the amount now asserted, is that the Metropolitan Company "at all times during the continuance of this lease will maintain, manage, use and operate and keep in good working order, condition and repair, at its own expense, the entire line of the said demised railroad or railroads and all extensions and branches thereof which are now or hereafter may be constructed, and all fixtures and appurtenances thereof which now are or hereafter may be constructed," and that "it will replace any part of the demised property which may be destroyed by fire or other cause and will at the termination of this lease or whenever the same ceases to be operative surrender the franchises, rights and privileges aforesaid unimpaired by any act or default."

It is conceded that the evidence establishes a breach of the obligation created by these covenants resulting in damage to a substantial amount. The claimants, in support of their demand in the claim as filed of \$730,000, introduced expert evidence of a cost of reproduction in the neighborhood of this latter figure, but abandon it as exceeding the requirement of a promise to keep in good working order, condition, and repair, and accept with modifications the estimates of the respondent's expert of putting the track, roadbed, and special work in such condition as of November, 1908. The respondent urges that the sum of \$120,181.83, being the sum testified to by the claimant receiver's auditor on respondent's cross-examination, as the amount expended by such receiver for this purpose up to January 11, 1911, after two years of occupancy under the supervision of a vigilant Public Service Commission, should be accepted as the cost of putting the road into the stipulated condition. I think, however, that this contention is foreclosed by the respondent's offer of testimony of a higher figure as the cost complying with the covenant, and, even if it were not, I should have no hesitation in accepting the claimant receiver's testimony that the repairs that he made were "emergency" repairs. I have no hesitation in accepting as satisfactory and fair the estimates of damage of the respondent's witness based as it is upon a long and intimate knowledge of the whole Metropolitan system, including the Second Avenue road; but his testimony of the cost of renewing the special work should be accepted without any deduction of one-half of the cost to be contributed by other lines and should be modified to meet the actual cost of the seven items of special work actually done by the claimant receiver out of the fourteen estimated on. This results in the addition of \$3,756.83 to his original estimate on special work of \$48,200.

The items making up the amount to be suggested to the court as damages for breach of the covenant cited will stand thus:

Cost of renewing track.....	\$373,060 00
Cost of renewing special work.....	51,956 83
Cost of renewing electrical parts (undisputed).....	79,358 19
Total damage.....	\$475,375 02

2. Failure to keep rolling stock in proper condition and supplied with adequate motors.

The claim as filed fixed these damages at \$687,590. The covenants, the breach of which resulted in the reduced damages now claimed, are in substance as follows:

The Metropolitan Company covenants that it "at all times during the continuance of this lease will keep the personality hereby demised in good working order, condition and repair so that the traffic and business of said railroad shall be encouraged and developed and reasonable accommodation given

to the public; * * * that it will at the termination of this lease, or when for any cause it may cease to be operative, transfer, deliver and return to the party of the first part, in good condition, the horses, harness, cars, tools, implements, machinery, equipments, stable equipments, office furniture and fixtures, and all property of every kind leased to and used (by it) in the maintenance and operation of the railroad or railroads aforesaid, except that which is absolutely transferred, or has passed from existence by death or destruction, and shall also deliver the substitutes, increments and additions provided or made by it; and substitutes for the property impossible to deliver by reason of death or destruction, shall be equal in value to that for which they are substituted." It further agreed "that after said railroad shall be reconstructed and the motive power changed, and the cars, rolling stock, equipment and motive power supplied thereto, as hereinbefore provided, it will cause all renewals of such rolling stock, equipment and motive power to be made at its own expense, and keep the same renewed and the said railroads supplied therewith."

At the end of the Metropolitan receivers' period of occupancy at midnight of November 12, 1908, the Metropolitan receivers turned over to the claimant receiver 150 standard type closed cars, 25 converted combination cars and 100 open cars, and, when turned over, these cars were equipped with "1,000 G. E." motors, two for each of these 275 cars. The term "1,000 G. E." is the trade designation of a motor of a certain type and horse power manufactured by the General Electric Company. These 1,000 G. E. motors had originally been bought for the Second Avenue Company before the Metropolitan receivers were appointed, but had been replaced by the Metropolitan Company by a superior type of motor, of greater horse power, and adequate to the traffic requirements on the Second Avenue line. These were known as "57 G. E." motors. These latter motors the Metropolitan receivers removed from the 275 cars just before delivering them to the claimant receiver and substituted what they assert were the motors originally purchased for the Second Avenue line, being the 1,000 G. E. motors, which they insist as matter of law were all that the claimants were entitled to. It is a fact established by this record, if not conceded, that these motors were inadequate to the service, and it is also a fact not only established, but I think conceded, that they were badly out of repair and that the cost of putting them into the operating condition required by the covenant would be \$78.25 for each pair of the 550 motors or \$21,518.75, whether used on the cars turned over or on cars for which they were adapted. The claimants, however, insist, in this proceeding that they are entitled to the value of 550 of the "57 G. E." motors, reduced by a disputed value of the 1,000 G. E. motors actually surrendered and such value thus reduced they claim on the evidence to be \$1,250 for each of the 275 cars or \$343,750. This sum is included in the \$541,870 claimed for the breach of the above covenants, and the balance of \$198,120 is the amount claimed as required for the rehabilitation of the cars, exclusive of these motors.

A claim, however, by the claimant receiver is pending and not yet sub judice before the special master that these 57 G. E. motors were "increments and additions" within the meaning of the covenants summarized, which the receivers were bound to surrender, and that as they removed and kept them, and as they cannot now be identified, the Second Avenue receiver is entitled to recover their value as for specific property, a manifestly more valuable right than a right to damage against an insolvent corporation. Claimants concede that their success in that proceeding means that the present claim for failure to furnish adequate motors must abate, but they insist that the claims are not inconsistent, since the obligation of the Metropolitan was to keep the personalty in such a condition of repair "that the traffic and business of the railroad should be encouraged and developed and reasonable accommodation given to the public" which the 1,000 G. E. motors wholly failed to do; and that they are therefore entitled to have the damage for failure to observe the obligation thus incurred assessed in this proceeding, subject, I assume, to a recommendation to the court that the allowance shall become effective only in the event that claimant receiver shall

fail in the so-called motor proceeding. The respondent insists that the mere pendency of the other proceeding bars a determination of the damages for a failure to furnish adequate motor service. With this latter contention I do not agree, but I do think that none of the issues of fact or law in that proceeding should be determined at this time in this proceeding. That proceeding, not yet submitted, has been pending for a long time, a vast amount of evidence has been there introduced, and there are there involved many issues of fact and law which include the very issue of adequate motor service here involved, the determination of which is now asked. The claimants should not at this time be either prejudiced or advantaged in that proceeding by a determination of this question now, and I shall report to the court that an assessment of damages for failure to furnish adequate motor service should not be made unless and until the claimants fail to establish their claim in the "motor" proceeding.

This leaves for assessment the amount of damages for failure to keep the 275 cars in repair, outside of the question of the failure to equip them with adequate motors, and this damage, as has been said, the claimants now fix at \$198,120. In this latter amount is included an item of \$18,240 for rehabilitating, as of November 12, 1908, 96 of the open cars at \$190 each and 4 remaining open cars at \$750 each, or \$3,000. With reference to these 96 open cars, I find on the testimony of the claimant receiver and that of the respondent's superintendent of rolling stock that they were thoroughly rehabilitated in the summer of 1908, and that the condition of these cars on November 13, 1908, fully complied with the obligation to keep in good operating condition and repair. With reference to the four remaining open cars, there is a doubt suggested by the claimant's receiver's testimony that four had no platforms when he received them. This statement was connected with statements clearly referring to the condition of the closed cars, and I think that claimants' counsel has mistakenly attributed that condition to these four open cars as the basis of the claim of \$750 for each car. I find and shall report that \$50 for each of these four cars was required to put them in fair operating condition.

The balance claimed as damages for the breach of the covenant respecting the 150 closed and 25 combination cars is \$176,880, made up as follows:

3 closed cars at \$1,500.....	\$ 4,500
147 closed cars at \$1,040.....	152,880
25 converted combination cars.....	19,500
	<hr/>
	\$176,880

The testimony of the claimant receiver shows that the condition of the three closed cars was such that \$4,500 was needed to make them usable. I do not understand that the item is disputed. The cost of rehabilitating the 147 closed cars at \$1,040 is vigorously disputed; the respondents contending that the cost per car is \$447.37, or \$65,763.39 for all. The latter figure is based on the testimony of the respondents' superintendent of rolling stock, who had a personal, though of course general, knowledge of the condition of the rolling stock of the system on the date in question, including that of these surrendered cars and an intimate knowledge of the cost of repairs. It meets the testimony of an expert without that knowledge, who speaks from what he saw and heard six months later and whose conclusions based on such data suggest what is really a cost of reconstruction much in excess of the requirement of the covenant and very near to that of a brand new car. I have no hesitation in accepting this lesser figure as more satisfactory.

With reference to the 25 combination cars, the claimant receiver testifies that they were in bad condition when he received them. The respondents' expert testifies that they were in good condition at that time, having been rehabilitated in the spring of 1907, which it will be noted is the year prior to the rehabilitation of the open cars. I accept the statement of the receiver as to the condition of these cars, and, although it was apparently

somewhat better than that of the closed cars, I adopt the same figure of \$447.87 per car as the cost of rehabilitating them, or \$11,196.75 in all.

This item of damage will stand thus:

Rehabilitation of platform of four open cars.....	\$ 200 00
Rehabilitation of three closed cars.....	4,500 00
Rehabilitation of 147 closed cars.....	65,763 69
Rehabilitation of 25 combination cars.....	11,184 25

Total\$81,647 94

To this amount should be added the undisputed item of \$21,518.75 for the rehabilitation of the 1,000 G. E. motors in the event that it shall hereafter be decided that those were the only motors that the claimants were entitled to, and this would make a total damage for the breach alleged of \$103,166.69.

3. Failure to pay taxes and assessments, \$446,826.46.

In the claims as originally filed the amount claimed for unpaid taxes and assessments was \$748,876.39, but as a result of the decisions of the Circuit Court of Appeals in these proceedings claimants now ask the allowance of the reduced amount stated. It is made up as follows:

(a) Taxes and assessments imposed before the lease of January 28, 1898, to the Metropolitan was made:

Assessment for paving First avenue confirmed February 17, 1883..	\$22,143 85
Assessment for paving 96th street.....	4,946 28
Assessment for paving First avenue between 92nd and 109th streets	719 65
Real estate tax 1862.....	3 26
Real estate tax 1866.....	2 00
	<hr/>
	\$27,815 04

On this interest is claimed up to October 1, 1907, aggregating \$32,040.08, making the total \$59,855.12.

(b) Franchise taxes from 1901 to 1907, inclusive, and interest to October 1, 1907, as follows:

1901	\$62,107 23	\$26,011 44	\$ 88,118 67
1902	56,031 00	19,459 54	75,590 54
1903	46,590 06	13,012 27	59,602 33
1904	46,661 12	9,787 81	56,448 93
1905	41,221 29	5,767 85	46,989 14
1906	35,370 52	1,490 18	37,860 70
1907	22,361 03		22,361 03
			<hr/>
			\$386,971 34

(a) The claimants ask the allowance of the taxes and assessments which were unpaid at the making of the lease, urging that, as matter of law, they must be held to be among the "debts or liabilities" which the Metropolitan agreed to assume. The respondent urges that *prima facie* these words do not cover taxes. There are, however, other words in the lease which do, as the Metropolitan expressly covenanted to save the Second Avenue Company harmless and indemnify against "any unpaid judgments, costs, assessments, license fees, taxes, orders of court."

The taxes and assessments with the interest claimed, the latter subject to verification, are allowed.

(b) As to the franchise taxes, the contention is made that as the covenant was made in 1898 prior to the enactment of the statute taxing franchises for the first time and bringing within the range of the state tax system "a new character of property," such taxes are not within its purview. The language is that the Metropolitan "will pay all taxes, assessments and charges which may lawfully be imposed in respect of the demised property or any part thereof." Considering the contention, without reference to the numerous authorities cited in the many briefs submitted respecting it, it would seem that a tax on the franchises, constituting as they did the most

important part of the demised property levied in pursuance of a constitutional statute, is a tax "lawfully imposed" within the meaning of the covenant. It is not, however, necessary to ask the court's consideration of the thorough discussion of the matter contained in the briefs, as I think it has been disposed of in the Central Crosstown Case. In that case the City receiver squarely raised the point under a covenant contained in the lease made in 1890 by the Christopher and Tenth Street to the Crosstown Company, which was assumed by the Metropolitan and City Companies, the language of which was that the lessee would pay "all taxes, assessments and charges which * * * may be lawfully imposed on the party of the first part." The Appellate Court, while not discussing the matter in its opinion, allowed the franchise taxes imposed on the Crosstown properties down to October 1, 1907. The language of the two covenants is not to be distinguished and that ruling is controlling here.

The item to be allowed against the Metropolitan estate for taxes is therefore as follows:

(a) Real estate taxes, assessments, and interest.....	\$ 59,855 12
(b) Franchise taxes and interest.....	386,971 34

Total	\$446,826 46
-------------	--------------

(4) Failure to pay rent and taxes during occupation by receivers for experimental occupation, \$122,911.

As originally filed, this item was for six installments of rent of \$41,895 each or \$251,370 accruing after the receivership up to December 1, 1909. Under the decisions of the Appellate Court it has been reduced to the amount stated, and as so reduced includes certain taxes accruing during the period of occupancy and payable as part of the rent which were not originally demanded. As thus reduced and constituted, it presents no contentions; its allowance being conceded. It is, however, as the respondent justly points out, subject to reduction by any allowance that may be made of net profits, if any, earned by the Metropolitan receivers during their period of occupancy to which the claimant may become entitled in the so-called use and occupation proceeding brought by him, still pending, and a reservation for that contingency will be made in the report.

(5) Failure to restore the car house, \$105,958.52.

The amount demanded for this item in the claim as filed was \$175,000. It depends on the following facts: In the Second Avenue lease, the Metropolitan covenanted to "replace any part of the demised property which may be destroyed by fire or other causes and at the termination of the lease, or whenever the same ceases to be operative to surrender the franchises, rights and privileges unimpaired by any act or default." On January 15, 1908, the time for the filing of claims as fixed by the court against the Metropolitan estate expired, and this claim, by the orders before referred to, is to be deemed filed as of that date. In February, 1908, the Second Avenue car barn on the westerly half of the block bounded by First and Second avenues and Ninety-Sixth and Seventh streets covered by the lease was destroyed by fire. The loss was \$309,258, and the insurance collected \$203,299.48; the difference being the balance now claimed.

It is clear that on the day which determines the provable status of claims there was no cause of action in existence for damages for this loss. In the "Termination of Lease" proceeding, the Appellate Court as a corollary to the right to net profits clearly lays down and applies the principle that losses accruing during the period of occupancy must be borne by the lessor. As against creditors existing at the time, this demand has not even as strong an equity to support it as a demand contingent at the date determining provable status; which ripens into a fixed liability before distribution, and yet under the decisions such a demand may not be allowed. I regard the reasoning not only in the case referred to, but in the Metropolitan Express and Central Crosstown cases as well, as conclusive against the allowance of this demand for damages, and shall therefore recommend that it be disallowed.

(6) Failure to account for proceeds of First Consolidated mortgage bonds, \$50,187.83.

The bonds here referred to are \$5,040,000 of the \$7,000,000 of bonds above referred to, which were secured by the mortgage in process of foreclosure by the claimant trustee in the action in the state court in which the claimant receiver was appointed. The balance of \$1,960,000 secured by bonds numbered from 5,041 to 7,000, inclusive, were to be used to retire certain General Consolidated bonds issued in 1885 amounting to \$1,600,000, and an issue of \$300,000 of debenture bonds issued in 1889, and to pay off a mortgage on real estate made in 1888, amounting to \$60,000. Of the total of 7,000 of bonds, 5,682 were actually issued according to the record, 642 for purposes connected with the retirement of part of this prior indebtedness, as the record affirmatively shows. The balance, consisting of the bonds numbered from 1 to 5,040, inclusive, for \$1,000 each, suggest the contentions to be decided, and their issue or use were controlled by certain provisions of mortgage and lease as the basis of such contentions which may be briefly summarized.

The lease made January 28, 1898, eight days after the mortgage, reciting that the lessor had obtained authority to change its motor power from horse to electric and had entered into contracts for the reconstruction of its roadbed required by the change and was then largely indebted to the Metropolitan lessee for advances for such construction and had mortgaged its property to secure 7,000,000 of its bonds for the purpose of paying prior indebtedness, and that incurred in such reconstruction and electric operation and of carrying out contracts respecting the latter purpose, which bonds were not then issued, states that the Second Avenue Company will, "*in accordance with the terms and conditions of said mortgage*, issue and dispose of its said bonds to an amount sufficient to pay and discharge all its debts and obligations and contracts heretofore incurred in the reconstruction of its road and roadbed made necessary by the change in its motive power and will from the proceeds of such bonds pay and discharge all such debts, obligations and contracts including the debt now due or hereafter (thereafter) to grow due for such purposes to said party of the second part" (Metropolitan Company); that it would thereafter "at the demand and upon the request of the Metropolitan Company issue and dispose of or cause to be issued and disposed of by the trustee named in said mortgage and the proceeds paid over to it, sufficient of its bonds to supply suitable cars, rolling stock, equipment and motive power to its said railroad to enable it to operate the railroad hereby leased and demised by the underground system of electricity or any other motive power, and to repay any expenditures made by it in improving the leased property, or in erecting, changing or reconstructing any building or buildings thereon, and whenever it shall desire to change the motive power upon parts or portions of said railroad upon which changes have not heretofore (theretofore) been authorized or proposed that it (would) issue and dispose of any pay over the proceeds thereof to the (Metropolitan), or deliver to it or cause the trustee named in said mortgage to sell and dispose of any pay over the proceeds thereof to (it) or deliver to (it) the balance of its said bonds secured to be paid by the mortgage aforesaid or so much thereof as (was) or (would) be necessary for a change of motive power and a reconstruction of its road and roadbed made necessary thereby, and to supply the necessary cars, rolling stock, equipment, and motive power thereof to enable it to operate said road as reconstructed." Then follows a covenant to issue further bonds secured by an additional mortgage for similar purposes to be applied solely to betterments, not relevant to the matter now under examination, and a covenant of assumption of debts and liabilities except those incurred to the Metropolitan Company, but including all bonds issued under this mortgage to the claimant trust company when issued and disposed of under said mortgage and lease.

The mortgage, the provisions of which are thus made part of the lease, after reciting the underlying indebtedness, directs that bonds numbered 5,041 to 7,000, inclusive, be reserved exclusively for refunding this indebtedness. It also recites the grant of the right to change to electrical power by the

Railroad Commission in 1897, and it is a matter of inference from the evidence contained in the record that this grant did not include the First Avenue line from Fifty-Seventh street to the Harlem as that apparently was obtained in 1907. It is therefore to be assumed that the bonds numbered 1 to 5,040, inclusive, were to be used in effecting the reconstruction and change on the other lines of the lessor company, and the evidence shows that they were so used. By the terms of the mortgage these latter bonds so numbered were to be certified by the trustee and delivered to the Second Avenue Company, or to any person designated by it, only upon its written application expressed through a resolution of its board of directors stating what amount of bonds were required at the time. The evidence shows that this provision was complied with; the resolutions of the board of directors of the Second Avenue Company, with the statements to which they refer, being contained in the record. These statements, which with one other that the respondent introduced, constitute the basis of a reconstructed account of the proceeds of bonds and expenditures of the Metropolitan for reconstruction, upon which the claimants base their demand under this head. This account is set forth in the brief, and as it represents the result of the contentions of claimants and their final demand it is here reproduced for purposes of examination and comment.

Statement of Account of Metropolitan Company in Respect to Proceeds of First Consolidated Mortgage Bonds.

1898. Mch. 22	Sale of bonds (S. M. 472)	1,914,166 67	Advanced by Met. St. R. Co. on account of loans, Second Avenue R. Co. to take up their outstanding notes (S. M. 493)...	224,114 75
1898. May 16	Sale of bonds (S. M. 218)	635,750 00		
1898. May 18	Sale of bonds (S. M. 213)	425,889 89	Expended for construction of roadbed, superstructure and substructure to August 31, 1904 (S. M. 493).....	3,276,748 82
1899. June 2	Sale of bonds (S. M. 218)	531,000 00		
1900. Mch. 15	Sale of bonds (S. M. 213)	1,136,405 51		
1904. Nov. 18	Sale of bonds (S. M. 201)	685,785 00	Expended for reconstruction of Second Ave. car house (S. M. 493).....	381,741 74
1907. June 27	Sale of bonds (S. M. 497)	704,600 00	Cost of car equipment (S. M. 497).....	703,438 01
1907. June 27	Sale of bonds property at 127th St. & Second Ave. (S. M. 497)	114,412 88	Engineering and superintendence (S. M. 497)....	57,610 14
			Consents (S. M. 497).....	498 20
1907. Note (S. M. 717)....		286,465 67	Track & roadway (S. M. 497)	722,685 25
			Reconstruction 96th Street car house (S. M. 497)...	159,988 35
			Rent & Yard expense, etc. (S. M. 497).....	126,716 32
			Electrification of First Av. line, Exhibit 33...	701,816 18
			Adaptation of First Ave. car house to electric cars, Exhibit 34	39,020 03
			Balance	50,187 83

It may be noted that there appears on the face of this account as thus stated an arithmetical error in the addition of credits given, which reduces the balance by \$10,000, making it \$40,187.83. The debits and credits given have been carefully verified by a reference to the record and are correctly stated in accordance with the contentions of claimant, so that it is simply a mistake in adding which reduces the amount claimed to the figure stated.

As this account shows on its face, the Metropolitan is charged with what appears to be the proceeds of bonds and is credited with expenditures of the nature indicated. The first six debits result from the issues and sales shown by the record of all of the 5,040 bonds, with the proceeds of which alone the Metropolitan in any event is chargeable. The claimants have, however, attributed to a sale of 590 bonds in 1904, two debits, one of actual proceeds amounting to \$685,875, in accordance with a contention that it was with such proceeds that the Metropolitan is chargeable, but which were never charged in any of the statements of account between the two companies contained in the record, and the other the debit of \$704,600 with which the Metropolitan is charged in a statement of account submitted and adopted by the Second Avenue directors on June 27, 1907, which exceeds the actual proceeds of these bonds by \$18,725. That there is here an error, and that on any theory one or the other of these debits should be eliminated from the account in any event, was clearly shown in respondent's reply brief, and I had supposed that it was an inadvertence which the claimants would correct. They nevertheless insist "that there is no basis for the assertion that any connection exists between the credit for \$704,600 * * * and the 590 bonds." It is therefore left for me to say, not only that there is such a basis, but that these two debits can on the record be attributed to nothing else. The four resolutions on which statements rendered to the Second Avenue directors at the meetings of March 9, 1898, May 11, 1898, May 22, 1899 and March 9, 1900, were based, and on which the mortgage trustee by the terms of the mortgage acted in issuing the bonds call for 2,000, 1,000, 450, and 1,000 bonds, respectively, or 4,450 in all, leaving for issue 590 bonds which were called for by the resolution adopted at the meeting of November 9, 1904. These exhaust the issue of 5,040 bonds and are all that the Second Avenue could or did call for or that under the terms of the mortgage the trustees could or did issue for purposes other than the refunding of the underlying indebtedness. The statement on which the directors acted demanding the issue of these last 590 bonds at the meeting of November, 1904, charges the Metropolitan with "cash received from sale of bonds \$4,533,405.51," which must of necessity be attributed, and which the claimants themselves attribute, to the 4,450 bonds of which issue was demanded at the four prior meetings and which, the uncontradicted evidence introduced by claimants show, were issued long before that date. The debit of \$704,600 "proceeds of sale of Second Avenue Railroad Company Consolidated mortgage bonds" contained in the only other statement of account between the two companies disclosed in the record on which the action of the directors of the Second Avenue Company was based at this sixth meeting of June 27, 1907, cannot be attributed to any bonds other than these last 590 bonds, since as comparison of the five statements shows the four prior statements of cash from bonds are attributed not only by the terms of the resolutions based upon them, but by claimants themselves to the 4,050 prior bonds. Either the debit of \$685,875 or of \$704,600 must be stricken from the claimants' reconstructed account above set out and the charge against the Metropolitan changed from a debit balance of \$40,187.83 to a credit balance of \$645,687.17 or \$664,412.12 as the case may be.

This, on claimants' own statement of the account, disposes of the claim that there are any of the proceeds of the bonds to be accounted for; but as they have credited the Metropolitan with two items relating to the electrification of the First Avenue line, aggregating \$704,836.21, which the respondent claims as an offset, it will be necessary to pass on some of the contentions on which the reconstructed account is based, in order to determine whether such credits have been properly disposed of in this connection.

The first debit of \$1,914,166.67 in claimants' suggested account is the same as the charge in the first statement of account between the two companies. It represents a sale of the first 2,000 bonds at an agreed price of 95 with certain interest to the date of sale. The Metropolitan actually sold these 2,000 bonds for \$2,104,166.67, in excess of such price and of par. These bonds were called for, issued, and sold nearly two months after the lease, when the Metropolitan was in a control of the Second Avenue Company under

the lease as complete as at any of the dates involved subsequent thereto. The propriety of the transaction is conceded by claimants, "because the transaction was under discussion at the same time as the making of the lease and the prospect of making a profit may have been one of the inducements which led the stockholders to ratify the lease." There is no evidence that it was under discussion, nor is there anything in the record that it was suggested to the stockholders at the time; and I can see no reason why the criticisms leveled at other charges do not apply to it, if they apply to any.

The second and third debits represent the actual proceeds of two sales, one for 600 and the other for 400 bonds, aggregating \$1,061,639.89. The issue of these 1,000 bonds was demanded at the meeting of May 11, 1898, on the statement adopted and approved showing expenditures by the Metropolitan of \$2,919,561.67. This sum, less the above-mentioned sum of \$1,914,166.67, proceeds of the first 2,000 bonds, left \$1,005,395 as an amount then due for advances to liquidate which the issue of these 1,000 bonds was directed. Counsel for claimant apparently thinks that this statement shows that the Metropolitan received the proceeds of these 1,000 bonds amounting to \$1,061,639.69 in settlement of this balance. The brief states the contention respecting this transaction to be "that the Metropolitan should be charged with the whole amount obtained by the sale of the bonds and not merely with their par value." It, however, shows nothing of the kind. The difference between the proceeds of bonds charged in the next statement of \$2,975,805.56 on which action at the meeting of May 1, 1899, calling for the next issue of 450 bonds was based and the charge of \$1,914,166.67 in this statement is precisely \$1,061,638.89, so that this is the amount with which on the face of the statements the Metropolitan is charged. This transaction is therefore, from no point of view, open to criticism.

The fourth debit of \$531,000 represents the actual proceeds of the 450 bonds just mentioned. A similar comparison of the statement presented at this meeting of May 1, 1899, with that presented at the meeting of March 9, 1900, on which the demand for the issue of the next 1,000 bonds was based, shows a difference of \$450,000, so that the Metropolitan was charged with the par of the bonds, or \$81,000 less than their proceeds. It is the first of the debits to which claimants' criticism applies.

The fifth debit of \$1,136,405.51 represents the actual proceeds of these 1,000 bonds directed to be issued at this meeting of March, 1900. Comparison of the statement acted on at this meeting with that presented at the next on November 9, 1904, at which the issue of the last 590 bonds was directed, shows that the Metropolitan was charged with \$1,107,599.95, an amount much in excess of the par value of the bonds. Still, it is \$28,805.56 less than the actual proceeds.

The sixth debit is \$685,875, representing the actual proceeds of the last 590 of the whole issue of 5,040 bonds. The seventh debit following is the amount with which the Metropolitan is charged in the statement acted on at the meeting of June 27, 1907, and is, as has been shown, to be attributed to these same bonds. It is \$704,600, or \$18,725 in excess of actual proceeds.

Claimants' contention, in effect is, that the debits of proceeds of bonds as shown in the statements should be surcharged by the excess of proceeds over debits. It affects only the third and fourth issue of bonds to which the fourth and fifth debits of this suggested account relate. As to these bonds the proceeds exceed the charges by \$109,805.56, but this is to be reduced by this last-mentioned \$18,725 excess of charge over proceeds, leaving a total excess in the whole issue of proceeds over charges of \$91,080.56.

Claimants' contention respecting this excess is that the relation between the Second Avenue Company and the Metropolitan, while nominally that of lessor and lessee, was under the lease that of trustee and cestui que trust. The control that it gave the lessee, and the fact that the latter chose the board of directors of the lessor company, which appointed the executive officers, made the relation confidential and so closely assimilates it to that indicated that the rules controlling between trustee and beneficiary, attorney and client, guardian and ward, and the like, apply, and the burden of establishing the fairness of transactions on their face showing a profit to the

Metropolitan was on it, and this it is said the latter has not met. It may be said, in passing, that the respondent has shown that, at stockholders' meetings duly called and held after the two issues of bonds under criticism, resolutions were passed ratifying all contracts, settlements of claims, and releases made during the year by the directors. It is not to be assumed, as claimants assume, that all the disclosure to which any stockholder was entitled was not made at these meetings, for presumptively every stockholder present or absent had full access to minutes of director's meetings which were ratified by those present without dissent. But apart from this consideration, I do not think that those two transactions on their face show any unfairness to the Second Avenue Company. By the lease the Second Avenue Company agreed in language I have quoted either to issue and dispose of and deliver to the Metropolitan the proceeds of the bonds for these reconstruction purposes, or to deliver the balance of the bonds themselves. Long after cash advances in excess of any credit disputed by claimants had been made, these 1,450 bonds were issued and accepted in the one case at not less than par and in the other considerably in excess in part settlement of such advances, and the transactions cannot be regarded as anything but the fulfillment of a contract made at arm's length. If subsequently the Metropolitan anticipated the payment of principal and interest by selling in excess of par, I do not perceive that that resale was not within the contemplation of the parties to the lease or not well within its language, nor that it is any more open to criticism than the charge of the first 2,000 bonds, the propriety of which claimants themselves in terms concede. The result is that there should be eliminated from the debit side of claimants' suggested account this surcharge of \$91,080.36. When this is done and the sixth debit of \$687,500, which is included in the seventh debit of \$704,600 through claimants' failure to perceive that both items are attributable to the same 590 bonds, is disregarded, as it clearly must be, the sum of the debits chargeable to the Metropolitan on claimants' own showing, including the final and questionable debit of the Second Avenue note for \$286,465.67 still unpaid, is reduced to \$5,655,983.06.

The total of the first nine credits appearing in claimants' account is \$5,653,541.58, or only \$2,441.48 less than this total charge. These nine credits all appear in the statements of account between the two companies, being thus conceded, and with two other credits also appearing, but objected to and eliminated by the claimants, these constitute all the credits claimed by the Metropolitan and allowed to it in the accounts between the two companies. One of these two credits, amounting to \$37,970.29, is for interest on advances during the period of reconstruction, and has been eliminated without the slightest justification from anything that the record contains and without the suggestion of a plausible reason in the briefs. The Metropolitan Company on the face of the statements was clearly entitled to it, and, when it is restored, it appears that the Metropolitan advanced \$35,528.86 more than the largest amount with which on the evidence it was properly chargeable. This result makes it altogether unnecessary to consider the elaborate and ingenious argument of counsel based on the same legal proposition as that advanced in support of the surcharge mentioned above, intended to justify the elimination of the other credit of \$750,000 claimed and allowed to the Metropolitan for the power house rights in the statement of account acted on at the meeting of November 9, 1904. It may be said, however, with reference to the contract conferring these rights, that, when it was made in 1900, the condition of the Metropolitan was such that a right to power at cost from it must at that time have borne an aspect very different from that which it bears now.

The account respecting these matters will be stated in the report in accordance with the foregoing, leaving credits for expenditures on the First Avenue line, which were not demanded or given in any of the statements of accounts between the companies respecting these bond proceeds and were incurred after the last of those statements was acted on to be disposed of in connection with the respondent's counterclaim which they suggest. The account thus stated, without including the item for power rights, as to which

no opinion will be expressed to the court, will show a balance due to the Metropolitan; but as claimants assert nothing respecting such balance, standing on the accounts as disclosed by the statements which they insist constitute an account stated, no allowance by way of counterclaim or otherwise respecting it will be suggested.

(7) Failure to repay money delivered at the inception of the lease, \$65,182.74.

In this amount the principal sum included is \$41,241.84, the balance being interest claimed. It is based on the following clauses of the lease:

"It is further understood and agreed that the party of the second part receives the cash in the treasury of the party of the first part at the time of the taking effect of this lease as owner, and not as lessee thereof, subject, however, to this reservation and condition, viz.: That, if the party of the first part shall resume possession of the demised property on account of any default of the party of the second part, then the said money so received by the party of the second part shall be deemed to have been a loan instead of an absolute transfer, and shall be returned by the party of the second part to the party of the first part with the remainder of the property of which the party of the first part takes possession."

The principal amount represents the cash in the construction account on the books of the Second Avenue Company. Respondent concedes that claimants have a claim against the Metropolitan estate for any money which is shown to have been received by the Metropolitan Company, at the time of the lease, but insist that there is no evidence in the record that any money *was* received. The only evidence in the record is the testimony of Mr. Brown, auditor for the Metropolitan receiver, that the construction books of the Second Avenue Company show cash on hand on January 28, 1898, of \$41,241.84. The respondent insists that the mere fact the item appeared on the books does not even permit an inference that there was that amount in the treasury, citing *Smith v. Rentz*, 131 N. Y. 175, 30 N. E. 54, 15 L. R. A. 138. I think, however, in view of the exceptional control vested in the Metropolitan Company by the lease and the possession enjoyed by it, coupled with the fact that no countervailing entry appears, it is possible to regard the books for such a purpose as this as those of the Metropolitan itself and the entry as an admission against interest. While the question is close, I think that, to the extent of the principal sum, the amount claimed should be allowed. Interest is not allowable, however, as the lessee did not agree to pay it by the language quoted; the right to interest, except as damages for the wrongful withholding of money, being a matter of agreement.

The disposition to be recommended to the court of all items claimed has now been indicated. The total damages are \$1,168,002.39, subject to a deduction of the amount of the net profits, if any, which may be found to be due from the Metropolitan receiver in the use and occupation proceeding still pending, and to the addition of the \$21,518.75 for the repair of the "1,000 G. E. motors," if it shall be held, in the "motor proceeding" likewise pending, that those were the only motors to which the Second Avenue Company under the lease was entitled. The question remaining to be passed on is whether this amount of \$1,168,002.39 is to be still further reduced by the amount of respondent's counterclaim for Metropolitan advances made in 1907, prior to the receivership, for the electrification of the First Avenue line, which were \$740,836.21.

I think that the claimants have in effect conceded that the respondent, if entitled to this deduction when they credited the Metropolitan with this amount in their account of the bond proceeds above set out. They nevertheless urge in their reply brief that he is not, except as against the obligation to account for such proceeds. Their reason for this must be that the payment of these bonds was assumed by the Metropolitan in the lease which they contend as a matter of law prevents the offset of advances represented by the bonds, and it is the explanation of the ingenious and elaborate effort to surcharge the debits and falsify the credits in the account between the companies as to the proceeds of these bonds above narrated. After these bonds were issued and the proceeds devoted to the reconstruction pur-

poses contemplated by the lease and the mortgage, subsequent expenditures for similar purposes were to be met by an additional issue of bonds inferior to the lien of the consolidated bonds mentioned and also of the rents reserved by the lease. These latter bonds, if issued, the Metropolitan does not in my opinion assume or agree to pay, although it is contended that it does.

The provisions of the lease respecting the issue of additional bonds is as follows:

"Whenever it shall be deemed by the party of the second part expedient to extend the line or lines of the railroad hereby demised or to require additional real estate or construct additional buildings for the operation of said railroad, *or to change the motive power upon said railroad* then upon the request of the party of the second part, the party of the first part shall authorize, execute and deliver to the party of the second part the negotiable bonds of the party of the first part in the usual form for the amounts the expenditures of which shall be required for such extension, acquisition, construction of change, and upon the report of the party of the second part, shall secure such bonds by a mortgage or mortgages upon all its property and franchises, but such bonds when issued shall be applied solely to betterments for which the same are issued."

Prior to the appointment of receivers on October 1, 1907, the 5,040 First Consolidated mortgage bonds had been issued and their proceeds expended and these additional advances for the electrification of the First Avenue line had been made by the Metropolitan. Its right to demand additional bonds for such advances secured by an inferior lien is clear under the language quoted and was on that date complete. Although a demand had not then been made, a debt was then owing, which, though not then matured by actual demand, is available to the insolvent as an offset. *Matter of Hatch*, 155 N. Y. 401, 50 N. E. 49, 40 L. R. A. 664. Payment of this debt contracted subsequent to the making of the lease and of the issue of the prior bonds and the expenditure of their proceeds was not assumed by the Metropolitan lessee. The language of the assumption clause refers only to debts existing at the making of the lease, except that the consolidated bonds thereafter to be issued are expressly assumed. No other future debt is. The language of the covenant is as follows:

"This lease is made subject to all debts and liabilities of the party of the first part, except debts due or liabilities incurred to the party of the second part, and such debts and liabilities as aforesaid and subject to the provisions and conditions of this lease are hereby assumed and are to be paid by the party of the second part as a part of the consideration hereof, and all bonds that shall be issued by the party of the first part under the mortgage to the Guaranty Trust Company hereinbefore referred to, when issued and disposed of as hereinbefore provided, or as provided in said mortgage or in this lease, shall be included among the obligations which the party of the second part assumes and agrees to pay under the provisions of this lease."

Even, however, if the debt did come within the assumption clause, it is clear that, under the decisions of the Appellate Court, the liability of the Metropolitan would be that of surety; the pledged property remaining the primary fund for the payment of bonds evidencing the debt, so far as it is concerned. Judge Hough clearly holds this in the *Central Crosstown Case* (*Farmers' Loan & Trust Co. v. Central Park, N. & E. R. R. Co.*) 193 Fed. 963, 113 C. C. A. 591, and I think that it is also the result of Judge Ward's reasoning in that case, though the claimants say not. However this may be, Judge Noyes, speaking for a unanimous court in the *Second Avenue stockholders' appeal*, clearly holds that the mortgaged property is a primary fund for the payment of the debt assumed and that the obligation of lessee to lessor created by a clause of assumption, such as that quoted, is contingent on the failure of the property to realize on foreclosure the amount assumed. This being so, the respondent's right to bonds secured by the stipulated lien for these advances cannot be avoided by the assertion of a claim contingent on the day fixed for filing claims, founded on the assumption clause. Of course, since the *Second Avenue Company* is insolvent as the record shows, these bonds, if issued for the purposes of the offset, are to be regarded as due.

What results is that the claimants have betterments represented by the advances and presumptively of the value of those advances, for which they will have paid if these advances be allowed as an offset. The estate represented by the claimants is not by such a disposition of the matter unjustly enriched at the expense of the creditors of the Metropolitan estate, and if, as the result of foreclosure and sale of the Second Avenue properties, it should ultimately appear that that value was less, the position of the claimants respecting this possible future demand for the difference is merely that of any holder of a contingent claim.

Therefore, while I think it clear that the Metropolitan did not under the lease assume or agree to pay the Second Avenue's debt for these advances, which makes the right to the set-off beyond question, it seems to me that, even if it had, the respondent is entitled to the deduction of \$740,836.21 from the total of damages to be reported of \$1,168,002.39, leaving \$427,166.18 as the net amount, with the possible further addition and reduction indicated.

There remains for consideration the question whether the City estate is liable under the Metropolitan lease of February 14, 1902, to the City Company for any of the demands, the allowance of which is to be recommended to the court against the Metropolitan estate. It is obviously not liable for any not to be allowed against that estate, and it can be liable for those which are allowed only through privity of estate or privity of contract.

Claimants insist that the opinion of the Circuit Court of Appeals in the Central Crosstown case determines that the City estate is liable on either ground or both. I do not so understand that decision. After intimating a doubt as to whether the transfer of the Crosstown-Metropolitan lease to the City Company by the Metropolitan might not operate as an assignment, what the court did say (198 Fed. 760, 117 C. C. A. 542) was: "Furthermore passing from privity of estate to privity of contract, the question whether the covenants in the Metropolitan-City lease should be construed to be rent covenants which are limited to the duration of the lease, or whether they survive, it is entitled to serious consideration. *All the questions should be construed upon a complete record and when it is necessary to pass upon them.*" The court therefore did not pass upon them. It did allow, however, certain dividend rentals and a franchise tax for the year 1907, accruing before the end of the period of experimental operation which it regarded as indicated by the record in that case; but that that decision is not to be extended further is made clear by the opinion just handed down in the Matter of Hemphill and the Second Avenue Bondholders v. New York City Railway Company, 204 Fed. 513, by the same court. It is there held: First, that the assumption clause of payments therein referred to contained in Metropolitan-City lease was in its essence a rent covenant limited to the existence of the lease; and, second, that the lease terminated, as distinguished from being defaulted on, long before July 31, 1908, the court saying as to this that "indeed we think that any idea that it would be continued was given up by all parties in interest even before February (1908) when the interest included in the August coupon began to run."

This decision disposes at once of the contention of claimants that the items of waste for failure to repair roadbed and rolling stock, as well as for failure to pay money delivered to the Metropolitan at the inception of the lease, are within the assumption clause, for clearly such items are not "rent" and do not come within a promise which is in its essence a rent covenant. They cannot be allowed on the theory that there was any privity of contract between the City Company and claimants, because that is the only clause in the Metropolitan-City lease which can by any stretch of imagination be regarded as contemplating the creation of an obligation to any one, except the lessor, respecting such items. The right to allowance must, if it exist, spring from privity of estate resulting from an assignment to the City Company of its unexpired term created by the Second Avenue-Metropolitan lease. No sublessee, independent of express contract, is ever liable to the original lessor on covenants to repair or to refund, such as those in the Second Avenue lease, independent of express agreement, and I do not understand that claimants make that contention. They do insist that the City Company is to be re-

garded as an assignee, notwithstanding that the lease of the Second Avenue Company to the Metropolitan was in legal effect in perpetuity, while that to the City Company was for 999 years; but this is precisely the opposite of what counsel for the claimants conceded in the Hemphill bondholders' claim v. City Company, just reviewed by the Appellate Court, above cited. Representing there 405,700 of the outstanding \$5,682,000 First Consolidated Second mortgage bonds here represented by the claimant trustee and receiver, counsel made the concession which resulted in the third conclusion of law in the report, to which no exception was filed and which was confirmed by the District Court, such conclusion being: "Third. The alleged lease from the Metropolitan Street Railway Company to the New York City Railway Company (Interurban Street Railway Company) did not operate as an assignment of the lease from the Second Avenue Railroad Company to the Metropolitan Street Railway Company." As the order confirming the report has just been affirmed, it must be regarded as settled that the City Company was a subtenant and not an assignee of the Second Avenue lease, so that there is no liability on the part of the City Company based on privity of estate for a failure to observe these Metropolitan covenants for which damages have been allowed against the Metropolitan estate.

The next item, of \$122,911.10 allowed against the Metropolitan estate for failure to pay rent and taxes during the period of occupation, consists of two installments of rent, aggregating \$75,411, the earlier accruing on September 1, 1908, for the quarter ending August 31, 1908, the latter being for two months and twelve days of the ensuing quarter. Two other items are the special franchise and realty tax for 1908, proportioned to November 12, 1908, when the road was surrendered to the claimant receiver aggregating \$37,195.37. These items are clearly not allowable against the City Company under the recent decision in the Second Avenue Bondholders' claim against that company, for it is there said that the lease was substantially terminated long before July 31, 1908, which is before any obligation respecting them accrued against the City Company. It is also said that any idea that it would be continued was given up by all parties in interest before February, 1908, and as the two remaining items allowed against the Metropolitan estate under this head one of \$7,535.59 for the special franchise tax and the other of \$2,769.13 balance of real estate tax, both accrued on October 7, 1907, and as counsel for the City receiver and for the Pennsylvania Steel Company insist that the lease must be regarded as having terminated prior to that date and not later than October 1, 1907, the question is squarely presented by the record now before the court as to whether it did so terminate. The record in this proceeding, unlike that in the Central Crosstown case, by express stipulation contains the record in the "Termination of Lease" proceeding so called, and, unlike that case, it suggests this question as to the date when the lease terminated as distinguished from having been defaulted on, which was there neither suggested nor considered. What was said by the Circuit Court of Appeals in the Termination of Lease proceeding was that this question of termination involves an inquiry as to the right and fact of re-entry and should be passed upon only when necessary to a real controversy, which, it was said, was a question outside any substantial controversy prevented upon that appeal. Here the controversy is squarely presented, and I think that on the facts it must be held that the right to re-entry existed on the 25th of September, 1907, when receivers of the City Company were appointed (Quincy, etc., R. Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632), and that it was in fact exercised when receivers were appointed of the Metropolitan estate on October 1st following. The financial history of the five years preceding the receivership disclosed by the present record made it clear at this date that it would be quite impossible to meet the fixed obligations accruing under the City lease in the nature of interest and taxes, to say nothing of the payment of the dividend rental reserved to Metropolitan stockholders, the continuation of which was involved in the adoption of the lease, so that neither at that time nor since did any of the parties in interest, or the court itself, as its later orders and opinions show, have any idea of electing to adopt it for the benefit of the City estate. As the Circuit Court

of Appeals evidently regards the question as to the date of the actual termination of the lease prior to February 1, 1908, as still open, I shall report October 1, 1907, as such date, and shall, accordingly, recommend the disallowance as against the City estate of these two items of taxes accruing October 7, 1907.

The remaining item allowed against the Metropolitan estate is for real estate taxes and assessments and franchise taxes. Of these taxes it is clear that no allowance can be made of items accruing prior to the inception of the lease to the City Company, for in my judgment no such taxes were assumed. The lease distinctly provides for apportionment of charges then due, which is wholly inconsistent with any intention to assume such payment. So, with reference to the franchise tax for the year 1907, that may not be allowed, if I am right in thinking that the lease terminated on October 1, 1907, for it did not accrue until October 7th following, and the rule is inflexible that charges accruing under a lease after its termination are not allowable against the estate of an insolvent lessee. *American Bonding Co. v. Pueblo Ins. Co.*, 150 Fed. 17, 80 C. C. A. 97, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357. The only taxes that may be considered in this connection are the franchise taxes accruing from 1902 to 1906, inclusive, the principal sum being \$225,873.99, and the interest to October 1, 1907, \$50,617.65, a total of \$276,491.64. They are in the nature of a rental charge such as comes within the assumption clause contained in the Metropolitan-City lease as construed by the Appellate Court in its recent decision cited and were allowed in the Central Crosstown case as against the City estate. Counsel for the Pennsylvania Steel Company and the City receiver have in their briefs advanced arguments of such persuasive force in support of their contention that the covenants of the City Company in the lease to it were intended solely for the benefit of the Metropolitan Company and that it alone should have the right to sue, leaving the original lessors to their remedy against that company, which through its receiver is now actually asserting its claims against the City estate for damages for similar identical breaches of these same covenants, that I should not hesitate to adopt their view and disallow this item altogether if I thought the question could be regarded as an open one. There are strong intimations that this is the correct view in the opinion of Judge Noyes in the Second Avenue bondholders' appeal, where it is intimated that the law of the federal forum and that of the New York courts are not now far apart, and that the rule that a contract upon which a third party may sue must have the benefit of that party as its object which the court evidently did not feel was at all clear on the face of the lease. Claimants urge, however, the Central Crosstown case in which the allowance was made against the City estate of franchise taxes accruing during the existence of the City lease, and I shall follow it in recommending the allowance of the taxes above mentioned from 1902 to 1906, inclusive, amounting to \$276,491.64.

Proposed reports in accordance with the foregoing should be filed with me and served on respondents on or before May 8, 1913, and proposed amendments and objections thereto five days later.

J. Parker Kirlin, of New York City, for Metropolitan St. Ry. Co.

James L. Quackenbush, of New York City (Jas. T. Mason, of New York City, of counsel), for New York City Ry. Co.

Dexter, Osborn & Fleming, of New York City (M. C. Fleming, of New York City, of counsel), for receiver of New York City Ry. Co.

Byrne & Cutcheon, of New York City (Chas. M. Travis, of New York City, of counsel), for Pennsylvania Steel Co. and Degnon Contracting Co.

Davies, Auerbach & Cornell, of New York City (B. Tolles of New York City, of counsel), for Guaranty Trust Co. of New York, Second Ave. R. Co., and Lynch, as receiver.

Chas. T. Payne and Geller, Rolston & Horan, all of New York City, for Farmers' Loan & Trust Co.

Geo. N. Hamlin and O'Brien, Boardman & Platt, all of New York City, for committee of contract creditors of New York City Ry. Co.

Charles Benner, of New York City, for committee of tort creditors of New York City Ry. Co.

Simpson, Thacher & Bartlett, of New York City, for committee under Metropolitan St. Ry. Co. stockholders' protective agreement.

Strong & Mellen, of New York City (Mr. Chase, of counsel), for Central Park, N. & E. R. R. Co.

Chas. H. Tuttle, of New York City, for Cornell and Belt Line Ry. Corp.

Richard Reid Rogers, of New York City (Jas. T. Mason, of New York City, of counsel), for Central Crosstown R. Co. and New York Rys. Co.

L. C. Krauthoff and J. P. Cotton, Jr., both of New York City, for committee acting under a plan of reorganization of Metropolitan St. Ry. Co.

Masten & Nichols, of New York City (Arthur H. Masten, of New York City, of counsel), for receiver of Metropolitan St. Ry. Co.

Page, Crawford & Tuska, of New York City (Wm. H. Page and Gilbert H. Crawford, both of New York City, of counsel), for Metropolitan Express Co.

LACOMBE, Circuit Judge. No attempt will be made to restate the extremely complicated series of questions which have been presented in this proceeding. Such of the special master's conclusions as have been controverted on the argument will be taken up in convenient, although perhaps not in logical sequence.

Claim Against Metropolitan.

1. It is contended that the amount of damages allowed for failure to keep rolling stock, other than the motors and electric equipment in good working order (\$81,647.94), should be materially increased. There was a wide discrepancy between the experts as to the cost on November 18, 1908, of thus repairing the closed cars then turned over to claimant. This discrepancy is due in part to different assumptions by the experts as to the condition in which the cars then were. The testimony of the witnesses has been read and I see no reason to find that there was any material difference in condition between these cars thus turned over and the general run of cars of the same age in use in the system, and concur with the master's finding that the estimate of the man who had some real knowledge of their condition at that time is the more satisfactory.

2. As to the refusal to allow damages for the loss of the car barn by fire on February 29, 1908, the master's conclusion that under prior decisions of the Circuit Court of Appeals in these proceedings show such allowance cannot be made is concurred in.

[1] 3. As to the premiums on bonds received by the Metropolitan at par and sold for a higher price, I am clearly of the opinion that under the lease there were specifically provided alternative ways for repaying the Metropolitan for moneys laid out under the clause in question. The lessor might itself sell (or cause to be sold) the bonds and turn over the proceeds, or it might make payment in bonds at their face value. Sometimes one method was followed, sometimes the other, and there seems to be no sound reason for insisting at this late day that the accounting between the parties shall be recast so as to eliminate the alternative method which the contract expressly provided for. If there be any evidence in the record as to the value of these bonds, it has not been found, but presumably the circumstance that they were salable at a premium was due to the circumstance that the lessee guaranteed their payment.

[2] 4. As to the item of interest on moneys advanced by lessee during the period of reconstruction, the argument of claimants is unpersuasive; such interest is usually allowed and nothing is found in the lease, in the record or in authority that requires a different ruling in this case. The master's disposition of this item is affirmed.

5. I think also that the lessee company upon its accounting for these expenditures properly credited itself with accrued interest on bonds sold, because under other clauses in the lease it was obligated to pay the same interest to the holder of each bond on its next coupon date. There are two such items of credit allowed by the master \$37,970.29 and \$13,185, totalling \$51,155.29. Claimant's brief asserts that the total actual amount of such accrued interest was only \$23,850. This court cannot search the record to verify the fact, but if it be a fact the master's allowance of credits for accrued interest should be reduced to the true amount.

6. As to the item of \$6,410.39 construction charges the master's findings and conclusions are confirmed.

7. The next item is \$750,000 (power house contract) credited to Metropolitan against debits for bonds turned over for expenditures in change of motive power and reconstruction. In his first opinion the master thought it unnecessary to pass upon this item. It was used only as a set off or credit against the amount of debits charged against the Metropolitan on bond account. Inasmuch, however, as he found for respondent as to items 3 and 4, supra, there was no excess of debits over other proved credits which made it necessary to consider this set off. In a supplementary report he did dispose of it; why is not entirely clear, as he did not change his conclusions as to items 3 and 4.

It seems clear enough that under the lease, which expressly provided for change of motive power, the building of a power house was a legitimate part of such change. Instead of building one, a contract was made between the two roads by which in consideration of \$750,000 in bonds the Metropolitan agreed not only to furnish power for Second Avenue system from its own power house while the lease lasted, to run the road, which it would have to do anyhow, but also in case the lease should terminate, and the Second Avenue Company resume possession or the mortgage should be foreclosed, to continue to furnish power for the system for the unexpired term of the charter of the Second Avenue Company and any renewals thereof. This contract must be tested by conditions existing when it was made, when every one expected the Metropolitan would continue a solvent concern. I agree with the special master that the contract cannot be held fraudulent and void in its inception. If the price was exorbitant equity might scale it down, but if the master's conclusions were erroneous as to items 3, 4, and 5, the balance against Metropolitan on the bond account would be but \$114,930.56 and the power house contract at the time it was made must certainly have been worth that amount.

[3] 8. As to the interest on the cash, practically operating capital, turned over with the road, cars and other personal property under the lease, the clause, which provides that in the event of default and resumption of possession by lessor it shall be deemed to be a loan and shall be returned, does not call for the payment of interest thereon. There was no wrongful withholding of this money during the lease. Moreover, the lease itself expressly states that, like the other personal property it is received by the Metropolitan "as lessee thereof," language which seems clearly to import that the consideration for its use, like the consideration for the use of the other personal property, is included in the rent stipulated in the lease.

[4] 9. The remaining matter in controversy is the allowance by the master as a set-off of \$740,836.41 for expenditures in connection with the electrification of the First Avenue line. When the lease was made certain changes and improvements in the way of electrification of parts of the railroad which had been approved by the State Board of Railroad Commissioners were under way. These, as we have seen, were to be paid for by the issue of bonds se-

cured by a mortgage already executed to the Guaranty Trust Company. There was, of course, the possibility that in the future the Metropolitan might find it desirable to electrify other parts of the road either to improve the operation of the Second Avenue lines or of other parts of the Metropolitan system of which those parts were connecting links. If it should make expenditures for these purposes without any provision as to payment therefor, and the lease should subsequently be abrogated and the property be retaken by the Second Avenue Company or its mortgagee, these expenditures, although greatly benefiting the property, would be lost to the Metropolitan, being irremovable additions to leased property placed there by a lessee. In order to meet such a contingency, therefore, the lease expressly provided that such expenditures should be paid for by the Second Avenue with additional bonds to be secured by the making of a new mortgage inferior in lien to the existing mortgage. The clause is quoted in the master's opinion. The contention that the general provision "this lease is made subject to all debts and liabilities of the party of the first part * * * and such debts * * * are hereby assumed and are to be paid by the party of the second part," covers these future inferior mortgage bonds is unpersuasive, especially as the parties evidently considered mortgage bonds a sort of liability which called for express provision, since in the same sentence they specifically provided for the Guaranty Trust mortgage bonds.

The exceptions to the report on the claim against Metropolitan Company are overruled and the report confirmed—except possibly as to the \$23,850, accrued interest referred to above.

Claim Against City Railway.

Substantially all the propositions involved in the disposition of this claim depend upon the scope and meaning of various prior deliverances of the Court of Appeals in opinions filed upon the decision of appeals taken in other proceedings involved in this receivership. That tribunal would be in no way assisted towards the disposition of the appeal in this proceeding by a statement of the interpretation of those deliverances which seems to this court to be the correct one or of the reasons which lead to such a conclusion. It knows better than the special master or the District Court precisely what legal propositions are contained in those opinions. It is enough to say that, generally, the views of the special master are concurred in.

The exceptions are overruled and the report confirmed.

PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.
and three other causes.

In re CENTRAL PARK, N. & E. R. R. CO.

Nos. 2—9, 2—33, 2—149, and 3—37.

(District Court, S. D. New York. September 26, 1913.)

1. STREET RAILROADS (§ 49*)—LEASE—INSOLVENCY OF LESSEE—ACCOUNTING BETWEEN PARTIES.

A lease of a street railroad provided that whenever the lessee deemed it expedient it might change the motive power in use at its own expense. It was further provided that in case it made such change on its request the lessor should issue and deliver to it mortgage bonds for the amount of the expenditure, but the lessee expressly assumed payment of such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bonds. It made and paid for the change to electric power, but made no request for the issue of bonds therefor, and some eight years afterward the lease was terminated by reason of its insolvency. *Held*, that on an accounting between the parties it was not entitled to set off, against claims owing to the lessor for breach of the lease, the amount expended by it in making the change of power.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

2. STREET RAILROADS (§ 49*)—LEASE—INSOLVENCY OF LESSEE—ACCOUNTING BETWEEN PARTIES.

Various items of debit and credit considered on an accounting between the lessor and lessee of a street railroad on termination of the lease through insolvency of the lessee.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 125, 126; Dec. Dig. § 49.*]

This cause comes here upon exceptions to the findings and conclusions of the special master.

See, also, 208 Fed. 747, 757.

The following is the opinion of the special master:

On the 1st day of March, 1910, two orders were made directing the filing not later than March 2, 1910, of the claims of the Central Park, North & East River Railroad Company against the Metropolitan and City estates *nunc pro tunc* as of the last day fixed for filing of such claims, such date in the case of the Metropolitan estate being January 15, 1908, and of the City estate December 10, 1907. Claims were duly filed, that against the Metropolitan being based on alleged breaches of covenants contained in the Central Park lease of October 14, 1892, to the Metropolitan Crosstown, which was devolved by operation of law through successive consolidations upon the Metropolitan Company and that against the City Company by virtue of the Metropolitan-City lease of 1902, which went into effect on April 1st of that year, which it is asserted operated as an assignment of the earlier lease mentioned and expressly assumed the performance of such covenants. The items of damage alleged are for failure to keep roadbed in repair \$500,000, and a similar failure as to rolling stock for a like amount; for failure to pay certain real estate taxes aggregating \$1,960.13, and certain specific franchise taxes \$256,120.17; for failure to meet \$1,200,000 with certain interest of outstanding Central Park bonds, secured by mortgage, issued and made December 1, 1872, payable in 1902; and for failure to return a cash item of \$108,000, claimed to have been taken over by the Metropolitan at the inception of the Central Park lease, the aggregate of the items exclusive of interest being \$2,569,080.30. The claim as filed against the City Company alleges identical breaches of the same covenants, demanding the same damages, the liability being based on privity of estate or contract. These claims were amended by orders dated December 6, 1911, allowing a demand for failure to repave within the railroad area amounting to \$179,479.63. An offset is claimed by the respondent Metropolitan receiver of \$861,729 for improvements, being based on certain provisions of the Central Park lease. The disposition of most, if not all, of the items will be controlled by the views taken of similar contentions involved in the claim of the Second Avenue Company expressed in the memorandum recently filed respecting that claim to which counsel are referred for a fuller statement of those views than will be necessary here.

(1) Item of damage for failure to keep roadbed in repair now reduced by claimant to \$88,044.80.

As reduced it includes two items which are objected to. The first is an item of \$3,500 for repairing the crossing at Fifty-Ninth street and Columbus avenue. It appears that the Metropolitan receivers did repair this crossing

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

at an expense of \$3,500 and brought suit for the amount, which has not been prosecuted to judgment. There are no facts establishing the liability of the Central Park Company in the record, as counsel points out. It is plainly an item to which claimant is entitled, and it is allowed unless the respondent receiver concedes that the claimant is free from any liability for the money expended on this repair.

The second item is for raising the tracks at the approach to the Queensboro Bridge amounting to \$10,094.79. This work was not begun until November 13, 1908, three months after surrender of the lines to the Central Park Company, and it has not been shown that the Metropolitan or its receivers were ever called on to do the work. Clearly this claim was not in existence on January 15, 1908, and cannot be allowed. It is not a question of repair.

The item is allowed against the Metropolitan estate at \$77,910.01 subject to the possible deduction indicated.

(2) Item of damage for failure to restore personal property. Minimum claimed \$394,897. Maximum claimed \$450,000.

Thus reduced, these alternative demands represent claimant's ideas as to the value of 210 horse cars, 1,206 horses, 225 sets of harness, and 1,209 bridles. Only the valuation to be placed on the horse cars suggests dispute; the valuation of the other items being substantially conceded. The amounts to be reported respecting these latter will be.

Horses	\$205,020
Harnesses	5,377
	<hr/> \$210,397

Claimant makes two contentions in support of the valuation that it asks me to place on the horse cars, which it insists should not be less than \$184,500:

1. That there should be included in this valuation the value of some 40 electric cars substituted for some 14 horse cars in use on the Fifty-Ninth Street line before electrification on the theory that they are "substitutes, increments or additions," within the meaning of the lease, to the delivery of which they became entitled on its termination.

2. That the Metropolitan must account for the value of these cars in 1892, and not for the value in 1908, when the right to the delivery under the lease accrued.

Respecting the first contention, it is sufficient to say that it has already been determined adversely to the claimant by the court. Pointing out that this case differs from the Second Avenue, in the respect that no part of the construction nor any part of the equipment was paid for by the lessor, Judge LACOMBE distinctly holds that these electric cars were not substitutes for the horse cars. There is no additional evidence in the record here to justify any other or different finding.

As to the second contention, it seems equally certain that, failing to return the identical 210 cars in the stipulated condition at the termination of the lease, the lessee is bound to account for their value at that time and not for the value at the inception of the lease. If at the time of surrender the lessee had gone into the open market and purchased 210 horse cars of the same type as the original cars in the stipulated condition of efficiency and repair, the lessor would have been bound to accept them, if tendered. The Metropolitan creditors are certainly not bound by any higher value nor in any way concluded by the reports based on original costs a dozen years and more prior to 1908, contained in the railroad reports. The question is whether the value as of that date can be determined with approximate fairness from the evidence. The claimant's manager, Mr. Lynch, testified that \$150 a car, both for box and open cars, was about the fair market value in 1908. This testimony was elicited on cross-examination and is met by testimony of respondent's expert, that the value was from \$110 to \$125 per car at that time, and that 200 or more cars could then have readily been obtained, which is what Mr. Lynch himself testified in effect. He also testi-

fies that in 1908, he leased 60 closed cars and 45 open cars from the Metropolitan receivers, and that from \$100 to \$150 was the amount required to put them in fair operating condition. On the whole it would seem from evidence such as this, which is doubtless the best that the nature of the case permits, that \$250 per car for each of the 210 cars to the return of which the claimant became entitled was their full value at the time the right to the return accrued and would be an ample allowance to suggest to the court. This amounts to \$52,500, making the total allowance to be reported under this head \$262,897.

3. Item of damages for paving, amount claimed \$173,731.21 and interest \$5,455.72; total \$179,186.93.

Of the principal sum, two items are conceded. These are the judgment against the Central Park Company of \$104,944.15 and the two paving items which claimant under its agreement with the New York Central Railway Company was liable to pay amounting to \$54,251.62. This sum is \$159,195.77.

The paving claims represented by the difference, which is \$16,530.44, is disputed. It is sufficient to say with reference to these claims that no notice to repair the areas covered by these items was ever served on the Central Park Company, though it may have been on the sublessee, the City Company. I think that as a matter of law no liability for such claims exists (130 App. Div. 842, 115 N. Y. Supp. 878), and that they should not be allowed.

Interest from the completion of the work to October 1, 1907, only can be allowed. This amounts to \$533.68. The balance of interest claimed is on work completed after the appointment of the Metropolitan receivers on October 1, 1907.

It results that \$159,195.77, with \$533.68 interest, or \$159,729.45, should be suggested under this head.

4. Item of damages for unpaid real estate taxes and special franchise taxes \$230,071.56 and interest.

These real estate taxes amount to \$4,965.13 and became liens on the real estate of the Central Park Company prior to the making of its lease to the Metropolitan in 1892. Counsel for the receiver apparently thinks that the only clauses in the lease which can be pointed to as suggesting a possible right to the allowance is the covenant to pay taxes which is, of course, prospective, and the clause assuming liabilities. Like the Second Avenue lease, however, this lease contains a promise that the lessee would pay, save harmless and indemnify the lessor from and against any and all unpaid taxes and all lawful claims and demands existing at the date of the lease. The interest on these taxes to October 1, 1907, is \$8,760.88, subject to verification, so that the total amount allowable is \$13,726.01. To this must be added the tax lien transfer and interest in all \$471.29.

The special franchise taxes claimed are from 1901 to 1907, inclusive, and amount to \$161,924.19, the interest, subject to verification, being \$35,041.48, and are allowable as in the Second Avenue case. The total of amounts allowable are:

			Totals.
Tax lien transfer.....	\$197.36	Interest	\$273.93
		"	\$471.29
Real Estate Taxes.....	4,965.13		8,760.88
		"	13,726.01
Franchise taxes.....	161,924.19		35,041.48
			196,965.67
	<hr/>		<hr/>
	\$167,086.68		\$44,076.29
			<hr/>
			\$211,162.97

(5) Item of damage for money delivered at the inception of the lease, \$108,618.16.

With respect to this item claimant has been able to present somewhat more proof than was possible to claimants in the Second Avenue case. The record affirmatively shows that the books of account of the Metropolitan Crosstown, of the Houston & West Streets & Pavonia Ferry Railroad Company, and of the Metropolitan itself, covering the period in 1892, when the cash was taken over, have wholly disappeared, and the minute books of the two former companies as well. A minute book of the Central Park Company covering the period from 1877 to 1895 was produced from the custody of

officers of the Central Park Company, who had been chosen long after the making of the lease when the Metropolitan was in control. The book contains minutes of a meeting on November 14, 1892, a month later than the lease, at which an examination of the accounts and vouchers of the company for October, 1892, was certified. Minutes of a meeting of the same committee on December 2d following sets forth a report containing the following:

"The Committee also have examined and certify that the total amount of cash on deposit to be turned over to the Metropolitan Crosstown Railway Company this day by check pursuant to the terms of the lease dated October 14, 1892, is as follows:

In the Mercantile Trust Company of N. Y. City General a/c.....	\$ 1,077 45
In the Mercantile Trust Company Tax Reserve a/c.....	25,769 95
In the Bank of New Amsterdam N. Y. City General a/c.....	81,270 76
In the office of the Company, Petty Cash.....	500 00

\$108,618 16

"Besides yesterday's and to-day's receipts in hands of receivers, conductors and in course of collection, less payments made therefrom not yet adjusted and interest on above deposits to this date.

"[Signed]

Jno. T. Terry,
"Charles Dana."

The minutes of finance committee meetings were approved by the directors on December 13, 1892, and on September 12, 1893. Mr. Hasbrouck, who was prior and subsequent to the making of the lease a director and vice president of the lessee company, and a director, treasurer, and either vice president or secretary of the Houston & West Streets & Pavonia Ferry Company reported to the directors of Central Park Company (of which he had been made a director and vice president after the lessee assumed control and on April 5, 1893), submitted his report to the directors that the property had been turned over to the lessee and the terms of the lease faithfully complied with. These minutes are, of course, objected to as self-serving declarations; but, on the theory adopted in the Second Avenue case, they may be regarded as admissions of the lessee, it being in control under the lease. Evidence that the funds in the Mercantile Trust Company and the Bank of New Amsterdam, presumptively those specified in the minutes, were paid out on December 5, 1892—when the lease under the lease was in control—was also introduced.

The allowance of \$108,618.16, will be recommended, but without interest, as that was not reserved.

(6) Item of rents paid receivers for horse and electric cars and for horses, \$114,229.33.

This item embraces the rents paid subsequent to August 5, 1908, which ended the receivers' period of occupation, for property of the nature indicated, under orders of the court and under reservation that the amounts so paid should be refunded, if it should be established that the cars and horses were the property of the claimant.

This item is not provable in this proceeding. We are concerned here with ascertaining claims against the Metropolitan Company, fixed in their nature, arising out of breaches of covenants in the lease, actually or constructively in existence as of January 15, 1908, against that company, but not claims arising out of acts of the receivers after the termination of the period of experimental occupation. The evidence of identity of cars leased by the receivers with those originally turned over in 1892 may, under the reservations, be pertinent in the use and occupation proceedings, but surely cannot be involved in this. Its disallowance will therefore be recommended.

(7) Item of damages for the principal of the Central Park bonded debt.

This item is based on the assumption clause contained in the lease of 1892. This the claimant, as did claimants in the Second Avenue case, regards, as between lessor and lessee, as an absolute and unconditional promise; but the courts hold it to be, even as between the parties, as only a

promise to answer for any deficiency in the value of the property, which is held to be the primary fund for payment, to be resorted to before resort may be had to the lessee under its covenant. *Farmers' Loan & Trust v. Central Park Co.*, 193 Fed. 963, 113 C. C. A. 591; *Second Avenue Bondholders' Appeal*, 198 Fed. 747, 117 C. C. A. 503.

On the day fixing provable status, January 15, 1908, this claim was clearly contingent and cannot therefore be allowed. It may be added that in this case, unlike the Second Avenue case, a sale has been had, and an amount in excess of principal, interest, and taxes due has been realized.

(8) Item of rental unpaid during the period of occupation, \$81,000.

This item suggests no dispute and is allowed.

(9) Item of legal expenses, \$29,893.17.

This item is based upon a covenant to indemnify from all expenses of prosecution or defense of actions or proceedings pending at the time of the lease or brought at any time thereafter against the lessor for any lawful claim existing at the time of the lease.

The request for services claimed for and the rendition of such services were after January 15, 1908, and must be disallowed for that reason. It may be noted that a large part of the amount claimed was for services not in connection with actions pending or claims existing at the time of the lease, and are therefore not within the covenant in any event.

(10) Items of car license fees \$8,350, repairs to cars \$15,750, and for 40 electric cars \$104,500; \$128,640.

The item relating to the 40 electric cars has been disposed of in another connection and is disallowed. That for repairs of cars so far as it suggests any provable claim—and I do not think it does—has been fully disposed of in connection with the valuation placed upon the horse cars. As to the car license fees they are for 1908, there is no proof that the Central Park Company ever paid them, and, if it did, it was under no legal liability to do so, as the receivers and not it were operating, so that the payment, if made, was voluntary. *City of N. Y. v. Sixth Ave. R. Co.*, 77 App. Div. 367, 79 N. Y. Supp. 319. Moreover, it is not at all clear that the fees were due from any one on January 15, 1908, for no proof of the ordinance was offered. They should therefore be disallowed.

It remains to be determined whether the respondent receiver is entitled to the offset claimed of \$861,792.37 of expenditures for the electrification of Fifty-Ninth street and of Tenth avenue, the amount of which are conceded. The lease contains the same covenant to issue bonds for the betterments of this nature secured by lien of mortgage which is present in the Second Avenue lease and the right to bonds of the face value of these expenditures was complete on October 1, 1907, when the Metropolitan receivers were appointed, although no demand up to that time had been made. The Central Park lease does, however, expressly assume and agree to pay these bonds, which the Second Avenue lease did not do. Even with this assumption, however, the respondent is, I think, entitled to the equitable offset claimed for the reasons more fully stated in the memorandum filed in the Second Avenue Company's claim for breach of lease to which counsel are referred and it is therefore allowed.

As against the Metropolitan estate, the result reached may be thus summarized.

1. Roadbed	\$ 77,910 01
2. Equipment	262,897 00
3. Paving	159,729 45
4. Taxes	211,162 97
5. Loan	108,618 16
6. Rent during occupation.....	81,000 00
Total	\$901,317 59
Less	861,792 37
Amount allowed.....	\$ 39,525 22

As against the City Company the disposition to be recommended to the court in the Second Avenue breach of lease claim will dispose of the items 1, 2, 5, and 6 above stated, as not allowable. Of the franchise taxes, which are allowable, viz., the franchise taxes from 1902 to 1906, inclusive, the principal sum aggregates \$139,544.41, and the interest subject to verification to \$27,848.64; a total of \$167,393.05. The only item here involved which is not disposed of in the Second Avenue case is the item of paving claims. I think the liability of the City Company is either to the city of New York, or to the Metropolitan Street Railway Company for charges such as these and not to the Central Park Company at all. These charges are clearly not "rent" within the meaning of article 3 of the Metropolitan-City lease, as recently construed by the Circuit Court of Appeals. The covenants contained in articles 2 and 4 which include them are just as clearly for the benefit of the Metropolitan Company and not for that of third parties. *Welden National Bank v. Smith*, 86 Fed. 398, 30 C. C. A. 133. So the similar covenant in the Central Park lease is, in its nature, personal and not such as runs with the land, even if the Metropolitan-City lease could be considered as operating as an assignment of the former lease, which, for the reasons suggested respecting the practically identical Second Avenue lease, I do not think it can. It may be noted that the City Company was vouched in, in the action by the City of New York which resulted in the judgment for \$104,944.15 constituting the larger part of this amount claimed here and allowed against the Metropolitan estate. None of the paving claims has ever been paid by the Central Park Company.

Proposed reports in accordance with the foregoing should be filed with me and served on respondents on or before May 12, 1913, and proposed amendments and objections thereto five days later.

J. Parker Kirlin, of New York City, for Metropolitan St. Ry. Co.

James L. Quackenbush, of New York City (Jas. T. Mason, of New York City, of counsel), for New York City Ry. Co.

Dexter, Osborn & Fleming, of New York City (M. C. Fleming, of New York City, of counsel), for receiver of New York City Ry. Co.

Byrne & Cutcheon of New York City (Chas. M. Travis, of New York City, of counsel), for Pennsylvania Steel Co. and Degnon Contracting Co.

Davies, Auerbach & Cornell, of New York City (B. Tolles, of New York City, of counsel), for Guaranty Trust Co. of New York, Second Ave. R. Co., and Lynch, as receiver.

Chas. T. Payne and Geller, Rolston & Horan, all of New York City, for Farmers' Loan & Trust Co.

Geo. N. Hamlin and O'Brien, Boardman & Platt, all of New York City, for committee of contract creditors of New York City Ry. Co.

Charles Benner, of New York City, for committee of tort creditors of New York City Ry. Co.

Simpson, Thacher & Bartlett, of New York City, for committee under Metropolitan St. Ry. Co. stockholders protective agreement.

Strong & Mellen, of New York City (Mr. Chase, of counsel), for Central Park, N. & E. R. R. Co.

Chas. H. Tuttle, of New York City, for Cornell and Belt Line Ry. Corp.

Richard Reid Rogers, of New York City (Jas. T. Mason, of New York City, of counsel), for Central Crosstown R. Co. and New York Rys. Co.

L. C. Krauthoff and J. P. Cotton, Jr., both of New York City, for committee acting under a plan of reorganization of Metropolitan St. Ry. Co.

Masten & Nichols, of New York City (Arthur H. Masten, of New York City, of counsel), for receiver of Metropolitan St. Ry. Co.

Page, Crawford & Tuska, of New York City (Wm. H. Page and Gilbert H. Crawford, both of New York City, of counsel), for Metropolitan Express Co.

LACOMBE, Circuit Judge. Touching the allowance and disallowance of various items of claim for paving the roadway in proximity to the tracks, I infer from the reply brief that, of the items disallowed on the theory that the city of New York could not recover for them against the Central Park

Company, judgment has since been actually entered against the latter company for \$7,012.42 in favor of the city of New York. If that be so, upon a proper recital in the decree, the amount awarded by the master for these items of paving should be appropriately increased. With this possible exception the special master's findings and conclusions as to these paving claims are confirmed.

Referring to claim touching the old bonds of the Central Park road, \$1,200,000, I have serious doubts as to the soundness of the special master's conclusions, finding much force in the contention that as between lessor and lessee—leaving the bondholder out of consideration—on December 1, 1912, when the lessee elected not to have the bonds renewed by the lessor, they constituted a matured obligation then due which the lessee had agreed to pay. Inasmuch, however, as the determination of the questions presented, will depend probably upon the interpretation of former opinions of the Court of Appeals, it seems best to confirm the findings and conclusions as to this part of the claim without further comment.

[1, 2] As to the counterclaim, the special master's allowance thereof is not sustained. The case differs materially from that of the Second Avenue, because by the terms of the lease the predecessor of the Metropolitan Company expressly undertook itself to pay the expense of changing the motive power of the road, etc. In each lease there is a clause providing that, in certain contingencies, the lessor company is to issue bonds for the amount of expenditures for such purposes. In the one case, however, the lessee did not contract to pay such bonds in case they were issued; in the other, it specifically assumed these very bonds as an obligation, which it was to provide for and pay. The situation seems to be this: Having determined to make the change, the lessee contracted with railroad builders and supply men for what was necessary to complete the work. When the work was done and the bills were presented, the Metropolitan had a choice of two ways in which to pay them. It could have done so out of any surplus cash it had on hand, or it could have borrowed the money on bonds which it could require the Central Park Company to issue. Each course, no doubt, presented its advantages and disadvantages; the first might reduce a fund which would be useful as working capital, the second would increase the fixed yearly charges to the amount of the interest on such bonds. Whichever course were adopted eventually the Metropolitan would pay the whole expense, if it fulfilled its contract. The work seems to have been fully completed and the bills for it paid by 1899. Manifestly, the Metropolitan elected to pay them out of funds of its own, for it made no request then of the lessor company to issue bonds, nor did it make any such request during all the years that elapsed until receivers were appointed in 1907. If under the terms of the contract, the lessor were ultimately to pay for this change of motive power, it might be that delay in making request for the issue of bonds would not be material; but, since the lessee was the one to pay these expenditures, the language of that clause of the lease seems to me to contemplate that if it should need the aid of the lessor's credit to enable it to pay them it should make its request for such credit within a reasonable time after incurring the obligations. The time when the request to issue bonds is to be complied with is "whenever it shall be deemed by the party of the second part expedient * * * to change the motive power." If just before receivership, in January, 1907, the Metropolitan, eight years after it had made expenditures which under the contract it was itself to pay for, had requested the Central Park Company to issue these bonds and the request had been refused, I do not think it could have enforced their issue under the terms of the contract.

Except so far as required by this opinion, the exceptions are overruled and the report confirmed.

RICHMOND CEDAR WORKS v. PINNIX et al.

(District Court, E. D. North Carolina. October 1, 1913.)

1. EVIDENCE (§ 343*)—DEEDS—CERTIFIED COPY OF RECORD OF ANCIENT DEED—PRESUMPTIONS.

For many years the statutes of North Carolina have required deeds acknowledged before a commissioner appointed for the state in other states to be probated for registry before a court or judge or clerk of a court in the county where the land lies, to entitle them to be recorded, but none of such statutes require the certificate of such probate to be registered. Revisal N. C. 1905, § 1599, entitles a duly certified copy of any deed or writing, required or allowed to be registered, to be used as original evidence, but does not require that such certified copy shall include the certificate of probate. *Held*, that where a certified copy of a deed showed it to have been registered in the county where the land lies more than 40 years before, it would be presumed that it had been duly admitted to probate, and that such copy was admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1315-1330; Dec. Dig. § 343.*]

2. AFFIDAVITS (§ 2*)—REGISTRATION OF ANCIENT DEEDS—NORTH CAROLINA STATUTE—AFFIDAVIT BY OFFICER OF CORPORATION.

Under Revisal N. C. 1905, § 981, which provides that "any person holding any unregistered deed or claiming title thereunder, executed prior to January 1, 1870, may have the same registered without proof of the execution thereof, provided that such person make an affidavit * * * that the grantor * * * of such deed, and the witnesses thereto, are dead or cannot be found and that he cannot make proof of their handwriting, and * * * provided that * * * affiant believes such deed to be a bona fide deed and executed by the grantor therein named," where a corporation is the holder of such a deed, the affidavit may properly be made by its president.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. §§ 5-15; Dec. Dig. § 2.*]

3. JOINT-STOCK COMPANIES (§ 14*)—DEEDS—VALIDITY—CAPACITY OF PARTIES TO CONVEY.

A deed, executed by a limited partnership association formed under the laws of a state and also by the individual members and stockholders of the association, is sufficient to convey title to its lands.

[Ed. Note.—For other cases, see Joint-Stock Companies, Cent. Dig. § 15; Dec. Dig. § 14.*]

4. ADVERSE POSSESSION (§ 85*)—SUFFICIENCY OF POSSESSION—COLOR OF TITLE.

The record owner of a tract of land granted by the state in 1788 died in 1832. No conveyance from him or his heirs was shown, but in 1842 a deed to the land was executed by a third person, reciting that it was the land purchased at a sale by the estate of the deceased owner. It also reserved to the grantor the right to remove certain timber cut by him. Successive conveyances containing similar recitals were made and recorded prior to 1860, and through them complainant deraigned title. There was also a public sale under a mortgage made by one of the grantees in 1845. The land was swamp, uninclosed, and valuable only for its timber. There was evidence to support findings by the master that complainant and its predecessors had, from time to time, cut timber from the land quite extensively, sometimes for several years in succession, and that they had paid the taxes thereon for 40 years. *Held*, that they had such color of title and such possession as to give complainant title by adverse possession under the state statute, as against the heirs of the former

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 208 F.—50

owner, who had exercised no possession and made no claim for more than 60 years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 313, 498-503, 656, 657, 660, 668, 688-690; Dec. Dig. § 85.*]

5. QUIETING TITLE (§ 15*)—SUIT—DEFENSES.

Allegations of certain defendants in a suit to quiet title that a codefendant joined as a tenant in common with them was not a bona fide owner, but purchased his interest in collusion with complainant and in its interest, *held* not to constitute a defense, since, even if proved, under the facts shown the rights of the other defendants were in no manner prejudiced.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 47; Dec. Dig. § 15.*]

6. EQUITY (§ 377*)—HEARING—SUBMISSION OF ISSUES TO JURY.

Where, in a suit to quiet title, a large amount of testimony has been taken at great expense in time and cost on the question of possession, and the master has made and reported his findings thereon, exceptions to which have been taken and argued to the court, an issue will not be thereafter framed on the question for submission to a jury.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 788-793; Dec. Dig. § 377.*]

7. ADVERSE POSSESSION (§ 13*)—NATURE AND REQUISITES.

Laches of the owner is the ground on which title is acquired by adverse possession. The owner sees his boundaries invaded by an adverse claimant, asserting title, and if then he remains passive long enough, he is held to acquiesce in the adverse claim; hence the possession must be open, notorious, and under claim of right in order to enable the owner to be informed of the invasion of his rights so that he may assert and enforce them.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 67-76; Dec. Dig. § 13.*]

For other definitions, see Words and Phrases, vol. 1, pp. 227-235; vol. 8, p. 7568.]

In Equity. Suit by the Richmond Cedar Works against one Pinnix and others. Decree for complainant.

Bill in equity, brought by plaintiff, to remove cloud from and quiet title. The land in controversy is situate in the Eastern district of North Carolina, being a portion of the Dismal Swamp, of the value of \$60,000. Plaintiff alleges that it is the owner and in possession of the locus in quo; that defendants assert an adverse interest in said land, under deeds and other paper writings, which are a cloud upon its title. Plaintiff is a Virginia corporation; defendants, Pinnix and Ferrebee, are citizens and residents of the Eastern district of North Carolina; defendant Gregory was, at the time of filing the bill, a citizen and resident of Mississippi. The equitable jurisdiction is invoked under the provisions of section 1589, Revisal N. C. 1905. *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52. Defendants deny that plaintiff is the owner of the land in controversy, or that it is in possession thereof; they aver that they are the owners as tenants in common. By consent an order of reference was made to Hon. J. B. Leigh, special master, to hear the evidence and report his findings of fact and conclusions of law. Upon the coming in of the report, the defendants filed exceptions thereto, and the cause was set down for hearing.

R. W. Winston, of Raleigh, N. C., for plaintiff.

E. F. Aydlett and J. Kenyon Wilson, of Elizabeth City, N. C., for defendants Pinnix and Ferrebee.

J. C. B. Ehringhaus, of Elizabeth City, N. C., for defendant Gregory.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

CONNOR, District Judge (after stating the facts as above). [1] Defendants' first exception is directed to the admission in evidence of a certified copy of a deed from John R. White and his wife to George T. Wallace, dated April 10, 1857; registered in Book C. C., page 542, Camden county, January 24, 1871. There is, upon the certified copy, a certificate of acknowledgment by the grantor and his wife, purporting to have been made by W. J. Baker, a commissioner of affidavits, in Virginia, for North Carolina, dated April 11, 1857. There is, on the copy of the deed, no order of registration, by the court of pleas and quarter sessions of Camden county, N. C. It is offered and admitted as color of title. If plaintiff had offered and proved the execution of the original deed, and showed that it, or those under whom it claimed, entered upon and remained in possession of the land, claiming under the deed, it would be admissible for the purpose of showing the character of the entry and extent of the possession, without registration. When relied upon as title, it must be acknowledged by the grantor, or his signature proven on oath, by one or more witnesses, in the manner prescribed by law, and when so acknowledged or proven and "registered according to law shall be valid, and pass title and estates without livery of seisin, attornment or other ceremony whatever." Revisal, § 979. This provision is found in our statutes as early as Laws 1715, c. 7. A number of statutes have been enacted providing for the probate of deeds, conveying land in this state, by grantors residing in other states of the Union and in foreign countries. These acts were collected, brought into orderly arrangement, and codified by Mr. Samuel F. Mordecai, dean of the Trinity Law School, with his uniform accuracy. Pub. Laws, 1899, c. 235; Pell's Rev. c. 18, §§ 952-956. For subsequent amendments see Supplement, 1911. Curative statutes have been enacted at every session of the General Assembly. None of them include the deed in controversy. At the session of 1830, the Governor was authorized to appoint commissioners of affidavits in the several states and territories, who were given power to take the acknowledgment or proof of deeds conveying lands lying within this state. It is provided that:

"Any such acknowledgment or proof, taken or made in the manner directed by the laws of this state, and certified by the commissioner before whom the same shall be taken or made, shall have the same force and effect and be as good and available in law for all purposes, as if the same had been made or taken before one of the Justices of the Supreme Court of the United States, or judge of any court of supreme jurisdiction in any of the United States." Acts 1830-31, c. 31; R. S. c. 21.

By section 4 of the statute the Governor is directed to make known to the clerks of the several courts of record of the state the name and places of residence of such Commissioners. By section 5, c. 37, R. S., and of the Revised Code, it is provided that, when a deed is proven before any of the several officers named therein, outside of this state, including "any commissioner appointed by the Governor of this state according to law," and certified by him as required by law, such deed—"being exhibited in the court of pleas and quarter sessions of the county in which such lands lie. * * * or to one of the Judges of the Supreme Court or of the superior courts of this state, shall be ordered to be registered with

the certificate thereto annexed, and such deeds, * * * with the certificates thereto annexed having been registered, pursuant to such order, in the county, in which such lands lie, * * * shall be valid in law to convey," etc.

This statute was in force in 1857, when the deed from White to Wallace purports to have been executed. It will be noted that the statute does not require that the certificate of the clerk of the court or the judge who orders the deed and the certificate of the commissioner to registration shall be made upon or attached to the deed or registered with it. It may be asked, what evidence would the register of deeds have that a deed tendered him for registration upon a probate taken by a commissioner had been passed upon by the court? By reference to chapter 98, R. S. (Id. Rev. Code, entitled "Registers") being the act of 1777, as amended by the Acts of 1807 and 1814, it will be seen that by section 5 it is made the duty of the clerks of the court of pleas and quarter sessions, upon application of the register of deeds for his county, at any time after 10 days from the rise of each court, to deliver to the said register all deeds and other instruments of writing admitted to probate and then remaining in his office for registration, and to pay over the fees for registering the same. For failure to discharge the duty so imposed, the clerk shall forfeit and pay to the register the sum of \$100. By section 6 it is made the duty of the register, within 20 days after the rising of each court, to apply at the clerk's office of their respective counties for all deeds admitted to probate for registration. For failure to do so the register forfeited the sum of \$10, one half to the use of the poor, and the other half to the use of the person suing for the same. The register, therefore, was authorized, and it was made his duty, to accept from the clerk such deeds as were given him for registration, as having been duly admitted to probate in open court. There was no statutory requirement that the clerk write any certificate on the deed, and none that such certificate, if written on it, be recorded. The fact of its probate and order of registration was entered on the minutes of the court. *Freeman v. Hatley*, 48 N. C. 115; *Perry v. Bragg*, 111 N. C. 163, 16 S. E. 10. The abolition of the court of pleas and quarter sessions, resulting in conferring upon clerks of the superior court and other officers probate jurisdiction, resulted in important changes in the method pursued in probating deeds. This is shown by the provision of section 1246, Code 1883, requiring the clerk of the superior court, taking probate of a deed, to "enter his certificate thereon." By section 1250, the power is conferred upon the clerk to "adjudge probates taken before a commissioner of affidavits to be correct," etc. Act 1899, c. 235, requires that the clerk, passing upon the validity of the probate, shall order the deed, together with the certificate, to be recorded. Revisal 1905, c. 18, § 1001. It is held that, unless required by the statute, the certificate need not be registered. *Cochran v. Improvement Co.*, 127 N. C. 386, 37 S. E. 496.

In the absence of any statute requiring the registration of the certificate, showing that the deed probated by the commissioner of affidavits has been passed upon, adjudged correct, and ordered to regis-

tration, why should we not presume, for the purpose of admitting a certified copy in evidence, that the registration was in accordance with the legal requirements? It will be further noted that the statute (Revisal 1905, § 1599) entitles a duly certified copy of any deed or writing, required or allowed to be registered, to be used as original evidence. The statute does not require that such certified copy shall include the certificate of probate. In *Cochran v. Improvement Co.*, 127 N. C. 386, 37 S. E. 496, it is expressly held that the probate of a deed will be presumed from the fact that it is registered, and that it is not necessary to register the certificate as evidence of probate. Mr. Justice Furches, in an interesting and well-considered opinion, reviews the decisions of the Supreme Court. The decision has been cited with approval. *Brown v. Hutchinson*, 155 N. C. 210, 71 S. E. 302; *Johnson v. Lumber Co.*, 147 N. C. 251, 60 S. E. 1129. Why is the certified copy not admissible upon the ground that it shows that the deed was placed on the record, in the county wherein the land lies, more than 40 years ago? Prof. Wigmore says:

"Where the alleged ancient original deed is lost (or otherwise unavailable) and a purporting official record is offered, made more than 30 years before, and certifying the deed's contents and execution, but inadmissible as an official record, because not made in accordance with statutory provisions, may not this ancient copy record serve as sufficient evidence of genuineness? * * * The defects in the record are, in a measure, technical only, and it still is entitled to some consideration as an official statement, and the long publicity of it has given ample opportunity, if any just ground existed, for doubting the original's authority. Accordingly, there has been a general disposition, on one ground or another, to accept such an ancient record, though otherwise inadmissible, as sufficient, after the lapse of time."

The learned author says:

"This conclusion has been usually accepted. * * * Moreover, the fact of possession of the land, as a confirming circumstance, seems often to be here insisted upon irrespective of its general requirements."

Among the illustrative cases cited by him are the following:

"Though the ancient record of a deed improperly acknowledged is not in itself evidence of the execution of the deed, yet such record, in connection with long and undisputed possession consistent with the deed, and other circumstances which tend, as a matter of fact, to show the probable execution and loss of such a deed, is admissible as evidence to go to the jury upon the question" of its execution. *Townsend v. Downer*, 32 Vt. 183.

"A copy of a deed * * * is, after 60 years, admissible in evidence to establish the grant under which the party claims title to the land in controversy." *Stokes v. Dawes*, 4 Mason, 268, Fed. Cas. No. 13,477.

"If it (the deed) had been recorded in the proper court of the proper county more than 20 years before the day of trial, the presumption was that its execution had been legally proved or acknowledged, and that the proper certificate had been 'written upon or under the deed.'" *White v. Hutchings*, 40 Ala. 253, 88 Am. Dec. 766.

• In *Bradley v. Lightcap*, 201 Ill. 514, 66 N. E. 546, the deed had been recorded more than 30 years. It was admitted without any proof of acknowledgment.

Experience, the best test of the admissibility of ancient deeds and records, has demonstrated the wisdom of relaxing the rules of evidence to prevent injustice and promote security of title to land. It

is reasonably safe in such cases to presume that the sworn officers to whom is committed the duty of making the records have observed the law. The wisdom of this rule is illustrated in numerous cases. It is well known to every attorney in this state that it was not the custom in the past for the grantor to surrender to the grantee the deeds constituting his chain of title. The State Reports abound in cases illustrating the wisdom, if not necessity, of admitting the record of ancient deeds, with all reasonable presumptions, to sustain the regularity and validity of their registration. The security of titles is thus promoted.

Without passing upon the effect to be given to the certified copy of the deed, I am of the opinion that it was properly received in evidence by the master.

[2] Plaintiff offered in evidence a certified copy of a deed from Wm. Wallace to Geo. T. Wallace, July 29, 1844. This deed was recorded on the 26th of October, 1912, upon the affidavit attached to the original, which was also offered in evidence, of Gustavus Millheiser, president of the Richmond Cedar Works. The affidavit is drawn in accordance with the provisions of section 981, Revisal. This section is section 2 of chapter 147, Laws 1885, as amended by chapter 277, Laws 1905, which provides that:

"Any person * * * holding any unregistered deed or claiming title thereunder, executed prior to January 1, 1870 (originally 1855), may have the same recorded without proof of the execution thereof: Provided, that such person * * * shall make an affidavit * * * that the grantor * * * of such deed, and the witnesses thereto are dead or cannot be found, and that he, * * * cannot make proof of their handwriting. Provided, that * * * affiant believes such deed to be a bona fide deed and executed by the grantor therein named. * * * Said affidavit shall be written upon or attached to such deed, and the same, together with such deed, shall be entitled to registration."

This statute (drawn by the writer) was incorporated in Act 1885, c. 147, to enable the large number of persons in this state, holding or claiming under unregistered deeds of 30 years of age or more, to put them upon the registration books. By this statute, a new policy in regard to the effect of registering deeds as muniments of title was introduced. For the first time in this state deeds which were registered were given priority, as against creditors and purchasers for value, over those claiming under unregistered deeds. The purpose of the statute was to secure the registration of deeds and increase the security of titles. Its provisions should be construed liberally to promote this end. The defendants objected to the introduction of this deed for that the president of the corporation was not authorized to make the affidavit unless so directed and authorized by a resolution of the board of directors; that the words "any person," etc., referred to the corporation, and the affidavit was the act of the corporation. I am unable to perceive the force of this objection. It is elementary that a corporation acts only through its officers or agents. While it may be that, as the custodian of its records, etc., the secretary may have more appropriately made this affidavit, there is no good reason why the president was not competent to do so. His authority to do an act for

the benefit of the corporation, ratified by its acceptance of such benefit, will be presumed. *Bank v. Oil Co.*, 157 N. C. 302, 73 S. E. 93. The original deed was also introduced. The effect to be given its registration upon "vested rights" is not involved in the question of its admissibility. The affidavit conforms to the requirements of the statute. The certified copy was properly admitted.

[3] Plaintiff offered in evidence a deed executed by the Richmond Cedar Works, "Limited," "a partnership association," "formed under the laws of Virginia," and "Gustavus Millheiser * * * and William H. Parrish, Jr., the only members and stockholders of said association," to the Richmond Cedar Works, a body politic and corporate, etc. The deed is signed "Richmond Cedar Works, Limited, by Gustavus Millheiser, President," attested by the corporate seal, attached by Thos. K. Parrish, secretary. It is also signed by the individual stockholders under their private seals. It is duly probated and recorded. I am unable to perceive any ground upon which to sustain the objection to its admission. If it is not properly executed as the deed of the association, it is executed by all of the stockholders and members of the "partnership association," and carries the title to the land described therein. This disposes of the exceptions to the rulings of the master in regard to the admission of the deeds relied upon by plaintiff in deraigning its chain of title.

[4] Postponing, for the present, consideration of the exception to the master's fourth finding of fact, it will be convenient to review the essential facts relating to the title. Conceding that the land in controversy is within the boundaries of the Ben Jones grant, from the state, bearing date July 10, 1788, title is thereby out of the state. It is also manifest that it is within the boundaries of lot No. 7 of the New Lebanon division, made by commissioners appointed for that purpose by the court of pleas and quarter sessions, confirmed at May term, 1817, of said court. Lot No. 7 was allotted, in said division, to Wiley McPherson and Hallowell Old, as tenants in common. Wiley McPherson died, during the year 1832, and upon the petition of his heirs at law a portion of his lands, not including his juniper swamp lands, was sold for partition. Subsequent to 1832 the heirs of McPherson and Old filed a petition in the court of equity for a sale of the lands owned by them as tenants in common. A deed for a portion of said land, not including lot No. 7, made by the clerk and master, is introduced. No deed covering lot No. 7 is found or introduced.

On March 3, 1842, George Happer executed to Wm. Wallace and Gisbourn Cherry a deed sufficient in form to convey land describing a tract of juniper swamp containing boundaries corresponding with the boundaries of lot No. 7, and further described as—

"containing eight hundred and seventy acres, more or less, and is the same swamp that the said Happer purchased at the sale of Wiley McPherson, deceased."

This deed contains the following reservation:

"Except the lumber made by said Happer, and now remaining in said swamp and the privilege of carting it off."

On November 8, 1843, Gisbourn Cherry executed a mortgage to Josiah Cherry conveying, among other land—

"one half of a tract lying on both sides of Cross Canal, containing eight hundred acres, more or less, and is the same land that was purchased (by) Cherry and Wm. Wallace, deed bearing date March 3, 1842." Recorded November 10, 1843.

On January 6, 1845, Josiah Cherry, mortgagee, executed a deed to Gisbourn Cherry, Jr., reciting the said mortgage and a sale at public auction "in front of Samuel Foreman's tavern," after advertisement, conveying "one-half of a tract of eight hundred acres more or less, called the Happer tract." Recorded July 4, 1845. On December 7, 1846, Gisbourn Cherry, Jr., executed a deed to J. R. White, conveying juniper swamp described as the same land sold under a deed of trust and purchased by Gisbourn Cherry. Recorded March 26, 1847. On April 10, 1857, J. R. White and wife executed a deed to G. T. Wallace, conveying a certain juniper swamp—

"the same that was purchased by said White from Gisbourn T. Cherry, and is the south part of the tract known as the Happer swamp (the north part of which is owned by the said Wallace), containing four hundred acres more or less."

On July 29, 1844, William Wallace executed a deed to G. T. Wallace conveying—

"a certain tract of juniper swamp land, belonging to Gisbourn Cherry, Sr., and myself and is the same that was purchased by us from George Happer, a deed bearing date March 3, 1842, * * * containing eight hundred and seventy acres, more or less, and is the same swamp land that the said George Happer purchased at the sale of Wiley McPherson, deceased."

If the description in these deeds is sufficiently definite to admit parol evidence to locate the land, the paper title to lot No. 7, containing 870 acres, vested in G. T. Wallace on April 10, 1857, and such title as he had passed to and vested in the plaintiff by the other deeds in evidence.

The master finds from the parol evidence and the plats that these deeds cover the lands in controversy. To this finding defendants except, and insist that the description is not sufficiently certain and definite to admit parol evidence to locate the land. The master finds otherwise. The exception to this finding cannot be sustained. The master finds:

"That no other persons than plaintiff and those under whom it claims have claimed the lands since the date of the aforesaid (Happer) deed, March 3, 1842, and certainly not since 1869.

"That plaintiff and those under whom it claims have claimed and exercised control over the said tract of land.

"That the Wallaces begun operations on lot No. 7 in 1869, and that, in varying degrees, they and the plaintiff in this case have continued to the beginning of this suit.

"That the land is a juniper swamp, and valuable principally for timber which, for several years after 1870, could only be moved by tram or roll ways and canal or large ditches. When water was low, or during fly season, operations had to be suspended until these conditions changed. That from 1869 to 1876, the Wallaces subjected some portion of lot No. 7 continuously to the only use to which it was susceptible, and that after this time to 1886 there were varying degrees of operation on the land, and from 1880 to 1885 or 1886, the use and operation of the land were continuous. That plaintiff and those

under whom it claimed, listed and paid tax on this land from 1872 to 1910, inclusive. There were several years during which the tax lists were lost. There is no evidence tending to show that defendants, or their ancestors, listed the land in controversy, for taxation.

"That the plaintiff does not connect itself with the grant, and therefore is compelled to rely upon an ouster under color of title and seven years' adverse possession. That the deeds under which plaintiff and those under whom it claims constitute color of title to said land, and that they have been in the adverse possession thereof, under such color of title, for more than seven years next before the filing of the bill herein.

"That the deeds under which defendants claim to own the said land constitute a cloud upon plaintiff's title. That the land in controversy is worth from \$60,000 to \$75,000. Defendants' exceptions challenge the correctness of each of these findings of fact, except the value of the land, and conclusions of law. Defendants Pinnix and Ferree except to the finding that defendant J. N. Gregory was, at the date of filing the bill herein, not a resident of the state of Virginia. This finding relates to the jurisdiction of this court."

There is sufficient evidence in the record to sustain the finding; the exception is overruled.

We are thus brought to a consideration of the findings and exceptions thereto, relating to plaintiff's title, and that is dependent upon the correctness of the findings in regard to the entry and adverse possession of plaintiff and those under whom it claims. Defendants offer no evidence that they, or those from whom they deraign title, have exercised any control, or act of dominion over, or in respect to, the land since 1842. They rely upon the legal title, conceded to have been in their ancestor, Wiley McPherson, at the time of his death and the principle of law which, in the absence of actual adverse occupation by another, draws the possession to it. The burden is therefore upon plaintiff to show such entry under color of title and adverse occupation, or possession, for seven years as will ripen into title. It is well settled, by numerous and uniform decisions of our Supreme Court, that such entry, followed by possession for seven years, not only bars the disseisee, but confers title upon the disseisor. In discussing the question of possession, and the evidence deemed sufficient to establish it, the courts have said:

"So much depends on the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule, adapted to all cases." Ewing v. Burnet, 11 Pet. 53, 9 L. Ed. 624.

It has been said by our Supreme Court that, in seeking to ascertain whether the acts and conduct of a trespasser, continued for the statutory period, are sufficient to constitute an ouster, the leading idea is that there shall be notice to the world that the land is being subjected to that use to which it is susceptible. *Moore v. Thompson*, 69 N. C. 120. A recent decision of the Supreme Court of this state is peculiarly in point because the land in controversy is situate in the same section, and is of the same character, as that involved in this case. In *Berry v. McPherson*, 153 N. C. 4, 68 S. E. 892, Mr. Justice Brown says:

"The land in controversy appears to be swamp land, uninclosed, and with no habitation upon it. The evidence indicates that the plaintiff and his father for more than 30 years exercised acts of dominion over the land, and

made from it the only profits and use of which it is susceptible. From the evidence of the witnesses the jury may well infer that these acts were those of ownership and not those of an occasional trespasser, and that they were repeated and continuous for a considerable period of time. The possession was as decided and notorious as the nature of the land would permit."

In *Locklear v. Savage*, 159 N. C. 236, 74 S. E. 347, Mr. Justice Walker reviews the North Carolina decisions, which are controlling with this court in this case. He says:

"While the evidence offered is not necessarily conclusive, if taken to be true, as to the fact of possession, we think it is sufficient to be submitted to the jury, under appropriate instructions, that they may draw such inference as they see proper, bearing in mind that the burden of proof is on the plaintiff to establish the fact of possession for the statutory period by a preponderance of the proof."

Applying this rule to the testimony heard by the master, it is found that, while the evidence, coming from a large number of witnesses, many of them illiterate colored men, who had, at different periods of time, worked in the swamp, cutting and removing timber, was not always clear, either in their understanding or memory, frequently contradictory, there is much reliable and satisfactory evidence, both from witnesses and conditions, which justifies the finding of the master—the natural evidence, stumps, indicating the cutting of trees in large numbers at different periods of time; tramroads, indicating different periods of time of building and use, ditches, cut into the land; and other similar evidence, showing that the land was subjected to the use to which it was susceptible. There is also evidence of books, accounts, etc., showing that large quantities of timber were cut and removed from the land by Wallace. Of course, as is usual in such controversies, the evidence is conflicting, witnesses differing in their statements; there is evidence tending to show, and the master finds, that some years ago a controversy arose regarding the proper location of the western boundary of lot No. 7, between the Roper Lumber Company and plaintiff, and that it was compromised by running a line, etc. Defendants contend that, while there is evidence of use and of control over portions of the land, it fails to show that such use extended over other parts of it; that for long periods of time the plaintiff and those under whom it claims made no use of any part; that the cutting was sporadic and limited, both in time and extent, to mere trespasses. There is evidence tending to support this contention. It is impracticable to analyze or discuss the evidence. The master, an intelligent lawyer, having much experience in dealing with questions of the character presented here, properly says:

"The evidence in this case is voluminous, and in many cases vague and uncertain, and sometimes contradictory."

It is necessarily so in such cases. He was doubtless impressed, as I am with the fact that since 1842 deeds have been executed conveying this land—many of them put to record between 1843 and 1846, others during the year 1871—reciting that this land was "purchased at the sale of Wiley McPherson, deceased"; that it was sold in 1845, after advertisement, at a public tavern; that the first deed (1842) contains

a reservation showing that Happer had cut timber on the land, and was "carting it away"; that from 1872 Wallace, who was claiming under these deeds, was listing the land and paying tax on it. These acts, accompanied by the cutting of timber, etc., were well calculated and sufficient to put the owners, if in fact the land had not been sold as the land of Wiley McPherson, deceased, upon notice and subject the claimants to an action.

[7] It is said that the ground upon which the disseisor acquires title by adverse possession is the laches of the owner. He sees his boundaries invaded by an adverse claimant, asserting title, and if he remains passive under such circumstances a sufficient length of time, he is held to acquiesce in the adverse claim; hence the possession must be open, notorious, and under a claim of right. This is required to enable the owner to be informed of the invasion of his rights that he may assert and enforce them by an action against the wrongdoer. Sedgwick & Wait, *Trial of Title*, etc., § 735. That the acts and conduct of plaintiff and those under whom it claims were of the character held by the courts of this state sufficient to be submitted to a jury upon the question of adverse possession is shown by reference to numerous cases. Respecting the continuity of the possession, which is equally essential as its character, the rule is well stated in *Berry v. McPherson*, *supra*:

"The testimony must tend to prove the continuity of possession for the statutory period either in plain terms or by 'necessary implication.' This possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period, and that during it the claimant has, from time to time, continuously subjected some portion of the disputed land to the only use of which it was susceptible."

Applying to the findings of fact by the master the elementary rules by which courts are governed in passing upon exceptions, it is manifest that they should not be disturbed unless there is an absence of evidence to support them, or they are manifestly against the weight of the evidence. This rule is so uniformly followed by courts, and so essential to the orderly administration of justice, that a citation of authority is neither necessary nor justified. The findings of the master are entitled to the same weight as the verdict of a jury.

[5] Upon a careful consideration of the evidence, the arguments and the briefs of counsel, I am of the opinion that the report of the master, in respect to the title of the plaintiff, must be sustained. The exceptions in that respect are overruled. The defendants Pinnix and Ferree charge that plaintiff entered into a conspiracy with defendant J. N. Gregory and the heirs of Hallowell Old, who are not parties to this record, for the purpose of practicing a fraud upon the jurisdiction of this court; that J. N. Gregory is not a bona fide owner of any interest in the land; that he is a party to the alleged conspiracy with plaintiff, etc.

In his fourth finding of fact, the master says:

"Another question affecting the bona fides of J. N. Gregory and as to his adversary interest to plaintiff, in this cause: I am frank to confess, that the evidence on this point is confusing to me, and introduced some complications

that have been somewhat hard to reconcile, but from the character, reputation, and standing of the witnesses who testified upon this point, and the character of the evidence, I am constrained to hold that the purchase of J. N. Gregory, as disclosed by the deeds to him, was bona fide, and that his interest is antagonistic to plaintiff."

An examination of the evidence discloses a condition in respect to this phase of the case which fully justifies the state of mind in which the master found himself. It is a complicated and, in some respect, a remarkable story. Without calling into question the testimony of any of the witnesses, in regard to it, and accepting it as true, the inferences to be drawn from it are not altogether satisfactory. Assuming, however, that Warwick, in buying the Baxter and Grice interest, and having the deeds made to J. N. Gregory, his brother-in-law, purposed to promote the interest of his employer, the plaintiff; that Gregory is a mere nominal holder of the interest of Baxter and Grice—it is not perceived how the real merits of this controversy are affected. Conceding that the special proceeding brought by Gregory for partition in the superior court of Camden county was for the purpose of forcing the land to sale, it is not perceived how the decree in this case can affect the rights or defenses of the other defendants in that case. It is evident that Gregory's presence in this record has not interfered with the defense of the other defendants, or deprived them of any rights or advantages in making such defense. If, as the master finds, Gregory acquired no title under the Baxter and Grice deeds, no one else is injured; he, or Warwick, has paid out a considerable sum of money, and he will be called upon for his portion of the cost in this case. The scheme or conspiracy, if true as contended, will not avail Gregory in the suit in the state court, and of course the plaintiff, which is not a party to that record, will not be affected by the result of that case; that is, its legal rights will not be affected, and this court cannot take notice of other results or conditions. I do not perceive how, in any way, the rights or interests of the other defendants have been injuriously affected by the manner in which, or the purpose for which, Warwick purchased the Baxter and Grice interest, or what difference it makes to the other defendants that the deed was made to Gregory; nor do the briefs of counsel suggest that they were injured thereby. If any wrong was done to Baxter and Grice, and it seems that none was done them, this court could not, in this case, administer any relief, nor have they asked that it do so; that is a matter with which the other defendants have no concern. If there was any evidence, or well-grounded suggestion, that the defendants had been injured in their rights by the conduct of Warwick, and that he was acting as the agent of the plaintiff in producing such condition, this court would not hesitate to either make him a party and make such decree as the evidence warranted, or dismiss plaintiff's bill.

It is suggested that some of the heirs of Hallowell Old, who reside in Virginia, should have been made parties to this bill. This objection is not for the defendants; this court would make them parties if within its jurisdiction, or if they were found to be neces-

sary, but neither condition exists. The plaintiff, may, if otherwise entitled, proceed against those persons who hold deeds constituting clouds upon its title, or who are asserting adverse claim thereto, without bringing in others who may have an interest in the land, but not in the result of this suit.

[6] Defendants, in their brief, suggest that an issue be framed in regard to the question of possession and sent to a jury. The court would not hesitate to pursue this course, but for the fact that the testimony has been taken at a large outlay of time and cost. An intelligent master, of the selection of all parties, has heard and considered it with care and an earnest desire to arrive at a correct conclusion. It is to the interest of all parties that the litigation be concluded. A trial before a jury would involve much delay and great expense, without any reasonable ground to suppose that a different, or more satisfactory, result would be reached.

An anxious and careful examination of the record, the argument and brief of counsel, leads me to the conclusion that the report of the special master should be confirmed. A decree may be drawn in accordance therewith. The cost will be adjusted in the final decree.

In re SILVER.

(District Court, N. D. Ohio, E. D. October 2, 1912.)

1. BANKS AND BANKING (§ 75*)—INSOLVENCY—DEPOSITS RECEIVED WHEN INSOLVENT—TRUST.

A private banker, who at the time of making a general assignment was so hopelessly insolvent that his estate in bankruptcy will not pay more than one per cent. on claims of general creditors, was legally chargeable with knowledge of his insolvency on the preceding day, which made his acceptance of deposits on that day fraudulent and impresses a trust on the money received in favor of the depositors where it is traced into the hands of his trustee.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 157; Dec. Dig. § 75.*]

2. MORTGAGES (§ 121*)—MORTGAGE GIVEN AS INDEMNITY—SUBSTITUTION OF OBLIGATION OF MORTGAGEE.

Bankrupt was owner of a private bank which was depository for a school district and had given a surety bond to secure its deposits. Anticipating an increased deposit, the bankrupt applied to the surety company for an additional bond, and as indemnity executed to the company a mortgage on land reciting the execution of the bond by the company and its conditions. The bond was afterward executed and forwarded to the bank for delivery to the board of education, but, not being required at that time, was returned and canceled. At the suggestion of the bank that it would be required later, the mortgage was retained, and on request a few months later the company executed a new bond of the same tenor and recorded the mortgage. It subsequently became liable for and paid in full the amount of such bond, which in the meantime had been renewed. *Held* that, since the liability incurred was that contemplated by the parties when it was executed, the mortgage did not become functus officio when the first bond was canceled, but remained in force as security for the second bond and its renewal, and that it was entitled to priority

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

over a second mortgage to one who had both actual and constructive notice that it was in existence.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 237-241; Dec. Dig. § 121.*]

3. EVIDENCE (§ 460*)—PAROL EVIDENCE AFFECTING WRITING—IDENTIFICATION OF MORTGAGE WITH OBLIGATION SECURED.

The admission of extrinsic evidence to identify a mortgage with the obligation which it secures is not a violation of the rule that a writing cannot be varied by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. § 460.*]

In the matter of Thomas H. Silver, bankrupt. On review of orders of referee. Reversed.

G. W. Adams, of Wellsville, Ohio, for petitioners.
Hill & Lones, for trustee.

KILLITS, District Judge. [1] The court has before it three petitions to review in as many matters the findings of the referee and his orders thereon. Taking up first the petitions of Julius Goetz & Co. and Calhoun & Thomas, which may be considered together, the facts pertinent to their issues are as follows: The bankrupt, prior to May 29, 1911, did business in Wellsville, Columbiana county, as a private banker under the title of "Silver Banking Company." Some suggestion was made that this was a partnership; but, if so, it was such in name only, for the interest of the supposed partner of the bankrupt was so questionable and infinitesimal as to be negligible. On that day the bankrupt made a general assignment for creditors, and an examination of his estate discloses the fact that he was so hopelessly insolvent that general creditors will receive hardly more than one per cent. of their claims.

The petitioner, Julius Goetz & Co., on Saturday, the 27th of May, 1911, about noon, deposited with Silver Banking Company the sum of \$364, and some time during the evening of that day made a further deposit of \$400.18; these deposits being made partly in cash and partly in checks. About 8 o'clock of the same evening, the petitioners, Calhoun & Thomas, deposited with the banking company in cash the sum of \$121.30. When the bank closed on Monday, the assignee found something over \$1,000 in money among its assets. The applications of these several petitioners to have their claims based on these several deposits treated as preferential, on the theory that to receive their deposits under the circumstances was a fraud upon them, were denied by the referee on this finding of fact which manifestly, from the referee's report, controlled his judgment:

"Seventh. That Thomas H. Silver testifies that he did not know that he was insolvent on the day said deposits were made or that he knew said deposits were made."

A son of Thomas H. Silver was by title the assistant cashier of the bank and in fact, with the consent of his father, who was in poor health, the sole manager of the institution. Unquestionably, whatever

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

knowledge is imputable to him of the bank's condition and its business is chargeable to the bankrupt. We believe the referee is in error in holding that direct and affirmative proof of the knowledge of the bankrupt concerning the bank's condition should have been produced by the petitioners and that for want thereof the disclaimer of such knowledge by the bankrupt should control. Mr. Wigmore, in his valuable work (section 245), observes:

"There are in a broad analysis four kinds of circumstances (events or things) which may point forward to the probability that a given person received a given impression (i. e., obtained knowledge, formed a belief or was made conscious): (1) The direct exposure of the fact to his sense of sight, hearing or the like. (2) The express making of a communication to him. (3) The reputation in the community on the subject, as leading probably to an express communication. (4) The quality of the occurrence as leading either to actual perception by his senses or to an express communication. Throughout all these four modes there run two considerations affecting some modes more strongly than others: (a) The probability that the person received an impression of any fact at all; and (b) the probability that from the particular occurrence he would gain an impression as to the specific fact in question."

We will not further quote from this philosophical discussion, but will be content with the observation that one who was impelled on one day to make an assignment for the benefit of creditors because of an insolvency so hopeless as was the case here must have been in such direct exposure on the previous day to the facts as to have charged him with knowledge of their existence. And the quality of the occurrence on Monday speaks very strongly to the belief that on Saturday the conditions bringing about such occurrence were known to the actors. It is possibly true that, actually speaking, the bankrupt did not know on Saturday that his institution was insolvent, but is beyond the range of probability that his son, the active manager of the institution, was likewise ignorant.

In the case of *Parmlee v. Adolph*, 28 Ohio St. 10, the court say, on page 20, discussing alleged error in refusing to give a request in an action based upon fraudulent representations:

"This request is based upon the idea that, where a party simply believes in the truth of a representation made by him upon which another parts with his property or rights, he will not be guilty of fraud or gross negligence. This doctrine appears to be sound where the question of the credit of the party recommended is involved, and nothing more. Such recommendations are generally understood to be nothing more than the opinion of those who give them, resting upon common reputation, and the apparent circumstances of the individual recommended, and not upon any examination of his affairs. And it is well known that men who are apparently in good circumstances and credit turn out to be, in reality, insolvent. In such cases, a recommendation of that kind should not be presumed fraudulent because it happens not to be true. But the rule is otherwise where the false representation induces the contract between the parties thereto and enters into it. It is otherwise where the party making the false representations is bound to know the truth of his representations; then mere belief in their truth will not excuse. One is responsible for his belief in case where a prudent person might know the truth of the facts upon which his supposed belief is founded."

We hold then that the facts surrounding this transaction justified petitioners' claim that the bankrupt legally knew of the insolvency of

his business when he received the deposits in question. The implied contract, therefore, which ordinarily arises to create the relation of debtor and creditor when deposits are made in a banking institution never was created, and a trust impressed upon these funds in behalf of these several depositors is the equitable result of these transactions. *Railway Co. v. Johnson*, 133 U. S. 566, 10 Sup. Ct. 390, 33 L. Ed. 683; *City of Philadelphia v. Aldrich* (C. C.) 98 Fed. 487; *Beal, Receiver, v. City of Somerville*, 50 Fed. 647, 1 C. C. A. 598, 17 L. R. A. 291; *Wasson v. Hawkins* (C. C.) 59 Fed. 233; *Massey v. Fisher* (C. C.) 62 Fed. 958; *Richardson v. New Orleans Debenture Co.*, 102 Fed. 780, 42 C. C. A. 619, 52 L. R. A. 67; *Orme v. Baker*, 74 Ohio St. 337, 78 N. E. 439, 113 Am. St. Rep. 968.

The findings and orders of the referee in this behalf are set aside, and an order will be entered establishing as preferred the claims of *Julius Goetz & Co.* and *Calhoun & Thomas*.

[2] In May, 1909, the Silver Banking Company undertook to become depository of the funds of a township school district, and as security therefor bought and furnished a bond in the sum of \$5,000 from the Fidelity & Casualty Company of New York. Subsequently it was assumed that the deposit would be in excess of this sum, and an additional bond for \$5,000 was solicited from the same surety company to run to the township school board, to secure which second bond the bankrupt offered a mortgage on lands owned by him known as the Hardy Farm. On the 7th of June, 1909, such a mortgage was executed by bankrupt and wife to the Fidelity & Casualty Company, reciting in the defeasance clause that the Fidelity & Casualty Company of New York had executed and delivered a certain surety bond in the sum of \$5,000 on behalf of Silver Banking Company to the board of education in question to secure the proper payment and accounting of any funds deposited by said board of education with the banking company, and that this mortgage was executed and delivered to save the surety company harmless from any loss or expense by reason of default in the accounting for funds deposited by the board of education in question.

Upon delivery of this mortgage to the surety company a bond for \$5,000 was executed on the 9th of June, 1909, and sent to the Silver Banking Company for delivery to the board of education. It developed, however, that the board of education was not then prepared to deposit with the banking company sums in excess of those secured by the earlier bond, wherefore, within a few days, this second bond so secured by the mortgage in question was returned to the Fidelity & Casualty Company for cancellation by the bankrupt's son, who was managing his banking business, and who explained in his letter that the board of education was not then prepared to make additional deposits to secure which this bond was procured, but that the prospect was that in the fall the board's funds would be increased, at which time security similar to that then returned would be needed, wherefore it was suggested that the Fidelity & Casualty Company retain the mortgage to be used as its indemnity for furnishing the second \$5,000 bond.

September 14th, the banking company, having then proffered to it the additional deposits by the board of education, made application to the

surety company for a bond in the sum of \$5,000, and proposed that the mortgage being still held by the surety company should stand as security for this new suretyship, as suggested in the letter of Mr. Silver, Jr., in June, when the second bond was returned unused.

The bond was furnished as applied for, and the mortgage was filed for record by the surety company in October, 1909. In May, 1911, upon the assignment by the bankrupt and upon default made upon the bonds, which had been renewed at the expiration of the year, loss in the full amount accrued to the surety company.

A few days prior to the assignment, the bankrupt, his wife joining, mortgaged the same premises to Homer C. Wells to secure a loan of \$5,000; the mortgage being recorded prior to the assignment. It is in evidence that the bankrupt applied to one L. C. Wells for a loan and was promised the same from Homer C. Wells, who furnished it, and that the bankrupt at the time when he made the application to L. C. Wells discussed with the latter the fact that the land which he offered as security was incumbered by a mortgage to the Fidelity & Casualty Company in the sum of \$5,000 to secure the deposits of the board of education in question.

The issues presented to the referee were: (1) The priority of lien as between Wells and the surety company; and (2) the question raised by the trustee whether the surety company had any lien at all upon the so-called Hardy Farm by virtue of this mortgage. Each of these questions was decided by the referee adversely to the Fidelity & Casualty Company, and they are before us for review of his conclusions.

It is urged in behalf of both Wells and the trustee that this mortgage by its recitation referred unmistakably to a surety bond then executed and that it became satisfied and *functus officio*, incapable of reissue in the informal way established by the facts, when the bond of June 9, 1909, was returned to the surety company unused and was canceled, and we are referred for authority, among other citations, to the cases of *Bogert v. Bliss*, 148 N. Y. 194, 42 N. E. 582, 51 Am. St. Rep. 684; *Flye v. Berry*, 181 Mass. 442, 63 N. E. 1071; 27 Cyc. 1403, and cases cited in support of the proposition; *Stone v. Palmer*, 166 Ill. 463, 46 N. E. 1080.

Whatever may be the force of these authorities as applied to the facts peculiar to them, we are unable to accept them as controlling in the facts before us. The purpose for which this mortgage was made was made was to secure the Fidelity & Casualty Company suretyship of additional deposits expected to be made with the Silver Banking Company by the board of education. The form in which that suretyship should be contracted is not material so long as the identity of the transaction as it was completed in September is certain with that in contemplation when the mortgage was made in June. That the deposit in September which the Fidelity & Casualty Company was requested to secure with indemnity to it was the deposit in the minds of the parties to the mortgage when it was made in June the facts of this case leave no question.

We have a case that is its parallel in Ohio authority. In *Patterson v. Johnson*, 7 Ohio, 225, pt. 1, the mortgage was given to secure in-

dorsers upon a note stated in the condition of the mortgage to be "a note for the sum of \$500.00 indorsed by them, payable at the Washington branch of the Bank of Philadelphia." The facts showed that, as in the case before us, while the instrument upon which the indorsers secured by the mortgage had become obligated was actually executed, it had never been used to ripen the obligation of the indorsers and had been destroyed, so that, as in the case at bar, the identical condition of the mortgage recited in the defeasance clause of the mortgage had never been fulfilled. It follows that if in this case the mortgage became *functus officio* because the bond of June 9th was returned and canceled, so in that case the mortgage became dead because no note, as described in the defeasance clause, ever ripened into an obligation of the mortgagee. However, another note made by the same parties for the same sum was executed and presented and discounted at another bank, and, being unpaid, subsequently the mortgagees were compelled to pay it. The issue, so far as it concerns us in this case, was between the mortgagees and subsequent lienholders who took chargeable with constructive notice through the recording of the mortgage in question. The court say:

"An attempt is made to invalidate the mortgages by denying the right of the mortgagee to apply it to a purpose different from that expressed on its face, viz., to secure the payment of a note at the bank at Washington, which was never incurred. If a person had been misled by this description, and after due inquiry had advanced money upon, or acquired an interest in this specific land, in the confidence of the nonexistence of such a lien, perhaps his rights might be preferred; but a mere general incumbrancer, if he acquires no paramount legal right, occupies the position of the debtor, and holds his interests subject to all the equities which may be exacted against him. It is evident, in this case, that the grantor of this deed intended it as a protection to his indorsers for their responsibility, upon a contemplated loan for \$500; it is permitted in equity to trace this debt in favor of securities wherever contracted, and under any form it may assume in the usages of business, and attach the security to it. 4 Johns. Ch. [N. Y.] 65, 8 Am. Dec. 538. The judgment creditor has no reason to complain of rights infringed by this rule, for the mortgage transferred the legal estate and defined the extent of the burden it imposed upon the land. * * * It was, then, of no moment to the later incumbrancers who held this lien, so long as it did not transcend the original amount."

The case of *Brinckerhoff v. Lansing*, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538, the case cited by the court in the quotation just made, fully sustains the opinion of the Supreme Court of Ohio upon facts much more favorable to the contention of the trustee and Wells than exist either in the case before us or the case just cited, and is authority for the principle, that maintains to this day with undiminished force, that when a mortgage is made to secure a debt or obligation it may stand unimpaired as such security for such debt or obligation in whatever form the latter may take, so long as its identity as a lineal successor to the original transaction is unmistakable. 27 Cyc. 1053, 1075.

The case of *Patterson v. Johnson* is still the law of Ohio. *Choteau v. Thompson*, 3 Ohio St. 424, 427, in which the opinion is by Thurman, C. J., who announces and concurs in a doctrine more applicable to the situation here than that which he criticises as the opinion of the majority of the same court in the case of *Choteau v. Thompson*, 2 Ohio

St. 114, which counsel for Wells and the trustee cite. *Brown v. National Bank*, 44 Ohio St. 269, 274, 6 N. E. 648.

In *Shirras v. Caig*, 7 Cranch, 34, 51 (3 L. Ed. 260), Chief Justice Marshall uses this language:

"It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of £30,000 sterling due to all the mortgagees. It was really intended to secure different sums, due at the time from particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount. It is not to be denied that a deed, which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is, certainly, always advisable fairly and plainly to state the truth. But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights, unless it be in favor of a person who has been, in fact, injured and deceived by the misrepresentation. That cannot have happened in the present case."

So it is here that the fact that the mortgage, dated in June and recorded in October, was held by the mortgagee to secure an obligation dated in September, could have injured no one. So far as the recital in the defeasance clause was a misrepresentation, the fact was harmless. Would anybody question that this mortgage was good had the second bond, the one returned, never been made? We would have had then a situation that is not infrequent of a mortgage made prior to the date of the obligation which it was intended to secure. If counsel's argument against this mortgage as applicable to the bond issued in September is good, because that bond does not meet the description in the defeasance clause, then it would be equally applicable had the bond of June 9th, a date two days later than the date of execution of the mortgage, been actually issued and taken effect. On the face of it, such a position would receive scant consideration in a court of equity; and, in view of the fact that there can be no question but that the bond of September is the culmination of a transaction in which the mortgage of June was an essential part, it seems to us that the situation calls for precisely the same determination had the facts been either that the June bond was not executed or that the September bond had not been executed and the June bond had been delivered to the board of education.

Counsel for the trustee and Wells truly argue on authority by them offered that, inasmuch as the bond of September expired with the year, the renewal in 1910 was a new contract; but, that being so, we must not fail to distinguish between the essential fact of a continuing obligation unchanged in identity and the clothing in which that obligation may be garbed from time to time. The obligation from September, 1910, until May, 1911, was the same obligation which the surety company undertook with the board of education as that shouldered by it in September, 1909, and the authorities already cited, and many which could be cited which the industry of counsel in this case has called to the court's attention, are all to the point that a renewal which takes the form of a new contract does not alter the force of the mortgage lien so long as the identity of the obligation secured remains.

Among the many cases cited by counsel for the surety company supporting this proposition are: *Durfee v. Knowles*, 50 Hun, 601, 2 N. Y. Supp. 466; *Parks v. Frahm*, 54 Kan. 676, 39 Pac. 185; *Bobbitt v. Flowers*, 1 Swan (Tenn.) 511—which are especially in point.

The surety company asks that the mortgage may be reformed so as to express the actual relation between the parties. We do not deem this to be necessary. Very little reformation, if any, seems to us to be possible. In view of the not uncommon practice to have a mortgage antedate the actual execution of the obligation which it secures, the instrument in question can hardly be said to be ambiguous, even as applied to the September bond, and in this proceeding the court may well enforce the rights of the mortgagee without reformation on the principle that a court of equity can treat as done that which should be done. *Pomeroy*, § 1235; *Walker v. Brown*, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865.

[3] Nor is there any force, in our judgment, in the contention of counsel that to allow testimony applying the mortgage to the September bond is to vary by parol a written contract. It is always competent to use extrinsic evidence to identify the mortgage with the obligation which it secures, and that proceeding has never been considered to be a violation of the rule invoked by counsel. *Hurd v. Robinson*, 11 Ohio St. 232; *Jones v. Guarantee & Indemnity Co.*, 101 U. S. 622, 25 L. Ed. 1030.

It follows that the referee was wrong in avoiding this mortgage, and it is ordered that on the distribution of the assets of the estate an accounting be had with the Fidelity & Casualty Company of the proceeds of the so-called Hardy Farm and the extent of its lien thereon as determined by the mortgage and the loss incurred by it through the default made on the September bond as renewed for the subsequent year. The Fidelity & Casualty Company will also recover its costs out of the proceeds of sale of the Hardy Farm.

SPERRY & HUTCHINSON CO. v. POMMER et al.

(District Court, N. D. New York. October 27, 1913.)

INJUNCTION (§ 128*)—GROUNDS—INDUCING BREACH OF CONTRACTS.

Complainant was in the trading stamp business with a general agency in Albany, where it had customers, when defendants, who had a store in Albany, entered the same business in that city. Their agent solicited business from merchants generally, including those using complainant's stamps. The contracts of most, but not all, of these contained a provision that they should not use any other kind of stamps during the term of the contract, but some of them did not know of such provision. Defendants advertised their list of customers and included therein through error some merchants who were using complainant's stamps but not theirs, but such errors were corrected when called to their attention. It did not appear that their agent made any misrepresentations. *Held*, that while they were not justified in advertising complainant's customers as their own contrary to the fact, or in soliciting complainant's customers known

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to be under exclusive contracts with it to break such contracts, there was no such evidence of an intentional unlawful interference with complainant's business as to warrant the granting of an injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 278; Dec. Dig. § 128.*]

In Equity. Suit by the Sperry & Hutchinson Company against Henry Pommer and others. On final hearing. Decree for defendants on filing stipulation.

Suit to restrain defendants from interfering with complainant's business—by acts alleged to amount to unfair competition in trade—and inducing complainant's customers to break their contracts.

Richard O. Bassett, of Albany, N. Y., and Frank T. Wolcott and John H. Jones, both of New York City, for complainant.

Louis M. King, of Schenectady, N. Y., Alfred D. Lind, of New York City, and Leopold Minkin, of Albany, N. Y., for defendants.

RAY, District Judge. For some two years or more prior to April, 1912, the Sperry & Hutchinson Company, with Patrick F. Jordan as its general manager in Albany, N. Y., had been in business in the city of Albany, in the trading stamp business, and its stamps are known as "S. & H." stamps, or "Green" stamps, referring to their color. These are put up in pads and sold to merchants who give them out to customers, if asked for, who pay cash for their goods. The Sperry & Hutchinson Company has a premium store where it keeps a line of goods of various kinds which are given out without charge in exchange for a book of stamps when a customer of the stores where these stamps are kept has gathered a book of stamps. This encourages purchasers to pay cash and enables them to obtain a premium free or, we may say, as a reward for having paid cash for purchases. Having the stamps to give out brings cash trade to the merchant and in this way is beneficial to him. Sperry & Hutchinson purchase these "premium goods" at wholesale and reap their reward through the profit made on the stamps sold. That is, if they sell a 1,000 pad for \$5 and give the collector (purchaser of goods) a premium which costs them \$2 in redemption of a book of 1,000 stamps and the cost of soliciting trade for the merchants who keep their stamps, advertising, rent, etc., for such stamps is \$2, then there is a profit of \$1 in that transaction. The housewife pays cash and gets a premium, the merchant gets increased cash trade for his money paid for the stamps, and Sperry & Hutchinson Company gets a profit on the goods it gives out as premiums. The business is legitimate and lawful if honestly conducted, although some of the merchants say it is annoying to them, but that they are compelled to keep stamps or lose business.

While the complainant company was running its business in Albany, the defendants Pommer started the same business there, putting out what is known as the "Palace" stamps. They have a furniture store where they do a general business and also keep their premium goods. Both advertise, but the Pommers advertise the more extensively. The

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

moment the Pommers started in this trading stamp business they became competitors of the Sperry & Hutchinson Company.

The complainant company usually required those to whom it sold and delivered or agreed to sell and deliver these "Green" or "S. & H." stamps to sign a contract in which is found this clause:

"Said subscriber agrees not to use any trading stamps issued by said company, except those furnished to him direct by it, and not to offer, give or use any other coupons, trading stamps or similar device during the term of this contract, and not to form, encourage or join in any combination of merchants for the purpose of discontinuing the use of said company's trading stamps. The subscriber also agrees that all newspaper and other advertisements published by or for him, shall state, 'We give "S. & H." Green Trading Stamps.'"

Quite a number of the merchants in Albany who had signed these contracts testified that they did not read these agreements, and that the contract was not read to them, and they did not understand or know they had signed a contract containing such a clause. I find that this was true as to several of these merchants who subsequently took Palace stamps of defendants. After the contracts were signed and the delivery of stamps commenced, it was the custom of the complainant's manager to take receipts for the stamps so delivered, and after 1910 the receipts so taken contained this clause:

"Conditions under which S. & H. Green trading stamps are furnished to merchants. * * * The undersigned agrees to use no trading stamps or similar devices except those furnished direct to him by the company, so long as he uses the trading stamps of or exhibits the advertising signs of the company."

The receipt signed was always below these conditions and the receipt was always taken away by the agent of the company. I find that but few, if any, of these merchants knew they had signed a receipt containing such a statement or condition. These merchants were usually busy when the pads of stamps were delivered from time to time, and they signed these receipts as a mere receipt for a pad or pads of stamps and not as a contract. This the Sperry & Hutchinson Company's agent well knew, and the contents of the receipt, these conditions, were not explained to them.

In all, or nearly all, stores where the merchants gave out these "S. & H. Green trading stamps," there was a sign furnished by the Sperry & Hutchinson Company stating, in substance, "We give out Green trading stamps." It follows that when defendants' agent went into one of these stores he knew or ought to have known that he was interviewing a merchant who was giving out the Green stamps. However, this did not inform him that the merchant was under an exclusive contract not to give out other trading stamps.

In April, 1912, the complainant by its duly authorized attorney sent the defendant Henry Pommer the following letter, which was duly received:

"New York, April 5, 1912.

"Mr. Henry Pommer, % Pommer Furniture & Carpet Palace, Albany, N. Y.—Dear Sir: The Sperry & Hutchinson Company has directed me to write you, notifying you that the merchants in Albany who are giving out 'S. & H.'

Green trading stamps to their customers, are under contract for specific periods of time to use 'S. & H.' Green trading stamps exclusively, and not to use the trading stamps, coupons or similar devices of any other concern. I am informed that your agents are endeavoring to induce merchants under contract with the Sperry & Hutchinson Company to violate this clause of their agreement by installing your stamps. The courts of this state and of the United States have repeatedly declared that it is an injury for which an action for damages will lie to induce one party to a contract to violate it. I have no doubt you do not wish to have an action brought against you and this warning will be sufficient to prevent you from further violation of my client's contracts. If you disregard this letter, I am instructed to commence an action against you for damages with an injunction, without further notice. I should be glad to hear what explanation, if any, you have to offer in the matter.

"Very truly yours,

John Hall Jones."

To this the defendant Pommer by his agent and attorney answered April 22, 1912, as follows:

"April 22, 1912.

"John Hall Jones, Esq., 2 West 45th St., New York, N. Y.—Dear Sir: My attention has been called to your letter of April 5, 1912, to Mr. Henry Pommer, this city, with reference to the business of the Palace trading stamps and to certain letters addressed by you to merchants in this city, who have lately subscribed for such stamps. Also, I have been advised of the actions of the Albany agent of the Sperry & Hutchinson Co., one Jordan, who has lately busied himself slandering Mr. Pommer, intimidating his customers and generally interfering with the Palace trading stamp business. Mr. Pommer has been and now is refraining from and will continue to refrain from fraudulently interfering with the trading stamp business of the Sperry & Hutchinson Co. and it is expected and insisted that the Sperry & Hutchinson Co. likewise refrain from fraudulently interfering with the business of the Palace trading stamps or steps will be taken to compel the Sperry & Hutchinson Co. and its agents, particularly Jordan, so to act. The only kind of competition the Sperry & Hutchinson Co. will receive from Mr. Pommer is honest competition and that the Sperry & Hutchinson Co. should welcome instead of trying to stifle. The merchants who have received your letters with reference to their having installed Palace trading stamps have, I am informed, been generally advised by their respective counsel that they have in no wise rendered themselves liable to the Sperry & Hutchinson Co., and that the alleged contract you claim they have violated is invalid, unlawful and contrary to public policy.

"Yours very truly,

Leopold Minkin."

Thereupon and on April 23, 1912, Mr. Jones wrote as follows:

"New York, April 23, 1912.

"Leopold Minkin, Esq., De Graaf Building, Albany, N. Y.—Dear Sir: Replying to yours of 22d, it seems strange that a responsible attorney like you should maintain that the trading stamp business as carried on under contract is invalid and contrary to public policy, in view of the fact that seventeen courts of appeal and numerous federal courts have passed upon the Sperry & Hutchinson Company's contract and have declared that contract and business perfectly legal. It may be that your letter was written without due consideration. Kindly read: 109 N. Y. 389; 72 App. Div. 308; 102 App. Div. 103, for New York cases. 134 Fed. 691; 145 Fed. 659; 135 Fed. 833; 161 Fed. 219; 137 Fed. 992. A short review of these cases will indicate to you that I am absolutely correct in my statement that Mr. Pommer is unlawfully interfering with the contracts and business of the Sperry & Hutchinson Company, and while I should be sorry to cause him the expense and trouble of litigation, I shall be compelled to take legal action to protect the Sperry & Hutchinson Company's business, if any further interference on his part is brought to my attention.

"Mr. Pommer has no right to interfere with the contracts of the Sperry & Hutchinson Company nor to induce any merchant under contract to violate the same, nor to exchange his stamps for 'S. & H.' stamps or traffic in 'S. & H.' stamps in any manner. If he violates our rights in these particulars we shall have to teach him how to respect such rights.

"Very truly yours,

John Hall Jones."

Here was notice that all merchants in Albany who were giving out the "S. & H. Green trading stamps" were under contracts with Sperry & Hutchinson Company for specific periods to use such trading stamps exclusively with negative covenant not to use those of other concerns. As matter of fact this statement was incorrect, as in one or more cases the contract did not so provide, the exclusive use clause having been stricken out, and in one or more instances there was no written contract at all and no verbal contract for any particular time and no agreement not to use the trading stamps of other concerns. Sperry & Hutchinson Company, the complainant here, knew this, and was evidently endeavoring to prevent the defendant Pommer from supplying his stamps to any one who was giving out the "S. & H. Green trading stamps" whether the merchant was under exclusive contract or not.

This suit was commenced August 12, 1912. June 2, 1912, there appeared in the New York World, published in New York City, the following:

"Sues for \$725,699 Trading Stamp 'Gifts.'

"Great A. & P. Co. Says Sperry & Hutchinson Gave 59 Cents a Unit
Instead of \$1.18.

"Suit for \$725,699 was begun yesterday in the New Jersey Supreme Court, at Newark, by the Great Atlantic and Pacific Tea Company, against the Sperry & Hutchinson Company. The tea company alleges that the defendant concerned violated a contract made July 25, 1909, to give \$1.18 worth of merchandise for 990 stamps, representing \$99 in purchases of customers.

"The tea company asserts that since it entered into the contract, less than three years ago, it has used 725,669,000 Green trading stamps, for which it has paid the defendant company \$1,451,338.

"The tea company says the stamp company only gave 59 cents of value in merchandise for 990 stamps, or only one-half the value its contract called for. The stamps were given out to the customers of the chain of stores operated by the plaintiff corporation.

"Chief Justice Gummere dismissed an application for a bill of particulars made in behalf of the Sperry & Hutchinson Company, yesterday, and directed its counsel to proceed through interrogatories."

Later H. J. Pommer put up in the window of their place of business a clipping of this article, but on notice immediately took it down. Two or three merchants using the Green stamps received a copy of the paper with this article blue penciled. It is not denied that a suit as stated was commenced and that the allegations set out in the article were contained in the complaint in that action. In point of fact the premiums given out in Albany for 990 stamps are worth from \$1.50 to \$2 or more. The complainant here would have us infer that defendants intended to represent to merchants using the Green stamps by posting up and sending this article (if defendants did send it) that the Sperry & Hutchinson premiums for a 990 stamp collection, one book, was worth only 59 cents, when in fact it was worth five or six times that. There is no proof in this case that the Pommers did not believe

all the statements made in that article were true and that the allegations made by the tea company against Sperry & Hutchinson Company were true.

April 26, 1912, in the Times Union, published at Albany, the Pommers had an advertisement:

"Patronize the stamp made in Albany; ask your grocer, the butcher, the dry goods, the clothier, the shoe man and other dealers and have the books redeemed at Pommers big furniture and carpet store. Ask these merchants for them. (Here follows a list of names of merchants with their addresses in Albany under a heading giving their business.) Pommers furniture, carpets, rugs, etc. 153-159 So. Pearl St. Almost everybody has had experience with the old method stamps. Nuf Ced."

In the list of names contained in this advertisement appear several who were receiving the "S. & H. Green trading stamps," and some of them were under contract with the Sperry & Hutchinson Company. William Hannay was one of these, and he testified, in substance, that Pommer called to see about his using Palace stamps, and he (Hannay) told Pommer of his contract and that he was not entitled to use the stamps.

"So he left a pad with me until I could find out whether I could use them or not, and I found out I couldn't, and so I sent them back. * * * I told Pommer if I found out I had a right to use them I would use them."

Also that it was a long time before they had any further communication and before Pommer was advised that Hannay was not going to use them. Said nothing about the advertisement of Pommer until it was in a dozen times and then sent word and it was not put in any more. (Meaning his name was not published any more.) Morris Sherman was another merchant who had a contract in fact, but he says he did not know he had such a contract, and so when asked to put in Palace stamps said nothing of a contract. Says Pommer wanted to sell him a pad of stamps, and he said he would not buy them because he did not know whether people would want them, but Pommer could leave a pad, and if people called for them he would give them out and pay for them. Several of the merchants who were taking the Green stamps when called upon and requested to put in Palace stamps also simply stated they had a contract, but there is no evidence they claimed or stated it to be a contract to take the Green stamps exclusively. Defendants' agent generally explained that the Pommer Palace stamps were cheaper than Green stamps and that the Pommers proposed to advertize their customers. All the witnesses state that Pommer and his agents made no false or untrue statements by way of inducement to introduce Palace stamps or otherwise.

May 14, 1912, defendants published an advertisement in the Knickerbocker Press, published and circulated in Albany, stating:

"These dealers will give you Palace stamps. Begin this very morning. Say to your dealer, 'I want Palace trading stamps for they are many times the best.'"

Then follows a number of names with address and business and under each, "We give Palace stamps." Some of these merchants did give Palace stamps. A few in so doing violated the terms of the con-

tract they had signed in ignorance of the condition. In one or two cases a suit was brought against the merchant either for damages or to enjoin his using the Palace stamps, but same did not come to trial, as the merchant discontinued using the Palace stamps and consented to an injunction enjoining him from using them. There seems to have been "consent decrees" in effect compelling specific performance of a contract not to use trading stamps other than the Green stamps put out by the Sperry & Hutchinson Company. It also appears from the evidence that the agent of the Pommers in Albany had been in the employ of Sperry & Hutchinson Company, and, it is claimed, he was familiar with the business methods of that company, including its custom of making these so-called "exclusive contracts" with the merchants who purchased and put out the S. & H. Green trading stamps. It is contended therefore that defendants Pommer, who issue the Palace stamps, must have known, or are charged with knowledge that all merchants who put out these Green stamps were under these "exclusive contracts" and that the mere offer to them of the Palace stamps, or request that they put in and use the Palace stamps, or the sale to them of Palace stamps, was inducing them to break their contracts with the complainant, or an effort so to do, and a wrongful act which should be enjoined, although no artifice, untruth, or false statement or fraud was resorted to or used. The contention is that this is especially true inasmuch as the Pommers offer to sell their Palace stamps for less money than the Green stamps are sold for and do more and better advertizing.

In *Angle v. Chicago, St. Paul, etc., Railway*, 151 U. S. 1, 13, 14 Sup. Ct. 240, 245 (38 L. Ed. 55) it is held:

"If one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer. * * *

"Wherever a man does an act which in law and fact is a wrongful act," and injury to another results from it as a natural and probable consequence, "an action on the case will lie."

And at page 13 of 151 U. S., at page 245 of 14 Sup. Ct. (38 L. Ed. 55), the court said:

"It has been repeatedly held that if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer. *Green v. Button*, 2 Cr. Mees. & R. 707, in which the defendant, by falsely pretending to one party to a contract that he had a lien upon certain property, prevented such party from delivering it to the plaintiff, the other party to the contract, and was held responsible for the loss occasioned thereby."

In the case now before this court all the witnesses concur in saying that no false or untrue statements were made, and I do not find that any deceit was practiced. It cannot be denied that in two or three instances the defendants did urge the merchants to take and use the Palace stamps, and the case is reduced to the simple proposition: Did such requests, the advantages of using the Palace stamps being pointed out to the merchants, amount to an unlawful attempt to induce

the merchants to break their contracts? Can malice be implied from what was said and done? It was clearly lawful for the Pommers to establish this trading stamp business in the city of Albany and secure custom by lawful means, and I see nothing wrong in putting out Palace stamps for less money than the Sperry & Hutchinson Company charged for theirs. It was perfectly proper for the Pommers to do any amount of free advertising for themselves and their customers, and I know of no law which would close their mouths to the truth when conversing with merchants who were putting out the S. & H. Green stamps. Some of the cases speak of this business as an advertising medium, and some say it is a business "*sui generis*," and intimate that it has special privileges. Conceding this, it seems to me that the well-known rules of law are to be applied. There may be free and untrammelled competition in this business, as in others, so long as there is no fraud practiced and no unfair competition and no unlawful interference with valid contracts. Both the Sperry & Hutchinson Company and the Pommers have stores where they keep a stock of goods so selected as to be desired and sought after by householders and housewives. These goods are purchased at wholesale, and the purpose is to dispose of them at a profit. Neither the Sperry & Hutchinson Company nor the Pommer Company is a philanthropist or a benefactor of the human race. Both are seeking to dispose of their wares for cash and at a profit. True, neither sells to customers for cash, but each delivers property to customers in exchange for stamps which it has put out or sold for cash and which stamps it has promised to redeem in goods. To aid itself in so disposing of its goods, the co-operation of other merchants is sought and enlisted who really pay the money therefor and who, it seems, are able to do so because of the advertising and increased cash trade they get. Each company is at liberty to fix the price of its stamps and the amount of advertising it will do and the character and value of the article (so-called premium) it will give in redemption of its stamps or promises to pay.

These stamps are a sort of nonnegotiable promissory note payable on demand in property to be selected from a certain list. These notes are sold for cash and certain free advertising. The exclusive contracts bind these merchants not to use the notes or stamps of the competing company. The one obtaining these contracts seeks, of course, to monopolize the business, in this line, of the merchant. The merchant entering into such a contract binds himself not to use other stamps, and hence he limits his trade so far as he gives out stamps to those who are collecting that particular stamp, but he in no way limits his general trade. He sells to all would-be customers who find the goods desired and who pay the price and do not desire stamps. The merchant does not bind himself not to deal with or sell goods to those who are collecting some other stamp, but he does bind himself not to give out that other stamp, and hence he binds himself to lose the trade of would-be purchasers of goods who desire other stamps and refuse to purchase his merchandise for the reason they cannot get the stamps. This, of course, is a restraint of trade to an extent. To an extent he limits his trade. I think the contracts referred to legal and binding between

the parties thereto and not unlawful as in restraint of trade. The Legislature of the state of New York on at least two occasions has attempted by legislation to blot out this trading stamp business, but the legislation was pronounced outside of the police power and unconstitutional. I do not think it at all strange that questions were raised as to the legality of these exclusive contracts and the fact that the question was raised as shown by the evidence is no evidence to my mind that defendants intended any unlawful interference with the complainant's business. So far as the advertisements are concerned, it appears that these were corrected. If a merchant under one of these exclusive contracts sees fit voluntarily to disregard it and take Palace stamps, he has the privilege so to do, taking the chances of suit, and defendants have the right to furnish them to any merchant asking for them so long as they do nothing to induce or procure such merchant to break the contract.

This court will not undertake to enjoin defendants from merely furnishing Palace stamps to any merchant who desires them, or from merely describing the merits of the Palace stamps. To knowingly and intentionally advertise in the public press the names of Sperry & Hutchinson Company's customers as takers and users of the Palace stamps, when such customers were not, would injure the complainant's business, and if the advertising were persisted in such injury would hardly be capable of adequate remedy in a court of law. So persistent solicitation of complainant's customers generally to take and put in the Palace stamps, such solicitors knowing that such customers are under contract to take and use the S. & H. Green stamps only, if successful, would work an injury to complainant's business and constitute an unlawful interference with such business, and actions at law against such customers would not afford an adequate remedy. But taking all the evidence and considering all that was said and done under the circumstances shown, I am not satisfied that defendants intended any unlawful interference with the complainant's business. Clearly it was not unlawful for customers who did not know they were under contract to take the Green stamps exclusively to take and use the Palace stamps, and I do not think the defendants were bound to assume, contrary to the fact, that all merchants using the S. & H. Green stamps were under contract to use same exclusively. I am not prepared to hold that defendants in any way violated complainant's rights by expressions of opinion that such exclusive contracts are in restraint of trade and void or in violation of the so-called Sherman anti-trust law. There is no evidence that such expressions were not made in good faith.

I am of the opinion that full and complete justice will be done in this case if defendants file a stipulation:

1. Not to advertise any person, corporation, or firm under contract with the Sperry & Hutchinson Company to take and put out its S. & H. Green stamps exclusively, as taking, using, and giving out to customers in the city of Albany the Palace stamps who is not actually so doing at the time.

2. To refrain from soliciting the customers of complainant in the city of Albany under exclusive contract with complainant to use their Green stamps only, to take and give out Palace stamps, provided complainant first notifies defendants in writing of the names and addresses of all its said customers who are under such exclusive contract.

If such stipulation is executed, served, and filed within 30 days from November 1, 1913, there will be a decree dismissing the bill of complaint without costs, subject to the right of the court to open such decree at any time within two years and enter a decree with costs enjoining such acts on satisfactory proof that the stipulation is not being observed. If such stipulation is not executed, served, and filed within said 30 days, there will be a decree enjoining such acts.

In re SUPERIOR DROP FORGE & MFG. CO.

(District Court, N. D. Ohio, E. D. February 28, 1913.)

No. 4,373.

1. BANKRUPTCY (§ 140*)—OWNERSHIP OF PROPERTY—SELLER AND BUYER OF MACHINERY—EFFECT OF SUBSTITUTION OF PURCHASERS.

Claimant sold two drop forges to the owner of a plant on a conditional sale contract which provided that they should be considered personalty and remain the property of claimant until paid for, which contract was duly recorded. The machines were very heavy and were bolted to concrete beds but could be removed without injury to the building. The purchaser sold the plant to bankrupt, not having paid for the forges, and for the purpose of substituting bankrupt in his place a new contract in the same terms was made between claimant and bankrupt and recorded and the old one canceled. *Held*, that the transaction did not affect the status of the forges, which remained personal property as between claimant and the bankrupt and its creditors and holders of subsequently acquired liens on the plant.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

2. FIXTURES (§ 22*)—BETWEEN SELLER AND BUYER OF MACHINERY—INTENT IN MAKING ANNEXATION.

Drop forges, motors, and printing presses, all heavy machines bolted to concrete beds in a manufacturing plant and which were necessary to the business carried on therein but could be removed without injury to the building, may retain the character of chattels and not become a part of the realty, under the law of Ohio, where such was the intention of the owner of the plant when they were installed, as where they were purchased under conditional sale contracts expressly providing that they should remain personalty and the property of the seller until paid for.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 57; Dec. Dig. § 22.*]

3. BANKRUPTCY (§ 144*)—TITLE AND RIGHTS OF TRUSTEE—EQUITIES OF THIRD PERSONS.

Bankr. Act July 1, 1898, c. 541, § 47a2, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3439), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), by vesting a trustee with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, as to property in the custody of the court, simply puts the trustee in the position of a creditor who has reduced his claim

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to judgment, whose rights with respect to specific property are subject to all latent or secret prior liens or equities in favor of third persons.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 237; Dec. Dig. § 144.*]

4. **BANKRUPTCY (§ 140*)—TITLE AND RIGHTS OF TRUSTEE—PROPERTY HELD UNDER UNRECORDED CONDITIONAL SALE CONTRACTS—OHIO STATUTE—"CREDITOR."**

Gen. Code Ohio, § 8568, which provides that conditional sale contracts, unless evidenced by writing and recorded, "shall be void as to all subsequent purchasers and mortgagees in good faith and creditors," avoids such contracts as to such creditors only as have acquired liens upon the property and does not include creditors who, prior to the recording of such a contract, have acquired general liens through the appointment of a trustee in bankruptcy for the purchaser.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1713-1722; vol. 8, pp. 7622, 7623.]

5. **MECHANICS' LIENS (§ 198*)—PROPERTY AFFECTED—FIXTURES PURCHASED UNDER CONDITIONAL SALE CONTRACT.**

A mechanic's lien which under the statute attaches to real property only does not attach to machinery installed on the premises as against the seller of such machinery under a conditional sale contract valid as against the owner of the premises and by which he agreed that it should remain personalty and the property of the seller until paid for, and it is immaterial that the contract had not been recorded at the time the mechanic's lien was acquired.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 348-355; Dec. Dig. § 198.*]

In the matter of the Superior Drop Forge & Manufacturing Company, bankrupt. On review of orders of referee. Reversed in part.

Geo. O. Willett, of Cleveland, Ohio, for petitioning creditors.

F. C. Friend, of Cleveland, Ohio, for bankrupt.

White, Johnon & Cannon and Smith, Taft & Arter, all of Cleveland, Ohio, for trustee.

KILLITS, District Judge. This case is before the court on petitions for review filed by the trustee and two claimants, the Alliance Machine Works and the Lake Erie Nail & Supply Company (which parties will be designated hereafter as the Alliance Works and the Lake Erie Company).

[1] The facts show that in the spring of 1911 the Alliance Works sold to one Eurich two drop forges on a conditional sale contract which provided that the machines should be considered personal property until paid for and should remain the property of the vendor until all charges therefor had been paid. They were installed in Eurich's plant upon heavy cement foundations specially constructed for them, to which they were bolted. Although exceptionally heavy, they were capable of removal without injury to the building, which was, however, constructed specially for a forging plant. The conditional sale contracts were filed for record pursuant to section 8568, General Code of Ohio, at the time of installation.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the fall of 1911 the vendee, Eurich, not having complied with the terms of the conditional sale contract, sold his plant to the bankrupt, and in September the Alliance Works entered into a conditional sale contract with the bankrupt covering these two drop forges, with terms similar in all particulars to the contracts made with Eurich, filed them for record, and thereupon released the contracts as against Eurich. The facts show that this was done simply in an attempt to substitute the bankrupt for Eurich as the original vendee and due to the fact that the bankrupt had succeeded to Eurich's business. The referee was of the opinion that these two drop forges had become fixtures as to all persons other than the Alliance Works and Eurich when they were first installed, and that, as between the Alliance Works and the bankrupt, they were fixtures in September and could not be treated as personalty under the substituted conditional sales contract, and that therefore the trustee for the creditors of the bankrupt and the Variety Iron Works, who subsequently placed a mechanics' lien on the property, were entitled to treat these two forges as part of the realty.

We think that the referee's conclusion that the transaction in September, through which the attempt was made to substitute the bankrupt for Eurich, affected the status of these two forges is wrong. The facts show simply a desire on the part of the three parties to the transaction, Eurich, the bankrupt, and the Alliance Works, to continue the status of this property as it was established when first installed, and we see no justification in equity in holding that there was any disturbance of the status through the transactions referred to. A short time thereafter the Alliance Works sold the bankrupt a third drop forge, which was installed in the manner of the first two, and simultaneously a conditional sale contract was made and recorded, attempting to retain the status of this machine as personal property with title in the vendor until paid for. The referee awards this forge to the Alliance Works, and it is his decision that the first two forges are part of the realty, to be administered upon for the benefit of creditors generally, subject to the mechanics' lien that we are called upon to review.

[2] The Lake Erie Company, in the fall of 1911, sold the bankrupt five motors and three printing presses; each of them being an exceedingly heavy piece of machinery and each installed on heavy specially constructed concrete bases, to which they were bolted. Each of these machines is removable without damage to the building, and each is an essential to a well-equipped business of the kind in which the bankrupt was engaged. Three of these machines were installed prior to October 20, 1911, and the balance subsequent thereto, but on that date a conditional sale contract was entered into between the bankrupt and the Lake Erie Company by the terms of which these machines were to be regarded as personal property and title to remain in the vendor until paid for. This conditional sale contract was not filed for record under the Ohio statute until March 4, 1912.

A mechanics' lien was perfected by the Variety Iron Works, which the referee finds to be dated December 12, 1911, and which covers all the property in question, in the referee's opinion, except the last drop

forge sold by the Alliance Works. The petition in bankruptcy was filed March 28, 1912.

The referee distinguishes between his holding with reference to the last drop forge, which he concedes to be the property of the Alliance Works, as a chattel, and the machines furnished by the Lake Erie Company, because of the fact that the conditional sale contract held by the latter was not filed for record immediately.

The Variety Iron Works, mechanics' lien holder, is not before the court with brief or argument.

The referee bases his opinion upon the authority of *Case Mfg. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. 493. We join with him in depending upon that case as controlling very largely the determination of the issues involved, but we are of the opinion that the referee fails to properly apply it.

Teaff v. Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634, is conceded to be the leading case in American jurisprudence upon this general subject and its criterion of an irremovable fixture is that accepted by all courts and text-writers. It is that three tests must unite in application: (1) Real or constructive annexation of the article in question to the realty. (2) Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected. (3) The intention of the party making the annexation to make the article a permanent accession to the freehold.

We may assume that the several articles involved in this contention became fixtures on their several installations if the first two tests were all that determined the question. Each one was constructively annexed to the realty; each one was manifestly appropriated and adapted to the use or purpose of that part of the realty with which it was connected. But the third test fails. All the circumstances speak to the point that the intention of the vendee in annexing them to the freehold was not to presently make them a permanent accession thereto. Bearing in mind the relation of the trustee as the representative of creditors and thereby having the rights and remedies of a judgment creditor, which we will subsequently consider, whatever the bankrupt could legally do by way of exempting these chattels from the responsibility of fixtures through these conditional sale contracts, and which he did do, must be binding upon the trustee. The case of *Case Mfg. Co. v. Garven*, *supra*, as it is applied to the facts before us, deals with the question of what a vendee of chattels adapted to become fixtures may legally do by way of contracting that they shall, although affixed to the realty, be treated as personalty.

Whether the distinction made in *Case Mfg. Co. v. Garven* is artificial or not, it is the law of Ohio and must govern the case before us. It is that machinery which is driven merely and which may be removed without substantial injury to the building, leaving the latter to remain in a state adapted to manufacturing purposes generally, may be the subject of a treaty between vendor and vendee whereby, although affixed, it shall be considered to be personal property subject to the fulfillment of the terms of the contract, but that machinery which furnishes the motive power and which is general in its applica-

tion to manufacturing purposes cannot be installed in a building and remain subject to a contract which shall exempt it from bearing the responsibility of a fixture. So in that case the Case Manufacturing Company was permitted to retain its lien through a conditional sale contract upon certain machines for the manufacture of flour and meal, while the Mansfield Machine Works, a party to the case and having a conditional sale contract the same in character as that of the Case Manufacturing Company, was not permitted to enjoy its provisions because it involved the boiler and engine constituting the motive power of the mill. The court say (45 Ohio St. 301, 13 N. E. 497):

"The difficulty of prescribing a rule that may be applied to cases in general has been confessed both by courts and writers upon the subject; various tests have been adopted, none of which have been applied with anything like uniformity. It may, however, be admitted that the distinction between the motive power of a factory and the machines driven by it is somewhat arbitrary; still it is one based upon a physical difference, easily perceived, if not dictated by any well-defined principle, and is no more illogical than many distinctions to be found in other branches of the law. That which divides all property into real and personal is quite as wanting in anything like scientific classification, but, from its general recognition wherever the common law prevails, is found to be very convenient in practice; and it is such considerations that have always more or less influenced the adoption of definite rules of property. * * *

"Here the question is not whether the character of the property may be changed by the agreement of the parties as between themselves (of this there is no doubt), but, when the property is such that from the manner of the annexation it would, but for the agreement, ordinarily be regarded as a fixture, whether it can be made by the agreement of the parties to preserve the character of personalty so as to avail against innocent purchasers without notice. This must, we think, upon principle and authority, be answered in the negative."

The distinction which serves to determine the power to control by contract the status as a chattel of what otherwise would be part of the realty as a fixture is clearly expressed by the court in *Fortman v. Goepper*, 14 Ohio St. 558, on page 567:

"The general principle to be kept in view, underlying all questions of this kind, is the distinction between the business which is carried on in or upon the premises, and the premises, or locus in quo. The former is personal in its nature, and articles that are merely accessory to the business and have been put on the premises for this purpose and not as accessions to the real estate retain the personal character of the principal to which they appropriately belong and are subservient. But articles which have been annexed to the premises as accessory to it, whatever business may be carried on upon it, and not peculiarly for the benefit of a present business which may be of a temporary duration, become subservient to the realty and acquire and retain its legal character."

This case is cited by the Supreme Court of Ohio in *Case Mfg. Co. v. Garven*, and the distinction made evidently lies at the base of the discrimination made in that case between the Case Manufacturing Company and the Mansfield Machine Works; the point being that a contract to maintain the status of personalty might be made with reference to machinery which was peculiar to the special business to be presently carried on upon the premises but could not be made with reference to such machinery affixed to the realty which was not peculiar to the pres-

ent business but had adaptation to other lines of industry which might be carried on upon the premises. So that, in our judgment, this case of the Case Mfg. Co. v. Garven is authority for the proposition that the bankrupt might well contract that the machinery in question, whether furnished by the Alliance Works or the Lake Erie Company, should remain personalty, although affixed to the realty, until paid for, and that each of these several machines, drop forges, motors, and presses was a chattel as between the vendor and vendee. This position of ours is not in conflict with *Pflueger v. Lewis Foundry & Machine Co.*, 134 Fed. 28, 67 C. C. A. 102, decided by the Circuit Court of Appeals of this circuit: First, because of the difference in questions before the court (there the court simply deciding the question whether a mechanics' lien was valid); and, second, because in that case there was a specific finding that the vendee intended to make the machinery involved a fixture, having granted no reservation by contract, as in the case before us. Judge Severens in his opinion (134 Fed. 31, 67 C. C. A. 105) recognizes the fact that the intention of the vendee controls in this language:

"The general rule upon this subject rests largely upon the presumed intention of the party who acquires the chattel and brings it into fixed association with his own real property. What that intention was in the present case seems clear. We think there can be no doubt that the Ohio Steel & Iron Specialty Company intended to affix the machine in question to the real estate as a part of the mill, to remain such permanently. The modern authorities, at least, upon this subject, with hardly any exception, agree that, upon such a state of facts as is presented here, the machine or other thing becomes a fixture, in the absence of any statute leading to a different result."

It should be noted that the Supreme Court of Ohio in *Case Mfg. Co. v. Garven*, *supra*, avoided the effect of the *Mansfield Machine Works* contract only against "innocent purchasers without notice." The case is not authority for the proposition that, even with respect to the motive machinery, the equity which the *Mansfield Works* undertook to preserve would not be effective against claimants who were not of the standing of innocent purchasers without notice. It seems to us that the referee in his opinion has plainly overlooked this very important distinction, and it is profitable now to determine whether the trustee in his representative capacity enjoys the exalted status of an innocent purchaser. There is but one answer to this question and that is in the negative.

[3] By the amendment of 1910 to section 47, subd. 2a, the trustee is vested with all the "rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon." Collier remarks, with the production of authorities cited in his note (page 659 [9th Ed.]):

"This language aptly refers to such rights, remedies, and powers as a creditor holding such a lien is entitled to under the law rather than to the rights, remedies, and powers of a creditor who had actually fastened a lien on the property of the bankrupt estate."

In other words, the amendment of 1910 simply puts the trustee in his representative capacity in the position of a creditor who has reduced his claim to judgment. Such a creditor, by the settled law, is subject to all latent or secret prior liens or equities in favor of third

persons. 23 Cyc. 1377; Freeman on Judgments (4th Ed.) § 368; Miller v. Albright, 60 Ohio St. 48, 53 N. E. 490.

[4] Nor does the language of the Ohio Code respecting conditional sale contracts, which reads that the contracts "shall be void as to all subsequent purchasers and mortgagees in good faith and *creditors*, unless the conditions are evidenced by writing," etc., help any. Creditors, as the term is there used, by analogy of the same expressions in the law respecting the validity of mortgages of chattel property, means those who have at least taken steps to acquire liens upon the property of the debtor for their claims. York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; In re Shirley, 112 Fed. 301, 50 C. C. A. 252; In re First National Bank of Canton, 135 Fed. 62, 67 C. C. A. 536. And the fact that the filing of the verified statement of the claim and contract was not contemporaneous with the execution does not avail to avoid the effect of the contract with respect to the creditors whose claims become liens through the appointment of the trustee. The delay only operates in favor of those creditors who may have acquired liens during the interim. The delayed filing causes the benefits of the statute to work in favor of the vendor against all other creditors of the vendee. This is the law of Ohio with reference to the delayed filing of chattel mortgages and by analogy applies here. Wilson v. Leslie, 20 Ohio, 161; York Mfg. Co. v. Cassell, *supra*.

It follows that the referee's holding as to the last drop forge furnished by the Alliance Works was correct, and the trustee's petition for review directed against it should be denied. And it also follows that the referee's holding was wrong as to the first two forges furnished by the Alliance Works, and also wrong as to the trustee and those having liens under his appointment with reference to the several machines furnished by the Lake Erie Company.

[5] There remains now to be examined the apparently perplexing question of priority as between the mechanics' lien of the Variety Iron Works and the liens of the Lake Erie Company. It will be recalled that, during the interim between the taking of the conditional sale contracts from the bankrupt by the Lake Erie Company and the filing of the verified statement thereof, the Variety Iron Works acquired a mechanics' lien, and at first blush it would seem that the language of section 8568, Ohio Code, requires that the lien of the Variety Iron Works should have priority. It must be remembered, however, that a mechanics' lien attaches to real property only, whereas the conditional sale section of the Ohio Code deals with personal property. The delay in filing a verified statement under that section can only work to the involving of the chattel in a lien which may apply to chattels as well as real property. As to all creditors of the bankrupt except those who became judgment creditors and consequently in position to levy upon these machines as chattels, the failure to file the verified statement was of no consequence. The machines were each a chattel by virtue of the contract evidencing the intention of the vendee so to consider them. The mechanics' lienor is bound by the distinction which the Supreme Court of Ohio makes between that kind of machinery which may be the subject of a contract preserving its status as a chattel, although

fixed apparently to the realty, and that class which becomes part of the realty by fixture as to all innocent purchasers without notice, in spite of a contract between vendor and vendee.

In *Miller v. Albright*, 60 Ohio St. 48, 51, 53 N. E. 490, 491, the court is discussing the inferiority of a judgment lien to an unknown vendor's lien, saying:

"It is a well-established rule that the lien of a judgment attaches only to such beneficial interest in land as the judgment debtor has at the time of its rendition; and, when the rule is not otherwise affected by statutory regulation, as in cases of mortgages and other instruments which become effectual against third persons only on proper registration, the judgment lien is subject to all equities concerning the land which could be successfully asserted against the debtor. This rule is declared in *Tousley v. Tousley*, 5 Ohio St. 87, where it is said that, so far as the statute goes in giving a judgment creditor preference over mortgages not perfected by delivery to the recorder, 'his rights are absolute, but for everything else he is remitted to general principles, and on general principles it is very clear that he acquires a lien only upon the interest of his debtor and is bound to yield to every claim that could be successfully asserted against him.' Hence the lien of the vendor must be as effectual against the judgment creditor who simply succeeds to the interest of the vendee in the property as it is against the vendee himself. The vendor and the party holding the judgment being equally meritorious creditors, the former has the better equity, because so much of the land as is necessary to pay the amount due him on the purchase price is in equity his property, which ought not to be taken for the payment of another's debt."

So here, dealing with property which may be chattels, and hence not subject to a mechanics' lien or real property, according to the intention of the possessor in apparently affixing it to the real estate, it would seem that, as between conflicting equities, that of the unpaid vendor was superior to that of the mechanics' lienor.

It follows from the foregoing that the referee erred in refusing to allow the testimony of the manager of the bankrupt that at the time of making the agreements with the Lake Erie Company, and at the time the bankrupt installed the property covered by the said agreement, it was not the intention of the bankrupt to make such property a permanent accession to and part of its freehold estate, and that the referee was right in refusing to exclude the testimony offered by the trustee and the Lorain Street Savings Bank Company tending to show that the plant and manufactory of said bankrupt was built solely and wholly for use as a drop forging plant, and also in refusing to exclude testimony that the machinery involved in the several reviews was an integral part of said plant and manufactory. This testimony was competent, both that refused and admitted, in the application of the second and third tests laid down in the criterion established in the case of *Teaff v. Hewitt*, supra.

The petitions for review of the Alliance Machine Works and the Lake Erie Nail & Supply Company will each be allowed and their liens protected accordingly.

UNITED STATES v. UTAH POWER & LIGHT CO.

(District Court, D. Utah. March 31, 1913.)

No. 390.

1. TRIAL (§ 11*)—TRANSFER OF CAUSES—LAW OR EQUITY—MISTAKEN REMEDY.

That complainant was not entitled to maintain a suit in equity, because it had an adequate remedy by ejectment, is not ground for dismissal under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), providing that such objection is only ground for transfer of the suit to the law side of the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 28-30; Dec. Dig. § 11.*]

2. WATERS AND WATER COURSES (§ 4*)—USE OF WATER FOR MINING—RIGHT OF WAY FOR CANALS—STATUTES—REPEAL.

Act Cong. July 26, 1866, c. 262, 14 Stat. 253, § 9 (Rev. St. § 2339 [U. S. Comp. St. 1901, p. 1437]), providing that whenever, by priority of possession, rights to the use of water for mining, etc., have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors of such vested rights shall be protected and maintained in the same, and the right of way for the construction of ditches and canals for the purposes specified is confirmed, etc., was not repealed by Act March 3, 1891, c. 561, 26 Stat. 1095 (U. S. Comp. St. 1901, p. 1535), granting rights of way for canals, ditches, and reservoir purposes for irrigation, subject to burdensome conditions, nor by Act Feb. 15, 1901, c. 372, 31 Stat. 790 (U. S. Comp. St. 1901, p. 1584), declaring that the right to use adjacent ground on each side of a ditch should be revocable, but such statutes are to be construed as in pari materia.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 1; Dec. Dig. § 4.*]

3. WATERS AND WATER COURSES (§ 27*)—PUBLIC LANDS—RIGHT OF WAY FOR WATER DITCHES AND CANALS—FOREST RESERVE.

Where defendant had obtained a right of way over public land for a pipe line to conduct water for power purposes, as authorized by Act Cong. July 26, 1866, c. 262, § 9, 14 Stat. 253 (Rev. St. § 2339 [U. S. Comp. St. 1901, p. 1437]), defendant's right to the land was not affected by the subsequent incorporation thereof into a forest reserve.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 19; Dec. Dig. § 27.*]

4. WATERS AND WATER COURSES (§ 27*)—DITCHES—RIGHT OF WAY—GENERATION OF ELECTRIC POWER—"BENEFICIAL USE."

Act Cong. July 26, 1866, c. 262, § 9, 14 Stat. 253 (Rev. St. § 2339 [U. S. Comp. St. 1901, p. 1437]), confirming rights of way for the construction of ditches and canals for the transportation of water for mining, agricultural, manufacturing, and other purposes, etc., granted rights of way over public land for ditches and canals for the generation of electric power; the generation of electricity being a beneficial use for which an appropriation of water might be had.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 19; Dec. Dig. § 27.*]

For other definitions, see Words and Phrases, vol. 1, p. 749.]

5. WATERS AND WATER COURSES (§ 27*)—PUBLIC LANDS—RIGHT OF WAY—PIPE LINE.

Where defendant acquired title to a right of way over public land for a pipe line and reservoir, as authorized by Act Cong. July 26, 1866, c.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

262, § 9, 14 Stat. 253 (Rev. St. § 2339 [U. S. Comp. St. 1901, p. 1437]), it was under no obligation to proceed to acquire rights under subsequent legislation; but, having elected to stand on the grant under section 9 and the amendment thereto including reservoirs, it could not claim any additional right under such subsequent legislation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 19; Dec. Dig. § 27.*]

In Equity. Suit by the United States against the Utah Power & Light Company. On motion to dismiss the whole and specify parts of the complaint. Sustained in part, and denied in part.

The suit was brought by the United States to determine the rights of the power company with reference to the maintenance of a part of its plant within the national forest without permission from either the Secretary of the Interior or the Secretary of Agriculture, and to enjoin an alleged continuing trespass or purpresture; the government claiming that the defendant had gone on the public domain and on the national forest without consent or permission of the government, and had constructed part of its plant thereon prior to inclusion of the land into a national forest.

H. E. Booth, U. S. Atty., of Salt Lake City, Utah.

Waldemar Van Cott, of Salt Lake City, Utah, for defendant.

MARSHALL, District Judge. [1] It is first objected that the plaintiff has an adequate relief at law, and hence no right in equity. The plaintiff alleges an exclusive possession in defendant—not simply an exercise of an easement. A claim of right is not negated. An action in ejectment would seem to furnish adequate relief. But it is not necessary to determine this question. Under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), the objection, if well taken, is only ground for the transfer of the suit to the law side of the court, and does not justify a dismissal.

[2, 3] Passing to the merits, the important issue is whether under section 9 of the act of July 26, 1866, carried into the Revised Statutes as section 2339 (U. S. Comp. St. 1901, p. 1437), the defendant had a title to a right of way for a pipe line for conducting water for power purposes. If so, the incorporation of the land into a forest reserve after defendant's right attached does not defeat it. It is claimed for the plaintiff that such right does not exist for these reasons: (1) That as to electric power purposes section 9 was repealed by Act May 14, 1896, c. 179, 29 Stat. 120 (U. S. Comp. St. 1901, p. 1573), amending Act March 3, 1891, c. 561, 26 Stat. 1095 (U. S. Comp. St. 1901, p. 1535), and by Act Feb. 15, 1901, c. 372, 31 Stat. 790 (U. S. Comp. St. 1901, p. 1584), which acts were prior to the initiation of the defendant's rights. (2) That section 9 never granted rights of way for canals and ditches for the generation of electric power, as such a use was not known at the time of the passage of that act.

Considering these objections briefly, it may be observed that section 9 has never been expressly repealed. If repealed at all, it is by im-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

plication. Does the subsequent legislation show an intent to repeal it? The subsequent statutes substitute for the grant of section 9 not involving any record title a revocable license based on a record; for a grant of a right of way for a ditch or canal a license to use such ditch together with 25 feet on each side of the same and other necessary ground not exceeding 40 acres; by the act of February 15, 1901, the right to use adjacent ground was extended to 50 feet on each side of the ditch and was expressly declared to be revocable. Do these subsequent statutes furnish additional or cumulative rights or were they intended to entirely displace section 9? Some light is thrown on this question by the act of March 3, 1891, granting rights of way for canals, ditches, and reservoir purposes for irrigation, subject to the filing of plats with the Secretary of the Interior and his approval thereof, and to a provision for forfeiture if the ditch or canal be not completed within five years. Was section 9 repealed by this act with respect to water rights for irrigation? This statute grants some rights additional to those granted by section 9, and is subject to burdensome conditions—to the small irrigator conditions so burdensome as in some cases to preclude the exercise of the right. If there was any class the government might be presumed to specially favor, it was the irrigator of land, and yet, if this was a repeal, he was singled out to be discriminated against. So that at an early date the Land Department of the government held that this statute was cumulative and did not repeal section 9 as to ditches for irrigation. *Cache Valley Canal Co.*, 16 Land Dec. Dept. Int. 192, 196; *Silver Lake, etc., Co. v. City of Los Angeles*, 37 Land Dec. Dept. Int. 152; *McMillan Reservoir Site*, 37 Land Dec. Dept. Int. 6; *Lincoln County, etc., Land Co. v. Big Sandy Reservoir Co.*, 32 Land Dec. Dept. Int. 463. And so the courts generally decided. *Cottonwood v. Thom*, 39 Mont. 115, 101 Pac. 825, 104 Pac. 281; *Rasmussen v. Blust*, 85 Neb. 198, 122 N. W. 862, 133 Am. St. Rep. 650; *United States v. Lee*, 15 N. M. 382, 110 Pac. 607; *United States v. Conrad Investment Co. (C. C.)* 156 Fed. 123. In enacting subsequent statutes respecting power plants Congress must be considered to have taken note of these holdings. Again, it did not expressly repeal section 9; again, it granted additional rights subject to specified conditions. These statutes are in *pari materia*; they are to be construed together and presumptively evidence the same intent. The weight of authority is that section 9 has not been repealed.

[4] Does section 9 grant rights of way for ditches and canals for the generation of electric power? It recognizes rights to the use of water for mining, agricultural, manufacturing, or other purposes whenever they have accrued under local customs, laws, and decisions of courts, and grants a right of way for the construction of ditches and canals for these purposes. This was in the nature of a continuing offer and embraced water rights for any beneficial purpose. Its object was to promote the development of the resources of the country; and this object would be defeated by holding that it should be so strictly construed as to eliminate every purpose for which water was not then used. As stated in *Wiel on Water Rights*, the rulings of half a cen-

tury are opposed to it. That the generation of electricity is a beneficial use for which an appropriation of water may be made has long been settled. *Speer v. Stephenson*, 16 Idaho, 707, 102 Pac. 365; *Sternberger v. Seaton Min. Co.*, 45 Colo. 401, 102 Pac. 168; *Thompson v. Pennebacker*, 173 Fed. 849, 97 C. C. A. 591; *Cascade Co. v. Empire Co. (C. C.)* 181 Fed. 1011.

[5] I am satisfied that the defendant has a title to a right of way for its pipe lines and reservoir under section 9 of the act of July 26, 1866, and was under no obligation to proceed under the subsequent legislation. But having elected to stand on the grant of section 9 and the amendment thereto including reservoirs, it cannot claim any additional right under this subsequent legislation. In the complaint it was alleged that the defendant has acquired no such additional right. It is evident then that in certain respects the plaintiff is entitled to relief.

The motion will be sustained as to "conduits," "reservoir," and "steel pressure pipe" in paragraph 3 of the bill; and also with respect to those parts of paragraph 4 specified in the motion as (a), (b), (f), (k), (l), (m), and (n) in relation to that paragraph, and will be otherwise denied.

MOTTINGER v. HENDRICKS.

(District Court, N. D. New York. October 18, 1913.)

1. CORPORATIONS (§ 253*)—ACTION AGAINST STOCKHOLDER—PROCEEDINGS UNDER DOUBLE LIABILITY STATUTE.

A judgment of a court of Ohio in sequestration proceedings under the state statute determining the insolvency of a corporation and the necessity and amount of an assessment against the stockholders under their statutory double liability, and appointing a receiver to collect the same, if the proceedings were regular, is conclusive on a stockholder served with process of the receiver's right to maintain an action against him and of the necessity of the assessment and propriety of the amount; but if he was not within the state and did not appear he is not precluded from making any defense to the receiver's action which is personal to himself, and if he was not served with process, either personally, or by publication, the proceeding is a nullity as to him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1024-1030; Dec. Dig. § 253.*]

2. CORPORATIONS (§ 248*)—ACTION AGAINST STOCKHOLDER—DEFENSES—PAYMENT.

In an action by a receiver specially appointed to collect assessments, made against the stockholders of an insolvent corporation under a double liability statute against one of such stockholders, an allegation in the answer that defendant compromised with plaintiff and paid him a stated sum of money in full settlement of the claimed liability states a defense, at least pro tanto, to the extent of the actual payment made.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 998-1001; Dec. Dig. § 248.*]

At Law. Action by Arthur S. Mottinger, as receiver of Aultman, Miller & Co., an Ohio corporation, against Francis Hendricks, as a stockholder in such corporation. On demurrer to the second, third, fourth, and fifth defenses pleaded in the answer. Sustained in part.

Barnum & Wells, of Syracuse, N. Y., for plaintiff.

Hiscock, Doheny, Williams & Cowie, of Syracuse, N. Y., for defendant.

RAY, District Judge. The complaint alleges: That Aultman, Miller & Co. was incorporated under and pursuant to the laws of the state of Ohio, which laws, so far as deemed applicable or material here, are set out in the complaint; and that Francis Hendricks, defendant, then and now a resident of the state of New York, was and is a stockholder in said corporation to the extent of some \$5,800. That the said corporation became insolvent, did not and could not pay its just debts, and that under and pursuant to the laws and statutes of the state of Ohio certain proceedings were had and actions instituted in which all stockholders, including this defendant, were made parties; and that such actions proceeded to judgment in which it was determined that the said corporation was bankrupt, had not paid and could not pay its debts, and that to pay same, duly proved and established in the action, resort must be had to the stockholders to the extent declared by such judgment, and who in such case by the laws of Ohio are made liable for the debts of the corporation to a certain extent. In such action and proceedings Arthur S. Mottinger was appointed receiver and authorized to proceed and by suit or otherwise enforce the liability of such stockholders. He qualified as such receiver and has instituted this action in the District Court of the Northern District of New York to enforce the alleged liability of said Hendricks.

[1] It is not necessary to set forth the statutes of the state of Ohio. Suffice it to say that the allegations of the complaint bring the case within *Converse, as Receiver, v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, and *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163. That is, the proceedings and judgments in Ohio, if had and pronounced as set forth in the complaint, and the laws of that state are as set forth therein, establish: I. The right of the plaintiff as receiver to commence and prosecute this action in the state of New York. II. The amount and propriety of the assessment on stockholders and the necessity therefor. For these purposes all actual stockholders were sufficiently represented by the presence of the corporation in the state of Ohio.

However, if this defendant, Francis Hendricks was not within the state of Ohio, or personally served with process in that state, and did not appear in those suits or proceedings, in person or by counsel, he is not precluded by the action taken in Ohio from alleging and showing: (1) That he was not and is not a stockholder in said corporation, or that he did not own as many shares of stock as found and stated in those proceedings; (2) that in law or equity he has a claim against the corporation which he is entitled to set off against the claim of the receiver; and (3) any other defense personal to himself. In short, the orders made and judgments pronounced there are not in the nature of a personal judgment against the defendant here. *Converse v. Hamilton*, 224 U. S. 243-256, 32 Sup. Ct. 415, 56 L. Ed. 749.

The defendant, Hendricks, therefore admits the incorporation and corporate capacity of said Aultman, Miller & Co., but in legal effect and in appropriate language denies each and every other allegation of the complaint. He denies that the judgment alleged was pronounced, the ownership of 58 shares of stock as alleged, and denies that he was a defendant in the action. In his second defense he not only repeats the admission but the denials, and, to make sure that he may prove the facts, alleges that at all the times mentioned he was in and a resident of the state of New York and was not served with any process or papers in the action mentioned and did not appear, and that no jurisdiction of defendant was obtained. If defendant, Hendricks, was out of the state of Ohio and was not served with process personally or by publication, there was no due process of law in the proceedings in the courts of Ohio, and as to Hendricks all those proceedings are a nullity. To constitute due process of law in any proceeding, civil or criminal, affecting the personal or property rights of a defendant, there must be notice of some kind and an opportunity to be heard. The complaint here recognizes this fact and alleges that the defendant, Hendricks, was served by publication as required by the laws of the state of Ohio, and this allegation is put in issue by the answer.

[2] The third defense reiterates and restates all the allegations of the answer contained in the first and second defenses, to avoid unnecessary repetition, and further alleges that during the pendency of one of the alleged proceedings in Ohio to fix liability on the stockholders the defendant, Hendricks, fully settled with the plaintiff, the receiver who brings this action, and compromised the claim and was fully released from any and all claims which plaintiff had or might have on account of defendant's liability, etc., as such stockholder. The plaintiff contends that this defense is not good, as it is not affirmatively stated that the plaintiff as receiver had authority or power to settle or compromise the claim. First. Is there any presumption that this receiver did not have power or authority to act and do what he did do; that he violated his duty or acted contrary to the orders of the court, if any order was necessary? Second. In this case this receiver is not merely an ordinary chancery receiver, but is a quasi assignee and representative of the creditors for whose benefit the collection is being made, and as such is clothed with power to collect by suit or otherwise. *Converse v. Hamilton*, 224 U. S. 243, 257, 32 Sup. Ct. 415, 56 L. Ed. 749; *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163.

Can it be that this receiver as quasi assignee and representative of the creditors must sue in New York to recover more than he finds himself entitled to on examination of all the facts? And if he settles for less than he is entitled to demand and receive, under such circumstances that he must or may sue to recover the balance, and actually receives the sum of money agreed upon, can it be that the stockholder when sued cannot plead the facts, the agreement and the payment of the money, and that the court is powerless to apply such payment on the demand and give judgment for the balance? If A. has a valid claim against B. for \$500, as to which there is no question or dispute, and A. agrees to take \$250 in full settlement, there being no considera-

tion for the agreement, and B. pays the money, and A. subsequently sues for the whole sum, \$500, is it possible that B. cannot set up and prove the compromise agreement and be allowed the \$250 paid? I think these facts well pleaded, and that if proved as alleged, and there is no evidence to modify or limit, they would establish a defense in whole or in part; that is, limit or defeat recovery as the case may be. If the plaintiff succeeds in proving that the defendant owned ten shares of the stock and no more, can he recover more than \$1,000? And if on a settlement with a duly authorized agent of the receiver the defendant paid such receiver the \$1,000, can the plaintiff recover it again on the theory there was no order of court directly authorizing him to receive the money? If the plaintiff has received from this defendant all he was entitled to, does it matter when he received it or under what name? If the plaintiff in this suit establishes a liability of \$5,800, aside from interest, and the defendant shows an agreement to accept \$1,000 in full payment made prior to the establishment of the liability, and it then is made to appear that such settlement was without authority of law, it might not avail defendant, except as to the sum actually paid; but here one defense alleges that the defendant was actually released from all further liability and, if so, no further liability remains. If the plaintiff had no authority to release the defendant, that fact will be made to appear when all the facts are before the court.

But taking all the allegations of defenses 3 and 4, as set up, the defendant has paid \$1,000 which the plaintiff was not entitled to, to purchase his peace. As to the fifth and sixth defenses, they are mere denials accompanied by an affirmative allegation that the cause of action alleged did not accrue within the time specified—six years in the one defense and eighteen months in the other. Under the denials the cause of action alleged never accrued, and the sixth and seventh defenses are mere repetitions, with an added statement, without any fact alleged in either complaint or answer to support it, that the cause of action set forth did not accrue within the times mentioned. On the facts set forth in the complaint the cause of action did accrue within the six-year period. The statute did not begin to run until the decree or judgment making the assessment was rendered. *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163. I do not think the fifth and sixth defenses state any fact or facts constituting a defense. I am not holding that for certain purposes the defendant, Hendricks, was not represented by the corporation in the Ohio suit. He undoubtedly was, if a stockholder, for the purposes and to the extent hereinbefore stated, as decided by the Supreme Court in the case cited, but as to all the other matters referred to he was not represented by the corporation or its presence as a defendant in that suit. That case overrules *Goss v. Carter*, 156 Fed. 746, 752, 84 C. C. A. 402, in so far as the opinion in the latter case conflicts, if it does, and clearly overrules *Irvine v. Putnam* (C. C.) 167 Fed. 174, which holds that the nonresident stockholder is bound by the findings and decree in the home suit even if not served with process. And I am not holding or intimating that a common-law receiver may act and compromise and settle claims which it is his duty to enforce without authority of the court

appointing him, but here we have a statutory receiver who is quasi assignee and representative of the creditors and not merely an arm of the court. See *Converse v. Hamilton*, 224 U. S. 256, 257, 32 Sup. Ct. 418 (56 L. Ed. 749), where it is said:

"It is true that an ordinary chancery receiver is a mere arm of the court appointing him, is invested with no estate in the property committed to his charge. * * * But here the receiver was not merely an ordinary chancery receiver, but much more. By * * * he became a quasi assignee and representative of the creditors, was invested with their rights of action against the stockholders, and was charged with the enforcement of those rights in the courts of that state and elsewhere."

All the facts will appear on the trial, and the court can then pass upon the effect of the alleged settlements and payment and the authority and powers of the receiver in the premises. I am not cited to any authority holding that a receiver standing in the position and clothed with the powers of an assignee and representative of creditors, not the court, may not accept what on examination he finds to be due him; but I do not now so hold. If it be true, as alleged, that Hendricks not only settled the claim but was released, it is, I think, presumed that he was properly released according to law and by due authority.

As to defenses 2, 3, and 4, the demurrer is overruled. As to defenses 5 and 6, the demurrer is sustained.

So ordered.

CITY OF DES MOINES v. BARBER ASPHALT CO. et al.

(District Court, S. D. Iowa, C. D. June 13, 1913.)

No. 97-M.

1. MUNICIPAL CORPORATIONS (§ 327*)—CONTRACTS—STATUTES—EFFECT ON EXISTING CONTRACTS.

A statutory provision relating to cities cannot be read into a contract with a city which was of a class expressly excluded from the operation of such provision when the contract was made, but was later made applicable by amendment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 850; Dec. Dig. § 327.*]

2. INDEMNITY (§ 13*)—LIABILITY FOR INJURIES FROM DEFECTIVE STREET—RECOVERY OVER AGAINST CONTRACTOR.

Defendant paved a street under a contract with a city which required it to make any repairs needed at any time within seven years on ten days' notice, or to pay the reasonable cost of such repairs. The pavement became defective, because of a hole, within the time, and the city notified the contractor to repair it; but it did not, and a woman, who stepped into the hole and was injured, recovered a judgment against the city which it paid. *Held*, that it could not recover over against the contractor, since it was primarily under the duty to keep the street in repair, which duty it neglected, although it had knowledge of the defect and could have repaired it, and recovered therefor from defendant under the contract, which gave defendant the option to make the repairs or pay for them.

[Ed. Note.—For other cases, see *Indemnity*, Cent. Dig. §§ 29-35; Dec. Dig. § 13.*]

At Law. Action by the City of Des Moines against the Barber Asphalt Company and the United States Fidelity & Guaranty Company. On demurrer to petition. Demurrer sustained.

Robert O. Brennan, City Sol., of Des Moines, Iowa, for plaintiff.
John M. Read, of Des Moines, Iowa, for defendants.

SMITH McPHERSON, District Judge. In July, 1905, the city and defendant Asphalt Company entered into a written contract for the paving of a street; the Guaranty Company being a surety only for the Asphalt Company. At that time the city was a city of the first class under the statutes of Iowa. After the contract was made and the paving was completed, the city under a statute of the state was changed from a city of the first class to one under a commission form of government, commonly known as the "Des Moines plan." This fact is of importance, because of two other statutes to be noticed herein later. The paving was completed during the summer and fall of 1905. The contract provided that the material and workmanship should be such—

"that the pavement shall endure, without need of repairs, during a period of seven years from and after the completion thereof."

Failing in which the contract provides:

"Then the contractor will, within ten days from the time of being notified of such defect, make the same good *or* will pay to the city of Des Moines the reasonable cost of remedying such defect."

The contract also provides that:

"The above obligation to maintain said improvement in good condition and repair shall continue and remain in force."

All the foregoing provisions are in writing. In print it was agreed that for any breach of the contract, followed by an action, a judgment against the city should be conclusive as to the liability of the Asphalt Company.

Within the limits of the paving, and within the seven years, by reason of disintegration of the paving near a street corner, a hole two or more feet both in length and width, and two or more inches in depth, existed. The city served a written notice on the Asphalt Company to repair the defect, to which the Asphalt Company gave no attention. Later on a lady stepped into the hole, receiving a serious bodily injury. For such injury the lady brought an action, resulting in a judgment against the city for \$4,000, which the city has paid, with interest and costs. To recover said amount this action is brought.

After the lady brought her action the city served a written notice on these defendants to appear and defend against said claim, to which the defendants gave no attention. To the petition herein the defendants have demurred, which issue of law is now for decision.

[1] Iowa has five kinds of municipal forms of government, each varying as to powers and liabilities from the other four: (1) Cities under special charters, created by special statutes. (2) Cities of the first class, created under general law, in excess of a designated popula-

tion. Des Moines was such when the contract was made and the paving done. (3) Cities of the second class, having a designated population less than the last preceding, existing under general laws. (4) Incorporated towns. (5) Cities having a commission form of government, such as Des Moines now is.

The notice to appear and defend the action brought by the lady, the petition herein states, was under section 1053 of the Iowa Code of 1897. But that statute is a section of chapter 14, title 5, of the Code, with reference only to cities under special charter. The first section (933) of that chapter is as follows:

"General Provisions not Applicable. The provisions of this chapter shall apply only to cities acting under special charter, and no provisions of this Code, nor laws hereafter enacted, relating to the powers, duties, liabilities or obligations of cities or towns, shall in any manner affect, or be construed to affect, cities while acting under special charter, unless the same have special reference or are made applicable to such cities."

In 1907 (Acts 32d G. A. c. 48, § 3) the Legislature amended the foregoing statute by providing that such statute should apply to a city such as Des Moines now is.

I conclude that neither of these statutes has any weight in the case at bar. Section 1053 of the Code applies only to cities under special charters. The statute of 1907 cannot be read into the contract. It is not a statute of procedure, nor remedy, but is one as to liability, and if carried back and made a part of the contract it would impair the same by creating a liability where one by statute did not exist when the contract was made. So that this case must be determined other than from these statutes. Plaintiff relies on some of the following cases:

In *Ottumwa v. Parks*, 43 Iowa, 119, a person for his own private purpose dug a cellar, without benefit or concern to the city, without a sufficient barrier. The city officers knew all this. A party fell into the cellar and was injured, for which he obtained a judgment against the city. The lot owner appeared and took part in the defense. It was held that the city could recover from the lot owner digging the cellar. But in that case there was a law by city ordinance prohibiting such a work without securing the same, so that no person fall therein.

Keokuk v. Independent District, 53 Iowa, 352, 5 N. W. 503, 36 Am. Rep. 226, was a like case, except there was no such ordinance. It was held that the city could not recover back the money thus paid by reason of a judgment paid off, rendered in a personal injury action against the city.

In *Washington Gas Co. v. District of Columbia*, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712, there was a similar action. Judgment for a personal injury was rendered against and paid by the District. The defect was occasioned by the Gas Company, and the holding was that the District could recover the amount from the Gas Company. But the Supreme Court based its ruling on two propositions: The one was that the District, being liable in the first instance, was not a wrongdoer, and the Gas Company was; at most, the District was not a wrongdoer to the extent that the Gas Company was. The other

proposition was that it was the duty of the company to keep the gas box in repair for its personal use and gain, and not that of the city or District, which could only barricade it.

City of Chicago v. Robbins, 2 Black, 418, 17 L. Ed. 298, was a case in which the lot owner dug an areaway under a sidewalk, into which a person fell by reason of insufficient barriers. The city having paid the damages resulting from a judgment in a case as to which the lot owner was notified to defend, the Supreme Court held the lot owner must reimburse the city. See same case in 4 Wall. 657, 18 L. Ed. 427.

Railroad v. Dunn, 59 Iowa, 619, 13 N. W. 722, was a case wherein a gate had been opened and for such a time had been left open as to give constructive notice to the railroad company. A horse owned by another party through the open gate went on the track and was killed. The company was adjudged to pay the value of the horse to its owner. Thereupon the company was allowed a recovery against the party opening the gate. Those who care to collect other cases on the subject can do so by reading volume 4 of Rose's Notes, page 652, reviewing Robbins v. Chicago, 4 Wall. 657, 18 L. Ed. 427.

The proposition need only be stated, without argument, and without citation of authorities, that a city, having authority and supervision of its streets and sidewalks, is liable to a person who without fault is injured by reason of a defective street or sidewalk. Then the city can or cannot recover back from the one who occasioned the defect, owing to the facts.

[2] It is a general rule that one wrongdoer cannot compel a co-wrongdoer to contribute the whole or part of the damages. To this rule there are two important exceptions: The one exception is that if one wrongdoer is not equally criminal or at fault, he may recover back what he has been compelled to pay from the other wrongdoer, who is the more culpable. This is illustrated by the Supreme Court in the Washington Gas Company Case, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712, hereinbefore cited. The second exception, although blended with the first, is that if the one wrongdoer, who has been compelled to pay damages, was only passively negligent, he may recover from the other wrongdoer, who put the wheels in motion, and by his affirmative act of negligence caused the injury. And such are all the cases hereinbefore cited. And see 2 Dillon on Municipal Corporations (4th Ed.) § 1035. But it is believed no case can be found wherein a recovery back has been allowed if both wrongdoers were only passively negligent, or where both wrongdoers were actively and affirmatively negligent. To otherwise hold puts a premium on indolence or inefficiency of city officers. In the case at bar the city had actual notice of the defect, because it notified the Asphalt Company of such defect. The officers of each trifled with the situation, trusting no one would be hurt, and then each gambled with the proposition as to who would pay the damages if a person did get hurt. There is no equity in favor of either of the wrongdoers as against the other. It is merely a question, not of state law, but of the common law, as was held in the Robbins Case, 2 Black, 418, 17 L. Ed. 298.

It was the absolute duty by law of the city to keep its streets in safe

condition. It was the duty, as contended, of the Asphalt Company by contract to keep the street in good condition for seven years. Neither was guilty of an affirmative or purposed wrong. Each was passively negligent. It will be observed that the contract between the city and the Asphalt Company recites that after notice of a defect, by the city to the Asphalt Company, the latter must either remedy the defect *or* it must pay to the city the reasonable cost for remedying the defect. The company had its election. By acquiescence it elected to pay such reasonable cost. The city all the time was primarily liable for all results growing out of such defect. It had no election. And no valid suggestion can be made why the city officers, knowing of such defect, did not repair it and then call for reimbursement.

The demurrer will be sustained; and, as plaintiff declines to amend, the case is dismissed.

THE RIVERSIDE.

(District Court, E. D. Pennsylvania. October 22, 1913.)

No. 46 of 1912.

COLLISION (§ 102*)—STEAM VESSELS MEETING—FAILURE TO KEEP LOOKOUT.

A collision in the Delaware river opposite Philadelphia in the evening between a steamer and tug meeting *held*, on conflicting evidence, due to the fault of both vessels in failing to keep proper lookouts or to note each other's approach until they were so near each other that the danger was apparent and a confusion of signals resulted.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 102.*]

In Admiralty. Suit for collision by the Atlantic Refining Company, owner of the tug *Imperator*, against the steamer *Riverside*; Chester Shipping Company, claimant. Decree dividing damages.

Howard M. Long, of Philadelphia, Pa., for libellant.

Lewis, Adler & Laws, of Philadelphia, Pa., for respondent.

J. B. McPHERSON, Circuit Judge. About half past 7 o'clock in the evening of September 9, 1912, a collision took place on the Delaware river near Jackson street, Philadelphia, between the tug *Imperator*, owned by the Atlantic Refining Company, and the steamer *Riverside*, a boat belonging to the Chester Shipping Company. The tug was severely injured and sank in a very short time. She was afterwards abandoned as a total loss, but as she obstructed navigation the government removed her. After she was raised, the libellant took several photographs in order to show the extent and position of her wound. The night was dark but clear, and the tide was slack water ebb. A light southwest wind brought a little smoke from the city, but this did not interfere with the seeing of lights at a safe distance. Neither the wind, nor the tide, nor the condition of the atmosphere, had anything to do with the collision. The proper lights were set and burning upon both vessels. The tug had left Pier 53 at Washington avenue, a mile or more north of Jackson street, and was bound south

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to Point Breeze in the Schuylkill river to tie up for the night. She had no tow and her speed was about 9 miles an hour. The steamer was bound north from Chester to her wharf at Arch street, Philadelphia, and her speed was about 13 miles an hour. The steamer is considerably larger than the tug, the latter being 90 feet long, while the length of the former is 141 feet, her other dimensions also being larger than the tug's. The steamer carries freight between Chester and Philadelphia; the tug is exclusively engaged in harbor service.

As usual, the two groups of witnesses are in sharp conflict, and I may say immediately that after hearing them testify I cannot rely wholly on either group. Neither account is credible in several particulars, and I find it much more satisfactory to start from certain physical facts that cannot be denied; I rely upon these with more confidence than upon much of the oral testimony. The first fact is the place where the tug sank; and the other facts are the nature and the position of the wound in her side. She sank upon the western or Pennsylvania side of the channel; a survey taken not long after the collision shows the point of submergence to be 450 feet from the western bulkhead line of the river; and the photographs taken after she was raised show that she was struck upon the starboard side not much aft of amidship, and that the blow was severe enough to break a hole about 8 feet wide, that extended several feet into the hull. With such a wound she could not have kept afloat more than a few minutes, even if the steamer's bow had been held in the break; this expedient would have had some effect, but not much, in keeping the water out. Now, as the tug sank 450 feet from the Pennsylvania side of the river, the first inquiry is: How did she get there? The steamer's explanation must be rejected. She declares that the collision took place far over on the New Jersey side of the river—indeed, actually in the anchorage ground—and she accounts for the sinking on the Pennsylvania side (which would undoubtedly call for explanation) by putting forward the theory that both vessels maintained full speed during and after the collision, and that the tug, although she was the lighter of the two vessels and although she was hanging broadside upon the bows of the steamer and was barely kept afloat, nevertheless forced the heavier vessel around in an almost complete circle, and then (apparently becoming inert) was herself pushed in a sinking condition 900 or 1,000 feet across the river to the place near the Pennsylvania shore where she finally succumbed. As already stated, I cannot accept such an explanation; it is improbable in a marked degree, and I shall not discuss it further.

In this connection I may add that another part of the steamer's testimony is also difficult to believe, namely, the assertion that shortly before the collision the tug was in such a position that the steamer could not see her green light, the red being the only sidelight visible, and that the tug's course was suddenly changed so completely that her red light was shut out and the green light alone came into view. This means that from a position of safety the tug, with no apparent reason, attempted to cross the river, taking a course across the bows of the steamer, and thus assuming a position of manifest danger. No

doubt this is possible; so is any whim or caprice, but the probabilities of ordinary conduct are against it, and since the testimony does not clearly support it I feel bound to reject it as unlikely.

The tug's account also is improbable. She declares that when she first saw the steamer the latter's green light alone was visible. This means that the steamer was heading toward the Pennsylvania side of the river, and therefore was going where she had no apparent motive and no business to go. This also may be described as possible, but unlikely; it does not square with ordinary conduct, and (in the absence of clear supporting testimony) I must decline to accept it. In this difficulty, if we turn for help to the physical facts of the situation, we find it to be certain that the tug was struck a severe blow upon the starboard side, and inspection of the wound shows that the blow was delivered nearly at right angles. In other words, the tug must have been crossing the bows of the steamer when the collision took place—although I do not think that this maneuver was undertaken upon a sudden caprice, as the steamer would have us suppose. In my opinion the undeniable physical facts (which must be accounted for) can only be explained reasonably by declining to accept the unlikely statements in the testimony offered by either vessel. As it seems to me—and I have considered and reconsidered all the evidence—the probable facts to be extracted from the mass of contradiction are these:

The tug was going down the river upon the Pennsylvania side of the channel; this is the course she would naturally choose, not only because the Pennsylvania side was the proper side, but also because it was the shortest road to her destination. As the steamer was bound to her dock—which was not in New Jersey, but in Philadelphia—we may conclude with probability that she was not skirting the New Jersey shore, but had come as near the Philadelphia side of the river as she dared. In any event, I am confident that she was not where she puts herself—so far over on the New Jersey side of the channel that a slight change of course took her into the anchorage ground. And if this part of the testimony is not to be trusted, it casts some doubt on other parts. In a word, the two vessels were approaching each other nearly head on—and it is worth noting that each says so, in some part of the testimony—and were therefore in a position where each not only could see, but where each did see, both sidelights of the other. I am satisfied also that, if there was a lookout at all upon the tug, he was inattentive; no doubt there was a deck hand near the bow, but it is not clear that he was stationed there as a lookout; and in any event if he did see the lights on the steamer at a proper distance he failed to report them. It is also probable from the steamer's own testimony that she failed to see, or at least failed to note, the lights upon the tug until the two vessels had come closer than was safe. I think therefore that each appears to have been at fault in failing to make timely discovery of the other. When the approaching lights were at last taken note of, both vessels were naturally much perturbed, not to say, flustered. The master of each was in the pilot house and had charge of the wheel, and the only reasonable explanation of the conflicting testimony concerning the whistles is that in the hurry and alarm of the

situation the passing signals were not properly given and answered, but were crossed. But I do not think it material to decide which vessel may have been most, or altogether, at fault in this respect; both were equally at fault in getting into the original position of danger, where the crossed signals were a not unnatural sequence, and I do not think it vitally important to lay the blame of the misleading signals on the shoulders of one rather than of the other. Neither vessel blew danger signals, nor reversed, so that neither adopted a course that is often of great value and is sometimes imperative. I can understand that when the steamer was forced to a quick decision she believed the best way out of the difficulty would be to keep her speed and try to pass port to port, while the tug, being in a similar strait, might also believe it best to keep her speed but to try to pass starboard to starboard. I think the master of the tug did give the starboard signal, and certainly the master of the steamer did give the port signal. But, as I have already said, it is not necessary to decide which signal was given first, or which vessel crossed the signal, for the mischief had already been done, and the confusion of signals did not cause the collision, although it may have taken away whatever possibility of escape still existed. The tug's effort to pass starboard to starboard was ill advised, and turned out to be fatal. I think it was a second fault on her part, although it is easy to understand why it was done; but it should not charge her with all the blame, since both vessels were primarily in the wrong. Neither of them took the needful precautions to avoid getting into dangerous proximity, and what happened afterwards was a result that often follows and should have been foreseen.

A somewhat different view of the situation may be taken, but the conclusion will not be changed. It is possible that each vessel saw the other, not relatively close at hand, but as far away as 1,000 or 1,500 feet. This is a safe enough distance when the usual care is taken. But even if this be true, I have no doubt that the collision was caused by each vessel holding her course too long without blowing promptly the proper signals and without making the proper effort to pass while the vessels were still a safe distance apart. This is a continually recurring fault, this effort of one vessel to make the other give way, and it is my experience that probably no other cause of collision is so fruitful. I state this alternative view of the testimony because it accounts for the dangerous proximity of the vessels, and for the final difficulties of the situation, as well as the view I have first stated; but to my mind the first view is the more probable. But in either event a perilous situation was brought about by the concurring fault of both vessels, and both are therefore liable.

My conclusion is that the damages should be divided. As the parties were not prepared at the hearing to offer testimony concerning the amount of the loss, that inquiry may be held hereafter, either in open court or before a commissioner, as Judge Thompson may prefer.

A decree in accordance with this opinion may be entered.

THE DEFENDER.

THE FEARLESS.

(District Court, W. D. Washington, S. D. October 21, 1913.)

No. 921.

1. TOWAGE (§ 11*)—CHARTER—LIABILITY FOR NEGLIGENCE OF TOWING TUG.

A provision of a charter party of a vessel to carry a cargo of lumber, giving the charterer the right to load at more than one mill by paying the extra cost of towage, did not require the charterer to furnish the towing tug, and, in the absence of further agreement, it was not liable for the negligence of the tug, which was presumably employed by the master.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

2. TOWAGE (§ 11*)—STRANDING OF TOW—LIABILITY OF TUG.

A barkentine partially loaded with lumber, while being towed downstream to another loading point at night, ran aground on the right bank, and in pulling her off by the stern the tug permitted her to strike the opposite bank, where she grounded and was injured. The channel was 200 feet wide. *Held*, that the tug was responsible for the movement of the tow and that the stranding was due to its negligence.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

3. TOWAGE (§ 11*)—INJURY TO TOW—LIABILITY OF TUGS.

Where a vessel is being towed by two others, in order to hold both liable for her injury, it must be shown that both were negligent.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11-23; Dec. Dig. § 11.*]

In Admiralty. Suit by the Barkentine Lahaina Company, owner of the barkentine Lahaina, against the tug Defender, the launch Fearless, and the Quinault Lumber Company. Decree against the Defender alone.

Huffer & Hayden, of Tacoma, Wash., for libelant.

Libelant relies upon the following authorities: *S. S. Syracuse v. Thos. Langley*, 12 Wall. 167, 20 L. Ed. 382; *Grand Trunk Ry. Co. of Canada v. Griffin* (C. C.) 21 Fed. 733; *Tug Margaret v. Chas. S. Bliss*, 94 U. S. 493, 24 L. Ed. 146; *The Atlas* (D. C.) 12 Fed. 798; *The W. G. Mason* (D. C.) 131 Fed. 632-636; *S. C. W. H. Webb*, 14 Wall. 406, 20 L. Ed. 774; *Sicula Americana Di Navigazione A Vapore v. Dalzell* (D. C.) 204 Fed. 697.

Welsh & Welsh, of So. Bend, Wash., for respondents the Defender and Quinault Lumber Co.

M. M. Richardson, of Vancouver, Wash., for respondent the Fearless.

In addition to certain authorities cited by libelant, respondents rely upon the following: 38 Cyc. 578, 579, 563, 582, 585, and notes 62 and 63; *The Columbia*, 109 Fed. 660, 48 C. C. A. 596; *The Anthracite*, 168 Fed. 693, 94 C. C. A. 179; *The Blue Bell* (D. C.) 189 Fed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

824; *The E. V. McCaulley* (D. C.) 189 Fed. 827; *W. E. Gladwish*, 196 Fed. 490, 116 C. C. A. 185; *The J. P. Donaldson*, 167 U. S. 599, 17 Sup. Ct. 951, 42 L. Ed. 292; *The Webb*, 81 U. S. (14 Wall.) 406, 20 L. Ed. 774; *The Burlington*, 137 U. S. 386, 11 Sup. Ct. 138, 34 L. Ed. 731; *McNally v. The L. P. Dayton*, 120 U. S. 337, 7 Sup. Ct. 568, 30 L. Ed. 669; *The Samuel E. Bouker* (D. C.) 141 Fed. 480; *Southern Towing Co. v. Egan*, 184 Fed. 275, 106 C. C. A. 417; *Heckman v. The Barge Richard III*, 3 Alaska, 453; *The Oak*, 152 Fed. 973, 82 C. C. A. 327; *The Syracuse* (C. C.) 36 Fed. 830; *The El Rio* (D. C.) 162 Fed. 567; *The Edmund L. Levy*, 128 Fed. 683, 63 C. C. A. 235; *The Narragansett* (C. C.) 20 Fed. 394; *The Nellie Flagg* (D. C.) 23 Fed. 671; *The James P. Donaldson* (D. C.) 19 Fed. 264; *The Morris & Cummings Dredge Co. v. Moran Towing & Trans. Co.* (D. C.) 163 Fed. 610, affirmed 177 Fed. 1004, 100 C. C. A. 427; *Woodberry v. Josephine*, 58 Fed. 813, 7 C. C. A. 495; *The Startle* (C. C.) 115 Fed. 555; *The Frederick E. Ives* (D. C.) 25 Fed. 447; *The Royal* (D. C.) 138 Fed. 416; *The Coney Island* (D. C.) 115 Fed. 751; *Stricker v. The Maurice* (D. C.) 128 Fed. 652; *The Jacob Brandow* (D. C.) 39 Fed. 831; *The Oceanica*, 170 Fed. 893, at pages 894 and 895, 96 C. C. A. 69.

CUSHMAN, District Judge. This suit is for decision, after issue joined and evidence taken, upon a libel in rem against the tug *Defender* and launch *Fearless*, and in personam against the *Quinault Lumber Company*, brought to recover damages from the stranding of the barkentine *Lahaina*, alleged to have been caused by negligent towing.

In June, 1911, the barkentine was loading a cargo of lumber on Willapa Harbor, under a charter party between the owner of the vessel and J. J. Moore & Co., of San Francisco. The respondent *Quinault Lumber Company* was furnishing the lumber cargo contracted to be carried under the charter.

[1] Libelant alleges that the *Quinault Lumber Company* employed the tug to tow the barkentine, then partly loaded, from Raymond, down the Willapa river to South Bend, about four miles, where she was to receive the remainder of her cargo. There is evidence of a contradictory nature as to the hiring of the tug. The charter party provided:

"Charterers also have the privilege of loading vessel at two mills, they paying the extra cost of towage."

The stranding of the barkentine occurred while she was being towed from the second to the third mill. No question had been made on account of the loading being done at three instead of two mills. It is therefore concluded that nothing more was contemplated by the master and mill company than a compliance with the above provision, which only bound the charterer, for whom the mill company was acting, to pay the extra cost of towage, and did not bind them to furnish a towboat. The extra cost was to be paid the vessel's owner, as was the money for freight and delays.

The mere fact that the mill company had made payments direct to the tug owner is not considered significant; as long as there was no question concerning amounts, this course would be natural, as avoiding delay. There is not sufficient evidence that, by the conversation between the master and the representative of the mill company, concerning the securing of the tug, a different arrangement was made by which the mill company was to furnish the tug. Therefore the libel must be dismissed as to the mill company.

[2] The Lahaina, a wooden vessel, was built in 1901, being 200 feet long, 40 feet beam, and of 994 tons. After loading 1,100,000 feet of lumber at Raymond, she was taken in tow by the tug, a 200 horse power boat, and the launch, 38 horse power, near midnight on July 12th. It was necessary to leave at this time of night in order to take advantage of an eight or nine foot tide, to reach a bad turn in the river at flood tide and slack water. The barkentine touched twice on the starboard bank going down, without damage and with only slight delay. On the second grounding the tug, being unable to pull the Lahaina off by the head, went astern, and, with the launch, pulled her off the right bank; but she went stern first upon the left bank, from which she could not be removed. She remained there about 12 hours. It is for the damage she is alleged to have suffered during this time that recovery is sought.

From the point of the second grounding, up the river, there is a comparatively straight course. While above this point the channel of the river is narrow, probably averaging less than 100 feet, at this point, the channel, at the then stage of water, was 200 feet wide, sufficient to float a vessel loaded, as was the barkentine, to 20 feet.

Capt. Bell, of the tug Defender, in his testimony (pages 70 and 71) after stating that Capt. Carlson, of the Lahaina, ordered him to give another pull, and he had told Capt. Carlson that the vessel was moving, testified as follows:

"Q. Why didn't you, if you knew it was going into the other bank—you knew that was not the proper place for her? A. Yes.

"Q. Why didn't you stop her headway? A. Capt. Carlson ordered me to pull her back.

"Q. So that, regardless of the consequences, you continued? A. I did not know; I was acting under instructions from Capt. Carlson.

"Q. So that you say that you could not have pulled the stern of the Lahaina around up the center of the channel and kept her off the other bank; do you mean to say that? A. I might have; but we wanted to go downstream.

"Q. You could have pulled her upstream and prevented her going into the other bank? A. Yes.

"Q. Then you let her drift across the channel while you sent the Fearless ahead to stop headway? A. No, we both got to her head as quick as possible.

"Q. You both let her go? A. Yes. * * *

"Q. But you did not think she would go on the opposite side when you let go? A. I was afraid she would; that is why I told Captain she had sternway.

"Q. But answer the question; when you let go, you did not expect she would go on the other bank? A. I was afraid she might.

"Q. Yet you let go; couldn't you at that time pull her stern up the river? A. No, sir.

"Q. You could not have attempted to? A. Yes, I could have attempted to.

"Q. You did not attempt to? A. No."

From this it is concluded that the *Lahaina* was stranded by the negligence of the master of the tug in pulling her off of the right bank in the manner in which he did.

It is urged upon the part of the respondent that the causal fault, if any, was the fact that, after the master of the tug, upon a statement of the amount of the barkentine's load, agreed to do the towing, unknown to him, 35,000 feet more of lumber were loaded on her, chiefly forward, and that this put the barkentine "down by the head," and that there was a further fault in that there was but one man at the wheel upon the *Lahaina* while going down the river, and he inexperienced, all of which caused her to steer so badly as to be run upon the bank.

If the stranding could be directly traced to either of these conditions, it would be necessary to make further inquiry as to how far they affected it. The court finds no preponderance of evidence that the *Lahaina* was steered badly; but, if such was the cause of the second grounding, it would only be one of the remote causes of the final stranding, for at that time she was being towed astern, being controlled solely by the tug, with no claim made that the wheel could have been handled so as to prevent this stranding. *Grand Trunk Ry. Co. v. Griffin* (C. C.) 21 Fed. 733.

The extra lumber did not increase her draft six inches, probably not over four. If such a slight increase in draft was sufficient to cause her grounding, the master of the tug should not have undertaken the tow.

There is evidence on the part of respondents that the captain of the *Lahaina*, when he engaged the tug, assured the master of the latter that his vessel would assume all of the risk in being towed down the river in the nighttime. Owing to the nature of the service and the situation of the parties—the master of the tug being fully aware of the conditions, the tow captain not—in any event, the court would require such an agreement to be clearly established before giving effect to it. Concerning this matter, the court finds nothing more than loose talk having been indulged in on the part of the men concerned and, while the darkness might have been one of the causes of the striking on the starboard bank, while the tug was maneuvering to ascertain concerning a bend in the river, immediately below, yet it was not the cause of the final stranding. *S. S. Syracuse v. Thomas Langley*, 12 Wall. 167, 20 L. Ed. 382.

The captain of the tug testified that the master of the *Lahaina*, after the latter had been pulled off the starboard bank, directed that she be given "another pull," and that this was the cause of the final stranding. It is not necessary to determine whether anything said by the master of the *Lahaina* was anything more than a suggestion, or advice. The tug's captain was in control of the situation and should have known the conditions. Even if such a direction was given by the master of the *Lahaina*, nothing appears to warrant the finding that such direction was given to pull across the river, instead of up it. The cause of the stranding was the negligent manner in which the pull was made, rather than that a further pull was made.

[3] The remaining questions concerning negligence pertain to the launch Fearless; the part taken by her in the towing and the final maneuvering, resulting in the stranding of the Lahaina. In order to justify both the tug and launch being held liable, the evidence must show that both were negligent. *The W. G. Mason*, 142 Fed. 913, 74 C. C. A. 83; *The Anthracite*, 168 Fed. 693, 94 C. C. A. 179; *Sicula Americana Di Navigazione A Vapore v. Dalzell et al.* (D. C.) 204 Fed. 697.

The Fearless was engaged for the purpose of swinging the tow around the bend in the river below the point of stranding. Though the launch may have assisted in pulling the tow off the starboard bank, it appears that she had cast off her line and gone to the bow and had not again made fast at the time the further pull was given, resulting in the grounding. The libel as to the Fearless will be dismissed.

The Lahaina was a wooden vessel, built in 1901, and, at the time of stranding, was full of timber below decks and with almost a complete deck load. She went to sea with a full cargo of lumber—1,300,000 feet. At the time of stranding she had in her hold and on deck 1,100,000 feet.

As the tide went down after the stranding, she listed to starboard. The evidence varies as to the amount of this list, from 10 to 45 degrees. The testimony is also conflicting concerning the character of the bottom at the point on which she lay both as to contour and firmness. When she went aground there were about 16 inches of water in the hold and at noon next day there were 36 inches.

The bottom on Willapa Harbor and river, generally, is soft. At the wharf in Raymond, and afterwards at South Bend while loading, at low tide, the bottom of the vessel rested on the mud. This was usual with other vessels and had resulted in there being a depression in the muddy bottom conforming, substantially, to the shape of a vessel's bottom.

The captain of the Lahaina testified to having heard, during the night of the stranding, reports in the hold, which were not unlike those of a gun. The court is unable to find whether this was caused by the straining of the vessel's hull, as claimed by libellant, or the breaking of pieces of lumber forming part of the cargo, occasioned by the list.

After reaching South Bend, the vessel was examined, under water, by a diver, and her "top sides" by a marine surveyor of experience. The diver found nothing the matter. The surveyor found certain evidences of straining in her seams and the breaking of the fresh paint along them. This surveyor for the insurance company required the installation of a gasoline engine for pumping, before allowing the boat to complete her voyage, and that she be put on the dry dock for examination and repairs at Sidney, Australia, for which point she was bound. This requirement was in anticipation of increased leakage on account of strain.

After reaching South Bend, she did not leak more than the ordinary wooden vessel—20 to 22 inches—but more than was usual for the Lahaina. It is probable that, in the quiet water of the harbor, the bot-

tom resting in the mud twice a day, leakage was prevented, to a certain extent. In a storm, before reaching Australia, the leakage was as much as 40, 50, or 60 inches a day. Before stranding, her leakage did not exceed 16 to 20 inches in any kind of weather.

She had come direct from San Francisco to Willapa Harbor, for her cargo, and, before leaving San Francisco, had been caulked on her bilges and repainted. The testimony shows that, while at Raymond, her leakage was less than usual. At Sidney, she was put on the dry dock and examined by marine surveyors for the parties and certain repairs required, which were made. The examination of the surveyors disclosed that the lead scuppers were broken, the keel was bruised, the rudder post strained, certain stanchions loosened, and the seams and cement along the garboard and sheer streak loosened. From this it is concluded that the Lahaina suffered from straining at the time of stranding. The locations of the scuppers, garboard, and sheer streak, at the angles and those parts of the hull most nearly resembling an angle, and therefore the parts of any structure most likely to show evidences of strain, render their injury significant. The starting of the rudder post may have been occasioned by having gone aground stern first.

The extent of injury from strain could not be determined without removing much of the inside structure of the vessel, which was not done. There will therefore be no general damage allowed for straining to the vessel, but the items of special damage, directly caused by the stranding, will be awarded against the Defender. These items, as claimed, total \$4,294.74. The following items claimed will be disallowed: Cost of gasoline engine, \$335.40; work of installing it, \$64; cutting pipe for its installation, \$2—for the reason that, while required because of the stranding, they make for the betterment and permanent equipment of the ship, and their cost does not afford a measure of damage. Twenty cases of gasoline, \$47—for reasons dependent upon the foregoing, will also be disallowed.

Seven cases of copper paint were used on the vessel's bottom after being repaired. This was necessary to cover up the caulking and cement in the seams and to protect the metal used in the keel repairing; but the evidence shows that it was usual to paint the vessel at San Francisco after each round trip to Australia. She was not painted after her return upon the trip in question. It is therefore apparent that but one-half of this item is properly chargeable herein.

For the same reason, there should be a deduction from the item of 42 pounds, made for, "docking vessel for one day and providing labor for cleaning the bottom of hull and painting from sixteen-foot water line to keel," of one-half the amount thereof covering the painting. As there is nothing in the evidence to disclose what portion of this item was for painting, if counsel cannot agree concerning this question, they will be heard further.

In re STRAUCH.

(District Court, N. D. Ohio, E. D. March 17, 1913.)

No. 3,868.

1. **BANKRUPTCY (§ 267*)—SALE OF MORTGAGED REAL ESTATE FREE FROM LIENS—WIFE'S RIGHT OF DOWER.**

Under the law of Ohio by which a wife by joining in a mortgage of her husband's real estate releases her right of dower only to the mortgagee and his assigns, where real estate of a bankrupt was sold free from the liens of mortgages thereon and the contingent right of dower of his wife, the wife is entitled to the full value of her dower interest from any surplus remaining after payment of the mortgage debts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 371, 380; Dec. Dig. § 267.*]

2. **BANKRUPTCY (§ 396*)—EXEMPTIONS.**

The value of personal property exemptions allowed to a bankrupt cannot be set off against a homestead exemption to which he is entitled for the purpose of diminishing the latter.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659-668; Dec. Dig. § 396.*]

3. **BANKRUPTCY (§ 399*)—EXEMPTIONS—GROUNDS FOR DISALLOWING.**

That a bankrupt failed to schedule a life insurance policy is not ground for disallowing his exemptions, where the omission was without fraudulent intent, but through mistake, and there was no concealment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. § 399.*]

4. **BANKRUPTCY (§ 348*)—CLAIMS ENTITLED TO PRIORITY—WAGES.**

An agreement by a merchant to pay his wife and adult daughter wages for managing his store during a time when he was ill in a hospital is valid, and they are entitled to the allowance of their wages earned within three months prior to his bankruptcy as preferred claims against his estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. § 348.*]

5. **EVIDENCE (§ 594*)—DEGREE OF PROOF—MAKING OF CONTRACT.**

The uncontradicted testimony of both parties to the making of a parol contract between them cannot be ignored because not corroborated.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.*]

In the matter of Aaron Strauch, bankrupt. On review of orders of referee. Reversed.

Edward Vollrath, of Bucyrus, Ohio, for petitioners.

R. V. Sears and A. S. Leuthold, both of Bucyrus, Ohio, for trustee.

KILLITS, District Judge. This matter is before the court on four petitions for review brought by the bankrupt's wife and daughter. In entering the orders complained of the referee has manifestly gone afar wrong.

[1] Touching the applications of Mrs. Strauch for allowance of dower and homestead, it appears that the real property of the bankrupt, being his home, was sold free of the contingent right of dower of Mrs. Strauch. Unless, therefore, something appears in the rec-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ord to prevent, Mrs. Strauch was clearly entitled to receive, from the trustee out of the proceeds of sale remaining after mortgage liens were satisfied, the value of her contingent right of dower, computed according to well-known methods. We are unable to find anything in this record to defeat her right of dower.

It is well established in this state that one enjoying a contingent right of dower, who joins in a mortgage of property involved to secure the debt of her spouse, releases dower only to the mortgagee and his assigns and is entitled to the value of the contingent right of dower computed upon the full value of the property, to be paid out of the surplus, if any, after the mortgage lien is satisfied.

The referee gives three reasons why in his judgment the claimant is not entitled to dower: (1) That she was barred by the compromise made with Albert G. Stoltz. (2) She was estopped by her conduct in assenting to the compromise. (3) That she cannot claim dower in said funds as against either the Second National Bank of Bucyrus or Stoltz.

The third position is undoubtedly valid. As against these parties who were mortgagees she has no right of dower for the reason that she signed the several mortgages, but that fact affords no reason why she should not have dower in the surplus remaining after these mortgage claims are satisfied. To understand the first two alleged reasons it must be explained that Stoltz was the mortgagee under an instrument which this court set aside as a preference. Pending appeal to the Circuit Court of Appeals, the trustee compromised with Stoltz and allowed him \$300 on his mortgage claim of \$1,500. How out of this circumstance the referee finds a bar or an estoppel against Mrs. Strauch passes the court's comprehension. The compromise was between the trustee and Stoltz. Under no circumstances could Mrs. Strauch's approval or assent, disapproval or dissent affect it. She was in no wise a party to it and in no wise could control it. The utmost interest she had in it was that to the extent Stoltz was allowed anything on his claim to that extent it might be that the surplus out of which her contingent dower should be paid might be reduced.

It appears that in making up the sum of \$1,500, which Stoltz claimed was the consideration for the mortgage set aside, \$376 were paid by him in cash to Mrs. Strauch. The facts indicate that Mrs. Strauch was her husband's agent in receiving this money, as they also suggest that the money was disbursed in the payment of household expenses and debts of Mr. Strauch. At the time Strauch was an invalid, and during his progress to health Mrs. Strauch was doing business for him. The referee affects to find in these circumstances a valid consideration moving from Stoltz to Mrs. Strauch for her dower interest. Assuming that to be the fact, it would in no wise affect the situation. Stoltz may have paid her actual cash to release her dower, and yet the release would be good only as to him and only affect the interest he had in the compromise and could not, even if upon the consideration passing from Stoltz, be permitted to operate to enlarge the rights of unsecured creditors. She would nevertheless be entitled to dower against all other creditors, to be paid out of the surplus.

If authority for the court's position is necessary, it may be found in the decision of the Circuit Court of Appeals of this circuit in the case of *In re Lingafelter*, 181 Fed. 24, 104 C. C. A. 38, 32 L. R. A. (N. S.) 103, 24 Am. Bankr. Rep. 656.

In his opinion the referee has also discovered an alleged estoppel in the fact that there was at some time some dispute over the description of the property conveyed by the Stoltz mortgage and contained in other conveyances. This homestead had been conveyed by the bankrupt to his wife. The trustee undertaking to recover it, Mrs. Strauch voluntarily conveyed it to the trustee with an express reservation in the deed that neither her dower nor homestead rights should be affected by the several transactions. For a while it was thought that in these conveyances part of the property was not covered by the description, and some confusion arose because of this misconception. It was afterwards cleared up, all the property passed out of Mrs. Strauch, and to predicate any estoppel against her because thereof is trivial indeed.

The order of the court as to this matter will be that the trustee compute the value of Mrs. Strauch's contingent right of dower upon the gross selling price of the property and pay that sum to her out of the surplus remaining after the payment of the bank's mortgage and the \$300 to Stoltz and the costs of those transactions.

[2] Coming now to Mrs. Strauch's claim for homestead, we are referred to the fact that at the time the petition in bankruptcy was filed the homestead was in Mrs. Strauch's name, wherefore no demand was made for exemption in kind by the bankrupt, who did, however, claim his statutory exemptions.

The facts show that the household goods shown to be the property of the bankrupt were not equivalent in their cash value to the amount of specific exemptions allowed by the Ohio statutes. We have alluded to the fact that Mrs. Strauch, in deeding the homestead to the trustee, reserved her right of homestead exemption, for which she promptly made application; her husband not having done so. The situation is governed by section 11737, General Code of Ohio; the homestead having been sold to satisfy liens and not being divisible so that a specific portion could be set off. Five hundred dollars, consequently, out of the proceeds would be the amount to be awarded in lieu of a homestead.

The referee defeats Mrs. Strauch's claim in a curious way. He deducts from the \$500 the value of the household furniture which he finds belonging to Mr. and Mrs. Strauch, including that which is covered by the bankrupt's specific exemptions. He also deducts the sum of \$118, which represents Mrs. Strauch's labor claim for three months prior to the filing of the petition, on which the trustee had paid \$100. Neither of these sums can be deducted from this claim, for the reason that neither of them are subject to levy. They are exempt from execution and attachment, and, being so exempt, they cannot be considered to be property or means the application of which may diminish a claim for homestead. One class of exemptions cannot be set off against another class for the purpose of diminishing the second class.

[3] Another reason for defeating this claim for homestead arose from the fact that an insurance policy which had a surrender value at the time of filing the petition of \$194 had not been scheduled by the bankrupt. The circumstances indicate that the bankrupt in good faith assumed that this policy was the property of his wife, for which reason he did not schedule it. There is not the slightest ground—and the court has read every syllable of the testimony—to reflect upon the utmost good faith of the bankrupt in failing to schedule this policy. It has been a matter of difference of opinion until within a short time whether tontine policies are schedulable or not, and it may be easily understood how one not a lawyer familiar with the determination of the courts on this subject might assume from the language of his policy that the beneficiary of a surrender value was the beneficiary named in the policy. Neither Mr. nor Mrs. Strauch made any concealment of the fact; on the other hand, the fact was discovered by their own voluntary statement, and, in our judgment, the referee was harsh towards these people in undertaking to impose a penalty on Mr. Strauch and through him upon his wife for the failure to list this policy. They have accounted for the proceeds, \$194. This sum of money unquestionably belonged to the bankrupt's estate. Having received it themselves, it should be accounted for by them. That may be done by deducting that sum from the homestead exemption of \$500, allowing Mrs. Strauch the balance.

The trustee assumes to find support for his position with reference to the effect of the failure to list this policy upon the homestead right in the case of *In re Sharr*, 15 Am. Bankr. Rep. 491, decided by a referee of this district and affirmed without report by this court. The fact that this court affirms generally the conclusions of a referee does not by any means involve the approval by the court of the referee's reasoning, and *In re Sharr*, so far as an attempt may be made to cite it to support the referee's action in this case, is not an authority upon this court, and, in fact, in the particular in which it is cited, it is inconsistent with the case of *In re Lingafelter*, cited above, decided by our Circuit Court of Appeals. The facts in *Re Sharr* are so entirely different from the facts before us that the case has no application whatever. It was a case where the bankrupt was an absconder who never was served with summons on the filing of an involuntary petition.

It is the order of the court that the trustee will pay to Mrs. Strauch, in full liquidation of her homestead claims, out of the surplus in his hands arising from the sale of the real estate, the sum of \$306, being the balance remaining after accounting for the proceeds of the Germania insurance policy.

[4] It appears from the testimony that at least during the later months of Mr. Strauch's business, while he was in the hospital and convalescing from a severe surgical operation, his store was managed by Mrs. Strauch and their grown daughter, Miriam. It also appears that a definite contract existed between Mr. Strauch and his wife and daughter that they were to receive as compensation the sums of \$10 and \$6 per week, respectively. On mere suspicion the referee disre-

gards this testimony, to which there is no contradiction, and therefore refuses to allow either of them their preferred claims for wages. Passing the point that these people may be considered to be operatives and hence entitled to preference for wages for a year preceding the bankruptcy, without further discussion than to suggest that we are not convinced by the facts that they should be so considered, it seems to us to be well established by the evidence, and entirely consistent with the fair and equitable administration of the bankruptcy law in this case, to allow these claims for the three months immediately preceding the filing of the petition, and the trustee will account to Miriam Strauch for the period in question at the rate of \$6 per week and to Mrs. Strauch upon her claim for a like period at the rate of \$10 per week.

[5] The referee, with a peculiar fancy, which has been manifest all through this case, disregards the claim of Miriam Strauch, for instance, because, as he says:

"There was a lack of corroboration of the testimony in behalf of Miriam Strauch and her father that there was a definite contract between them whereby Miriam was to receive for her work the sum of \$6 per week for her services."

We are not aware that when testimony is as positive as this was its credibility is affected by the lack of corroboration. The referee was not justified in fancifully and arbitrarily disregarding it, nor was he entitled to consider the fact that this daughter, who was five or six years past her majority, had received favors from her parents in her immature years and when her father was in better financial circumstances. It would make no difference how kind and indulgent a father he had been to her at a time when such indulgence did not affect his creditors.

CORY v. LAKE SHORE & M. S. RY. CO.

(District Court, N. D. Ohio, E. D. March 17, 1911.)

No. 8,044.

MASTER AND SERVANT (§ 250*)—EMPLOYERS' LIABILITY ACT—EXCLUSIVENESS OF REMEDY.

Where a railroad employé is killed or injured while engaged in interstate commerce in the course of his employment in another state than that of his residence, the remedy given by federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), is exclusive, and an action cannot be maintained under a statute of the state where the injury occurred.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 805; Dec. Dig. § 250.*]

At Law. Action by W. A. Cory, administrator of the estate of Albert L. Stafford, deceased, against the Lake Shore & Michigan Southern Railway Company. On motion to strike paragraph from answer. Motion sustained.

C. W. Dille, of Cleveland, Ohio, for plaintiff.

Cook, McGowan & Foote, of Cleveland, Ohio, for defendant

KILLITS, District Judge. The plaintiff is administrator of the estate of Albert L. Stafford by appointment in the probate court of Cuyahoga county, Ohio. He alleges in his petition that the decedent came to his death while in the employ of the defendant through defendant's negligence on an occasion when defendant and decedent, as defendant's employé, were engaged in interstate commerce.

To the petition an answer has been filed, containing, among other things, this allegation:

"Further answering, defendant says that prior to the bringing of this action an action was brought in this court by Reznor Stafford, father of said Albert L. Stafford, deceased, and his sole beneficiary, against this defendant, being action No. 8,021 on the docket of this court, which said action is still pending in this court; that in said action said Reznor Stafford seeks to recover from this defendant damages for the death of said Albert L. Stafford on the same cause of action and upon the same issues as those upon which this action are brought."

The case is before the court on motion of the plaintiff to strike this allegation from the answer.

The accident occurred in the state of Pennsylvania. The decedent was unmarried and childless, and was domiciled in Cuyahoga county. Reznor Stafford, his father, was a resident of the state of Pennsylvania, in which state the law gives him a right of action for the death of his son without the intervention of a personal representative, and, assuming to act under the Pennsylvania law, he brought the action spoken of in the paragraph sought to be stricken from defendant's answer.

The question thus raised is whether the federal employers' liability act, under which this action is brought, is exclusive, or whether it is

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

merely concurrent with the state law to the end that an action brought under the state law makes it impossible, while the same is pending, to bring an action under the federal statute.

We think, upon the facts of this case as set out in the petition, the decedent being a resident of Ohio, the accident occurring when the decedent was engaged in the course of his employment for the defendant in interstate commerce, an action lies only under the federal employers' liability law, and that the paragraph moved against states no matter of defense and should be stricken out.

In this we follow *Fulgham v. Midland Valley Ry. Co.* (C. C.) 167 Fed. 660; *Dewberry v. Southern R. Co.* (C. C.) 175 Fed. 307; *Taylor v. Southern R. Co.* (C. C.) 178 Fed. 380; *Whittaker v. Illinois Central R. Co.* (C. C.) 176 Fed. 130. While these cases are none of them exactly on all fours with the case at bar as to the facts, yet they approach the proposition from standpoints clearly analogous, and in the discussion of the facts each court finds itself moved to declare in general language that the federal law is exclusive.

In *Whittaker v. Illinois Central R. Co.*, *supra*, the question was clearly put to the court whether the plaintiff did not have an action under the state law which could be brought in the federal court based on diversity of citizenship, upon which proposition the court says:

"Conceding the act of Congress to be constitutional, in the courts of the United States, at least, it is superior to and supersedes any state law or jurisprudence on the same subject."

We are not out of harmony with *Troxell v. Delaware, L. & W. R. Co.* (C. C.) 180 Fed. 871, in which case the court does not disapprove of the doctrine of the cases which we cite above, but bases its decision sustaining a verdict, when brought in its court by the widow rather than the personal representative of the decedent, upon the theory that when it appears that the decedent was injured when in the employ of the defendant while engaged in intrastate as well as interstate commerce, as distinguished from a case of exclusive interstate commerce, either the federal act or the state practice may be invoked.

The paragraph moved against is stricken from the answer, and defendant may amend its answer to conform to this order and have its exceptions.

RIDGEWAY v. KENDRICK et al.

(Circuit Court of Appeals, Third Circuit. November 3, 1913.)

No. 1,747.

BANKRUPTCY (§ 303*) — ACTION BY TRUSTEE — FRAUDULENT CONVEYANCE OF PROPERTY.

The claim of a trustee that a mortgage given by a bankrupt was fraudulent or voidable as a preference *held* not sustained by evidence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458-462; Dec. Dig. § 303.*]

Appeal from the District Court of the United States for the District of New Jersey; Joseph Cross, Judge.

Suit in equity by Warren L. Ridgeway, trustee in bankruptcy of Ida G. Kendrick, against Ida G. Kendrick and others. From the decree, complainant appeals. Reversed in part.

The following is the opinion of the District Court, by Cross, District Judge:

The bill of complaint in this cause is filed by Warren L. Ridgeway, as trustee in bankruptcy of the estate of Ida G. Kendrick, against Ida G. Kendrick, Ellen Gladys Kendrick, Harry M. Geary, Samuel H. Headley, and also against Ida G. Kendrick and Harry M. Geary, as trustees for Ellen G. Kendrick, to set aside certain conveyances and mortgages, to which more particular reference will later be made. The defendant Ida G. Kendrick was duly adjudicated a bankrupt on April 10, 1911, pursuant to the prayer of an involuntary petition therefor, filed in this court March 27, 1911. The complainant was elected trustee in bankruptcy of the estate of said bankrupt, at a meeting of the creditors held May 19, 1911. Since the bill of complaint was filed, certain property, which it was therein alleged had been transferred by the bankrupt in fraud of her creditors, and which was thereby sought to have restored to her estate, have been foreclosed and sold, or otherwise conveyed to independent parties, and have thereby admittedly been eliminated from these proceedings. The matters remaining for consideration are a transaction set up in the seventh and eighth paragraph of the bill of complaint, being a transfer of a hotel known as "Halcyon Hall" made by the bankrupt on the 15th day of August, 1908, to her and her father, Harry M. Geary, as trustee for her daughter, Ellen Gladys Kendrick, upon certain trusts in the said deed and bill of complaint particularly set forth; also, two other alleged fraudulent transactions: One, a mortgage dated November 25, 1910, made by the bankrupt to her father, Harry M. Geary, to secure the payment of \$15,000 one year from date, with interest, upon a property known and designated as the Hotel Imperial; the other, a mortgage also upon the Hotel Imperial, dated November 30, 1910, made by the bankrupt to one Samuel H. Headley, to secure the payment of \$20,000 with interest at any time within two years from the date thereof.

Another mortgage to one Joseph Salus, upon the Hotel Imperial for \$15,000 is stipulated, in behalf of all of the parties to this suit, to be invalid; hence it will require no further consideration.

The above conveyance from the bankrupt to herself and father, as trustees for her daughter, was made in August, 1908, at which time the bill alleges the bankrupt was insolvent, being largely indebted to divers persons, and that said conveyance was made to hinder, defraud, and delay, not only those creditors, but such other persons as might subsequently become her creditors. Indeed, the bill alleges, not only that that conveyance, but the mortgages above mentioned, and others which need not, for the reason above given, be considered, were all part of a plan, conceived at the time last men-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tioned, to defraud her present and future creditors, and that she was then insolvent; but the evidence, largely given by the bankrupt, does not support either of these allegations. It does, however, show that she owed at that time unsecured debts to the amount of from \$15,000 to \$16,000, that is according to her own testimony; but, on the other hand, she swears that at that time her assets were largely in excess of her liabilities, and shows that she was worth over and above her indebtedness, secured and unsecured, upwards of \$80,000. It also appears that her then existing unsecured indebtedness, consisting largely of running accounts, was with one possible exception, entirely paid off before the bankruptcy proceedings against her were instituted, and in the excepted case it was reduced to a comparatively insignificant amount, so that it could hardly be claimed to afford a sufficient, or indeed, any foundation for setting aside as fraudulent a conveyance made nearly three years before. In this connection it should also be noted that there is no evidence that her unsecured creditors had sued or threatened to sue, or had in any way disturbed or harassed her. The bill further alleges, however, and argument is made in behalf of the complainant in support of it, that, at the time the above conveyance was made, the bankrupt had just been compelled to take back the Hotel Imperial from an unsuccessful tenant; that she herself was about to run it; and that it was because of her intended entrance upon this alleged hazardous business that she evolved the fraudulent scheme, above referred to, of making over some of her property to her daughter, and encumbering the balance with intent thereby to defraud her present and future creditors. Mrs. Kendrick, however, was not a novice at the hotel business; she had previously been engaged in it for a long period, perhaps 20 years, and apparently had acquired a considerable estate thereby. At all events, I do not consider that an experienced person, who is about to engage in the hotel business in a thriving place like Atlantic City, is necessarily to be considered as entering upon a hazardous business. There is no evidence that such is the case, and the court will not, in the absence of evidence, assume it to be a fact. For this reason, this conveyance ought not to be held fraudulent and void, as against subsequent creditors. The rule that a voluntary conveyance will be set aside, even at the instance of subsequent creditors, where the transfer was made with a view of entering upon a hazardous business, the risks of which the grantor intended to guard himself against at the expense of his creditors, is salutary and wholesome, but under the evidence has no applicability to the case in hand; consequently the prayer of the bill that the conveyance under consideration be set aside as fraudulent will be denied.

The mortgage made by the bankrupt to her father, Harry M. Geary, was without consideration, and is clearly void. It is a circumstance worthy of mention that, since the beginning of this suit, the mortgage was sold under execution for \$5; furthermore, the defendant Geary did not appear in this suit and testify in support of his mortgage. The only testimony pertaining to it, of importance, is that of the bankrupt herself, which clearly shows that it was without consideration and intended to protect her property from her creditors. The substance of her testimony in this connection is that she purchased the property which the mortgage covers, being that known as the Hotel Imperial, from her father, the defendant Geary, about 23 years before, for \$18,000. The consideration for the purchase, according to her testimony, was to be paid as follows: "I bought it of him under an agreement that I was to give him a thousand dollars a year in cash, and board for him and mama and my grandmother, as long as they lived." She further testified that she supported her mother and grandmother until they died, and her father until she was forced into bankruptcy, and that when she made the mortgage in question she had fully complied with the agreement with reference to the payment to him annually of the sum of \$1,000. Subsequently she made an attempt to modify her testimony, and, under the guidance and suggestion of her attorney, swore that she actually owed her father \$15,000 at the time the mortgage was made. But the circumstances are such as to make her testimony in this respect unreliable. She seemingly told the truth in the first instance, and then by the aid of leading questions finally succeeded in flatly contradicting herself. She admits that the mortgage was given to

protect her property from a deficiency which had arisen upon the sale of another property under foreclosure of a mortgage. This will appear from the following question and answer:

"Q. By whose advice, if any one's, did you make this mortgage to Mr. Geary?

"A. When Strawbridge foreclosed that mortgage on 142 (South Maryland avenue), I didn't know they could sue on the mortgage afterwards, and then I went to Judge Endicott about papa's mortgage on the Imperial, and that is how I got the mortgage on the Imperial."

She also said that no conversation took place between her father and herself, at the time the mortgage was given. She then immediately added, "I never gave it to him," but later added, "Yes, he saw it, he had it," and then added that she got it back afterwards. She said that she got it away from him and kept it, because, "you see, I have got a sister, and I wasn't having him (father) give that mortgage to her; it is a fine family—I had worked and earned this money, don't you know?" She later said, speaking of the mortgage in question, "that mortgage would have been canceled if the creditors would have settled and let me have the Imperial back and run it." But if the mortgage was supported by a consideration, still it was a past consideration, and the mortgage having been given within four months of bankruptcy, clearly as a preference, should be set aside, since the father undoubtedly had knowledge of her financial condition at the time, and reasonable cause to believe that in accepting it he was accepting a preference. Of the agreement under and pursuant to which it is claimed the mortgage was given, little can be said, for little has been shown. No oral attempt was made to prove its contents.

There remains for consideration the Headley mortgage for \$20,000, which the bill of complaint alleges was executed in pursuance of the fraudulent scheme, conceived by the bankrupt in 1908, to hinder, defraud, and delay her creditors. The mortgage is dated November 30, 1910, and covers the Hotel Imperial, together with other property known as 101 States avenue, Atlantic City (since foreclosed and sold under a prior mortgage), and was made to secure the sum of \$20,000 with interest at any time within two years. The circumstances under which the said mortgage was given, as shown by the proofs, are as follows: The States avenue property was formerly owned by one Townsend, who, in the fall of 1908, made an exchange of property with Mrs. Kendrick, the bankrupt, by which she conveyed a property known as the Hotel Lawrence, to an appointee of his, and he, by way of exchange therefor, conveyed the States avenue property to Ellen Gladys Kendrick, her daughter. Shortly thereafter Mr. Headley was approached by Mrs. Kendrick, and an attempt made to secure his services in making certain material improvements to the States avenue property. An examination of the title, which he thereupon caused to be made, showed that the title thereto was not in the bankrupt, but in her daughter, whereupon negotiations were entered into between Mr. Headley and the daughter, which ultimately resulted in a contract between them under which Mr. Headley was to furnish the plans, perform the work and labor, and furnish the materials necessary to complete the improvements agreed upon, and was to receive therefor as his compensation 10 per cent. of their cost. Although this contract was made with the daughter, Mrs. Kendrick herself was present, not only when it was made, but subsequently at many of the interviews held between Mr. Headley and her daughter, concerning the making of said improvements. Upon the completion of the contract, Mr. Headley, being unable to get his money, threatened to file mechanics' liens against the property for the sum of \$35,593 due him under his contract for the cost of said improvements with 10 per cent. added.

There were prior liens upon the property at this time, aggregating \$16,015. Negotiations subsequently entered into between the parties resulted in the procurement of a loan upon the States avenue property from a building association of \$30,000, which was to be applied, in the first instance, to the extinguishment of the existing incumbrances thereon, and in the second place towards the payment of Mr. Headley's claim, while so much of his claim as was not thus paid was to be secured by a second mortgage of \$20,000 upon the property, provided other satisfactory security in addition to such prop-

erty could be obtained. The reason for this proviso was that Headley did not deem the equity therein over the building association's mortgage sufficient security for the payment of the balance which would remain due him. Mrs. Kendrick and her daughter accordingly endeavored to have Mr. Geary individually and also as trustee, with her for her daughter in the deed above mentioned, become such additional security. This Geary declined to do. Mrs. Kendrick then offered to include in the mortgage the Hotel Imperial, which offer was accepted, and the mortgage in question was executed; whereupon Mr. Headley released to the daughter his right of lien against the States avenue property, and also surrendered certain promissory notes of the daughter, indorsed by Mrs. Kendrick, which had been given him on account of his contract with the daughter while the same was in process of execution. The bankruptcy proceedings against Mrs. Kendrick followed almost immediately thereafter. Since then, the States avenue property has been sold under a proceeding instituted for the foreclosure of the Building Association mortgage, and at such sale realized only sufficient to pay that mortgage with interest and costs. The prayer in the bill of complaint, in respect of this mortgage to Headley, is that it may be set aside and declared null and void as in fraud of the trustee in bankruptcy and the creditors of the bankrupt, and also because it was given as a pre-existing debt under the bankruptcy act. There is one answer, and that a short one, to both of the prayers, and it is this: That Mr. Headley, in so far as the case shows, was entirely innocent in the premises, and there is nothing whatever to show that he had any reason to suppose that the daughter, Ellen Gladys Kendrick, was not beyond question the absolute owner of the States avenue property which she agreed with him to have improved upon the terms mentioned. Apparently the contract for the improvement was made and executed in good faith on his part, and it would be impossible, under the evidence, to find that what he did by way of improvement to the States avenue property was part of a scheme devised two years or more before by him, Mrs. Kendrick, and others, with intent to defraud creditors of Mrs. Kendrick, not then in existence. Nor is there anything to show, or any facts from which an inference could reasonably be drawn, that when Headley released his lien claim, surrendered the notes above referred to, and accepted the bond of Mrs. Kendrick, secured by a mortgage upon the Hotel Imperial as additional security for his claim, he knew anything in particular about her financial affairs. That is to say, there is nothing to show that he knew she was insolvent, or that he believed, or had reasonable cause to believe, that he thereby effected a preference over other creditors of the bankrupt. The natural inference to be drawn from his conduct is quite to the contrary.

My conclusion upon the whole case is that the plaintiff is entitled to have the Geary and Salms mortgages upon the Hotel Imperial set aside, and that the other relief sought by the bill of complaint should be denied. Counsel, unless they can agree upon the form of decree, will be heard thereon upon notice.

Theo. W. Schimpf and Jas. M. Sheen, both of Atlantic City, N. J., for appellant.

Chandler & Robertson and Emerson L. Richards, all of Atlantic City, N. J., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. A creditors' petition was filed against Ida G. Kendrick on March 27, 1911, and she was adjudged bankrupt on April 10. The trustee afterwards chosen brought this suit in equity on August 23 to set aside a trust deed and three mortgages, asserting them to be either fraudulent or preferential. Two of the mortgages were set aside—that part of the decree has been ac-

quiesced in—but the deed and the other mortgage were sustained, and this action of the court is complained of in the present appeal. We refer to the foregoing opinion of the district judge for a statement of the facts and of the reasons for his action.

We agree that no ground exists for setting aside the mortgage to Headley. It cannot be avoided as a preference, because the evidence shows clearly that Headley did not have reasonable cause to believe that a preference was intended. And it cannot be avoided as a fraudulent lien, because the evidence shows that it was recorded according to law, and was both given and accepted "in good faith and not in contemplation of or in fraud upon this act, and for a present consideration." It is therefore protected by Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), as amended by Act Feb. 5, 1910, c. 487, § 16, 32 Stat. 800 (U. S. Comp. St. Supp. 1911, p. 1509). The consideration was twofold: (1) The surrender by Headley of his right to file a mechanic's lien against the house on States avenue; and (2) the benefit given to Mrs. Kendrick by relieving her of liability as indorser on notes aggregating \$6,000. The trustee does not contend that the consideration for the mortgage was less than the face of that instrument; his position is that the transaction was fraudulent throughout and is therefore wholly void. Indeed, the bill goes so far as to charge (but without support in the evidence) that the mortgage was part of a fraudulent scheme devised more than two years before.

But at present we are not prepared to decide that the trust deed conveying the Halcyon Hall property should be adjudged either valid or void. Upon this subject the findings are not satisfactory, and we feel obliged to return the case for further proceedings. Our reasons are as follows: When the deed was made in August, 1908, Mrs. Kendrick owed certain debts, and since that date she has become indebted to other persons. In brief (so far as this deed is concerned) her creditors fall into two classes, existing and subsequent. Section 70e of the Bankruptcy Act clothes the trustee with power to enforce the rights that either class may possess:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it except a bona fide holder for value."

See, also, *Crane v. Brewer*, 73 N. J. Eq. 558, 68 Atl. 78. But the record shows clearly enough that against subsequent creditors the deed is good. The law of New Jersey allows such creditors to attack a voluntary conveyance, but requires them to prove fraud in fact, and imposes the burden of proof upon them. *Mellon v. Mulvey*, 23 N. J. Eq. 198; *Kinsey v. Feller*, 64 N. J. Eq. 367, 51 Atl. 485; *Bank v. Beatty*, 75 N. J. Eq. 436, 72 Atl. 428. We agree with the District Court that this burden has not been sustained. The transaction was in good faith, and Mrs. Kendrick was solvent at the time. Moreover, we also agree that she did not convey the property in order to remove it from the risks of a hazardous business upon which she was about to

enter. In a word, fraud in fact was not proved, but was negatived; and therefore the attack on behalf of subsequent creditors was not successful.

But the rights of creditors to whom Mrs. Kendrick owed money in August, 1908, remain to be considered, and it is upon this point that we are not satisfied with the findings of the District Court. The law of New Jersey puts this class of creditors on a different footing from subsequent creditors. As we understand the decisions of that state, a person in debt, even if he be solvent, cannot by a voluntary conveyance put his property out of the reach of creditors then existing; and the presumption of fraud against him in favor of such creditors is conclusive. *Haston v. Castner*, 31 N. J. Eq. 697; *Campbell v. Tompkins*, 32 N. J. Eq. 173; *Severs v. Dodson*, 53 N. J. Eq. 634, 635, 34 Atl. 7, 51 Am. St. Rep. 641; *Banking Co. v. Dennis*, 56 N. J. Eq. 550, 39 Atl. 689.

This being the rule in New Jersey, it is of great importance to know precisely and specifically what debts Mrs. Kendrick owed in August, 1908, and what has become of them since that date. In this respect the findings seem to us inadequate, and perhaps we may fairly speak of them as vague. We think we are entitled to definiteness on this subject in order that we may run no risk of mistake, and we must therefore return this part of the case for further proceedings.

We therefore affirm so much of the decree appealed from as refers to the mortgage to Samuel H. Headley; but we reverse so much of the decree as refers to the trust deed of the Halcyon Hall property, and remand that subject for further proceedings.

Three-fourths of the costs on this appeal to be paid by the trustee in bankruptcy, but to be a charge against the bankrupt estate, and one-fourth to be paid by Ida G. Kendrick and Harry M. Geary, trustees for Ellen G. Kendrick.

LEARY v. MAYOR & ALDERMEN OF JERSEY CITY et al.

(Circuit Court of Appeals, Third Circuit. August 22, 1913. Rehearing Denied November 4, 1913.)

No. 1,598.

1. STATES (§ 12*)—TERRITORIAL EXTENT AND BOUNDARIES.

Under the Compact of 1833 between the states of New Jersey and New York (Act June 28, 1834, c. 126, 4 Stat. 708), providing that the boundary line between the two states shall be the middle of the Hudson river, of the bay of New York, etc., that the state of New York shall have exclusive jurisdiction over all the waters of the bay of New York, subject to New Jersey's exclusive right of property in and to the land under water lying west of the middle of the bay—the territory of the state of New Jersey extends to the middle of New York Bay, and incident to its ownership of such territory is the sovereign power to tax the land under water.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 6-11; Dec. Dig. § 12.*]

2. EVIDENCE (§ 25*)—JUDICIAL NOTICE—GEOGRAPHICAL FACTS.

The law will take judicial notice of the universal and unvarying practice of the states to subdivide their entire territory into counties and their counties into municipal districts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 31-33; Dec. Dig. § 25.*]

3. MUNICIPAL CORPORATIONS (§ 25*)—BOUNDARIES—PRACTICAL CONSTRUCTION.

Where the state conveyed submerged littoral land fronting a city, describing it as located in such city, and the grantee assigned the conveyance describing the land in the same way, and the city assessed taxes thereon for approximately 30 years, there was such an assertion, practice, and acquiescence on the part of the state, municipality, and owner, in the assumption that the land was included in such city, as called for the principle of interpretation which makes fixed practice its own interpreter.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 62; Dec. Dig. § 25.*]

4. COUNTIES (§ 7*)—TERRITORIAL EXTENT AND BOUNDARIES.

Under Act N. J. Feb. 22, 1840 (Revision 1877, p. 205, § 42), creating the county of Hudson and defining its boundaries as extending along the boundary line between certain counties to Kill-Van-Kull; thence eastwardly on the boundary line between this state and the state of New York to the Hudson river; thence northwardly on such boundary line between this state and the state of New York up the Hudson river—such county extends into New York Bay to the boundary line between New York and New Jersey.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 3; Dec. Dig. § 7.*]

5. MUNICIPAL CORPORATIONS (§ 23*)—TERRITORIAL EXTENT AND BOUNDARIES.

Act N. J. March 18, 1863 (P. L. p. 306), creating the township of Greenville, described it as bounded on the southeast by "New York Harbor" Act N. J. March 11, 1868 (P. L. p. 314), creating the city of Bergen, described its boundaries as running into New York Bay until it intersects the boundary line of the state of New York; thence southerly "along said boundary line of the state of New York until it intersects the dividing line between the township of Greenville and the city of Bergen." The township of Greenville was subsequently annexed to Jersey City. *Held*, that Greenville extended, and Jersey City now extends, to the New York line in the middle of New York Harbor, notwithstanding the provision that it was bounded "by New York Harbor," since boundaries described by such terms as sea, bay, etc., include land below high-water mark, as far as the grantor owns, and a statute passed with a view to including within some municipal subdivision every part of the state's sovereignty, in order to extend the benefits of government to all its territory, is not to be construed with the same precise accuracy involved in a grant by an individual of a specific part of a larger tract, especially as the Legislature in the act of 1868 assumed that Greenville extended to the midharbor, interstate line.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 52-59; Dec. Dig. § 23.*]

6. CONSTITUTIONAL LAW (§ 284*)—MUNICIPAL CORPORATIONS (§ 957*)—REVIEW OF ASSESSMENT—STATUTORY PROVISIONS—DUE PROCESS OF LAW.

Act N. J. March 30, 1886 (P. L. p. 149), authorizing the legislative body of any city, with the concurrence of the board or body having charge of its finances, to apply to the circuit court for the appointment of commissioners to adjust arrearages of taxes, and providing that the commissioners may examine into and fix and determine as to each parcel of land how much such arrearages and subsequent taxes, if any, ought in the way of taxes, assessment, or water rate, in fairness, equity, and justice

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to be laid, assessed, and charged against and actually collected from such land, requiring a report of the commissioners to be presented to the court for approval upon such notice as the court shall direct, and providing that no writ of certiorari shall be allowed to contest or set aside any tax, assessment, or lien determined by the commissioners, or to set aside any proceedings under that act to collect the same, unless the party applying shall give a bond conditioned for the payment of so much thereof as shall be ascertained to be justly payable, or unless application therefor shall be made within six months from the confirmation of the report, does not deny taxpayers due process of law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 893–896; Dec. Dig. § 284; * *Municipal Corporations*, Cent. Dig. §§ 2015–2022; Dec. Dig. § 957.*]

**7. MUNICIPAL CORPORATIONS (§ 980*)—REVIEW OF ASSESSMENT—CONCLUSIVE-
NESS OF ACTION OF REVIEWING BOARD.**

Where a taxpayer failed to avail himself of the opportunity to have questions as to the amount, scope, lien, and limitation of taxes against his property determined by commissioners appointed under such act, or by the courts empowered to conform and review such action, such questions were settled by the decree of the commissioners, and were not open to review in a collateral action to enjoin a tax sale.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2124–2133; Dec. Dig. § 980.*]

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Bill in equity by Daniel J. Leary against the Mayor and Aldermen of the City of Jersey City and others. From a decree (189 Fed. 419), dismissing the bill, the plaintiff appeals. Affirmed.

Merritt Lane, of Jersey City, N. J., for appellant.

Warren Dixon and James J. Murphy, both of Jersey City, N. J., for appellees.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Daniel J. Leary, a citizen of the state of New York, brought a bill in equity to enjoin Jersey City, a municipality of the state of New Jersey, from selling certain real estate for defaulted taxes. That court, on final hearing, in an opinion reported at 189 Fed. 419, found against the plaintiff, and from the decree dismissing his bill Leary appeals.

From the proofs it appears that on April 30, 1881, the state of New Jersey—acting by its commissioners appointed under the statute of that state of March 31, 1869, which act was a supplement to one of April 11, 1864—by an instrument attached to the bill as “Exhibit 1,” conveyed to the Morris & Cumings Dredging Company, a corporation of New York, the locus in quo, which was submerged littoral land situate in New York Bay and fronting Jersey City. On February 24, 1904, that company assigned to the plaintiff its interest under the said conveyance of the state. On these lands taxes were assessed by the municipal authorities of Jersey City for the years 1883 to 1905, inclusive, and on the legality of such assessments this case turns. Such legality involves in turn several questions, and to them we now address ourselves seriatim.

[1] The first and underlying one is, Is this submerged land, which abuts the uplands of Jersey City and lies under the waters of New York Bay or Harbor, within the sovereignty and jurisdiction of New Jersey? This question turns on the construction and effect given to the compact between the states of New Jersey and New York. Act June 28, 1834, c. 126, 4 Stat. 708. While it was raised by the bill under the averment "that the lands and premises herein mentioned and described are not within the jurisdiction of the state of New Jersey, and not subject to the sovereignty of said state, and cannot be taxed under the authority of said state, although within the geographical boundaries thereof," such position is not tenable. Not only is there a stipulation "that before the lease of the lands as hereinafter mentioned they belonged absolutely to the state of New Jersey, and were and always had been a part of the public domain," but the question of the jurisdiction and taxing power of the state over such lands was adjudged and upheld by the court of Errors and Appeals of New Jersey in *Central R. R. Co. v. Jersey City*, 72 N. J. Law, 311, 61 Atl. 1118, a decision affirmed (209 U. S. 473, 28 Sup. Ct. 592, 52 L. Ed. 896) by the Supreme Court of the United States. It is clear, therefore, that the territory of the state of New Jersey extends to the median line of New York Bay, and that incident to the ownership of such territory is the sovereign power to tax the same.

[2] We next turn to the question whether these lands are, for taxing purposes, within the limits of Jersey City. The law will take judicial notice of the universal and unvarying practice of our states to subdivide their entire territory into counties, and their counties into municipal districts. Indeed the existence within a state of any portion of its territory without county or municipal relation is unheard of. But unless this littoral land of New Jersey is within the county of Hudson and within the boundaries of Jersey City, it is in this anomalous, nonmunicipal relation, for it is not contended it has or can have any other municipal relation than with Jersey City. The locus in quo abuts the upland property that was part of the township of Greenville, before that municipality was annexed to Jersey City. The question then resolves itself into ascertaining the water-front boundary of the township of Greenville in the county of Hudson.

[3] In the first place the conveyances on which the plaintiff bases his interest and his right to maintain this bill show an assertion by the state of its sovereignty over these lands, and an acquiescence by plaintiff's predecessor in title in such assertion. In the state's conveyance, Exhibit 1, it is described as:

"All that tract of land under the waters of the Bay of New York in the city of Jersey City in the county of Hudson and state of New Jersey described as follows."

Moreover, Exhibit No. 2 of plaintiff's bill shows that he accepted an assignment of the Morris & Cumings Dredging Company wherein the land was again described as "that tract of land under the waters of the bay of New York in the city of Jersey City in the county of Hudson and the state of New Jersey," and wherein it is recited that a mortgage of \$100,000 on said property was recorded in Hudson coun-

ty. These facts, together with the assessment of taxes thereon by the authorities of Jersey City, disclose such an assertion, practice, and acquiescence on the part of state, municipality, and owner, covering a period of approximately 30 years, in the assumption that the land in question was included in Jersey City as call for that salutary principle of interpretation which makes fixed practice its own interpreter. *Stuart v. Laird*, 1 Cranch, 308, 2 L. Ed. 115; *United States v. Commonwealth*, 186 Fed. 288, 108 C. C. A. 331.

[4] But, passing by these inferential considerations, we turn to the positive evidence of boundary disclosed in the record. As we have seen, by the Compact of 1833 and its construction by the courts (70 N. J. Law, 81, 56 Atl. 239; 72 N. J. Law, 311, 61 Atl. 1118; and 209 U. S. 476, 28 Sup. Ct. 592, 52 L. Ed. 896) this submerged land lies within the boundary of New Jersey. The boundary at this point is the middle of the bay of New York. Such being the case, the act of New Jersey of February 22, 1840 (Rev. of N. J. 1877, p. 205, § 42), creating the county of Hudson, included these lands in that county by language which made the boundary line in New York Bay between New York and New Jersey also the boundary of Hudson county, viz.:

"Thence down the said Passaic river and Newark Bay, in the several courses thereof, on the boundary lines between the county of Bergen, as the same stood before the passing of this act, and the counties of Passaic and Essex, to Kill-Van-Kull; thence, eastwardly, *on the boundary line between this state and the state of New York*, to the Hudson river, thence, northwardly, continuing on the said boundary line between this state and the state of New York, up the said Hudson river to the place of beginning, * * * and said lines shall hereafter be the division lines between the counties of Essex, Passaic, and Bergen, and the state of New York, and the said county of Hudson, respectively."

[5] It will thus be seen that the locus in quo is in Hudson county. Is it also included in Jersey City? It will be noted that no contention is made that, if not in Jersey City, it falls within any other New Jersey municipality. Without detailing the various acts and findings of commissioners relating thereto, it suffices to say that the upland which this submerged locus in quo fronts was included in the township of Bergen, a subdivision of Hudson county. By the act of March 11, 1862 (Laws of New Jersey, p. 162) "all that part of the county of Hudson which now constitutes the township of Bergen" was incorporated as the town of Bergen. By the act of March 18, 1863 (Laws of New Jersey, p. 306) the "southwestern part or portion of the township of Bergen, as it existed immediately previous to the passage of said act, and comprised, or nearly so, within the limits of what is known as Washington School District, Number three, bounded on the southeast by New York Harbor," etc., was detached from the town of Bergen and incorporated as the township of Greenville.

Upon the alleged restriction of the township of Greenville to the shore line of the waters of New York Bay by the words "bounded on the southeast by New York Harbor" is based the whole contention of the plaintiff on this territorial question. Addressing ourselves to that question, it should be noted that the subsequent legislation assumes

as a fact that the water line boundary of the township of Greenville is the mid-harbor, interstate line. For example, in the act of March 11, 1868 (Laws of New Jersey, p. 314) by which the "same territory heretofore known and incorporated as 'The Town of Bergen,' * * * is hereby formed into a city corporate, to be designated and known in law as 'the city of Bergen,'" it will be noted that not only is the Bergen shore boundary carried to the interstate boundary line, but it is stated that the Greenville township line also extends to the New York line. The act incorporating the city of Bergen thus describes its pertinent boundaries:

"Thence southerly along the center of Mill creek its several courses into New York Bay, until it intersects the boundary line of the state of New York; thence southerly along said boundary line of the state of New York until it intersects the dividing line between the township of Greenville and the city of Bergen," etc.

But apart from the statutory construction thus placed by the state of New Jersey on its own territorial legislation, we think the words in the township of Greenville act, viz., "bounded on the southeast by New York Harbor," should not receive the narrow construction contended for the plaintiff. To do so is to lose sight of the principle that boundaries by such terms as "sea," "bay," "harbor," "creek" or "river," includes land below high-water mark as far as the grantor owns. *Atty. Gen. v. Delaware R. R.*, 27 N. J. Eq. 631; *Boston v. Richardson*, 95 Mass. (13 Allen) 146; *Atlantic Dock Co. v. Brooklyn*, 1 Abb. Dec. (N. Y.) 24; *Rex v. Landulph*, 1 Moody & R. N. P. Rep. 393; *McCannon v. Sinclair*, 2 El. & El. (Q. B.) 53. Moreover, it must not be overlooked that, in the context in which the words "bounded on the southeast by New York Harbor" are used, we have not before us the precise accuracy involved in a grant by an individual in conveying a specific part of a larger tract of land, but the general wording of a statute passed with a view to include within some municipal subdivision every part of the state's sovereignty, a purpose necessitated in order to extend the benefits of government to all its territory. In that regard the court below well said:

"The terms used by a sovereign in such grants are not to be subjected to the strict rule of construction as when it grants title to some of its territory to a private grantee. The legislative purpose sought by such territorial subdivision is to be kept in mind. * * * To admit the contention of complainant under this head, a class of property than which none is more valuable, would escape taxation, not by express legislative exemption—the only way indicated in the city enactments—but by a narrow construction of the word 'on' in running the harbor boundary. Such a rule of construction is not permissible in view of the state's policy, clearly indicated by legislation granting title to lands under tide water, requiring the taxation of all property within the state, and subdividing the entire territory of the state into taxing districts, to impose and collect such taxes."

To this it may be added that the deed under which the plaintiff claims, and which is exhibited as part of the bill, and is the foundation of his property right to invoke jurisdiction in this case, itself shows the assertion and act of the state locates this land in Jersey City, viz.:

"All that tract of land under the waters of the bay of New York in the city of Jersey City in the county of Hudson and state of New Jersey."

For the plaintiff to aver that such is not the fact, that the said lands are neither in the state, county, nor municipality, and to say that the deed conveyed no such land, is virtually to undermine the support on which his right to relief is based.

Having thus found that the locus in quo is in Jersey City, we turn to the next question, viz., Are the lands in question liable for the taxes claimed? As to the actual assessment of the taxes the stipulation concedes—

“that the taxes in question mentioned in the foregoing bill were originally levied for city, county, state and school purposes in the same manner as such taxes were levied upon other property in Jersey City.”

But it is contended that the conveyance from the state of New Jersey to the Morris & Cumings Dredging Company, being Exhibit 1, was only a lease of the property; that the state is still the real owner, and that no taxes can be legally assessed against lands owned by the state, or against the mere leasehold interest of any one holding under such a conveyance as Exhibit 1. The various statutes of New Jersey and the conveyance are fully set forth in the opinion of the court below, and by reference thereto we avoid a repetition that would needlessly lengthen the present discussion. After a thorough examination that court held—

“that the estate conveyed is an estate in fee simple, with a condition subsequent, the condition being that, if the annual payments are not made when due, the estate may be defeated, and that the land described in the instrument made by the state of New Jersey to the plaintiff's grantor is taxable in his hands.”

In such conclusion we concur. Without discussing other New Jersey cases, none of which in our judgment rule the present question, it suffices to say that we find support for the foregoing conclusion in *Hudson Tunnel Co. v. Board of Riparian Com'rs*, 27 N. J. Eq. 573; *Cook v. Bayonne*, 80 N. J. Law, 598, 77 Atl. 1048, and *Cook v. The Mayor*, 80 N. J. Law, 596, 77 Atl. 1048, decided during the pendency of the present case, wherein the Supreme Court of the state held:

“An instrument calling itself a ‘lease,’ made by the Riparian Commission of this state for lands under water, pursuant to the statutes of 1869 and 1871 (3 Gen. St. 1895, pp. 2788, 2790), which ‘bargains, sells, leases and conveys’ to the grantee, ‘her heirs and assigns forever,’ with habendum in fee and reservation of annual rental, with right of re-entry and of distress in case of non-payment expressly reserved, and covenanting for a further conveyance free and discharged of the rent on payment of a stipulated gross sum, is a grant in fee, subject to a rent charge, and the land therein described is taxable in the hands of the grantee.”

[6, 7] Subsequent to the filing of this bill certain proceedings were taken by Jersey City under the New Jersey statute of March 30, 1886 (Laws of New Jersey, p. 149), commonly known as the “Martin Act.” Such proceeding is reported in *Jersey City v. Speer*, 78 N. J. Law, 34, 27 Atl. 448; affirmed 79 N. J. Law, 598, 76 Atl. 1037. Thereupon a supplemental bill was filed in this case, in which it was averred that said proceeding had been instituted; that thereunder the commissioner “proceeded to consider the taxes claimed to have been assessed, levied, and apportioned against the lands and premises mentioned and

set forth in your orator's bill, * * * and did report that they had adjusted the alleged taxes against the lands and premises mentioned in your orator's bill of complaint," etc., and that said report was duly confirmed by the circuit court of Hudson county. The supplemental bill, by reference to the original bill, then alleged, *inter alia*, that by reason of the ownership of the fee by the state of New Jersey and of the lands not being within either the territorial jurisdiction of New Jersey or the corporate limits of Jersey City, they were not taxable, and the proceedings of the commissioners was illegal and in violation of the plaintiff's constitutional rights. It is, of course, clear that if the fee of the lands in question was in the state, or if the lands themselves were not in Jersey City, no valid basis existed on which any adjustment could be based, but it is equally clear that if these lands are in Jersey City and the plaintiff and not the state is the owner of them, they are taxable by the authorities of Jersey City, and the adjustment of taxes thus imposed can be and was lawfully confided to such a tribunal. If so, the taxpayer is not denied due process of law, and the action of such tribunal cannot be attacked collaterally. That the lands in question are in Jersey City, and that the plaintiff, not the state, is the owner thereof, we have already found, so that the objections which the plaintiff made to the jurisdictional power of the commission was without foundation. That he did not avail himself of his further right to raise the other questions he now seeks to raise as to lien, limitation, the fact that some of the taxes were assessed prior to the conveyance, and other kindred matters, does not change the situation, for the law gave him that right before the commission. He not only appeared before it, but was represented by counsel when the report came up for confirmation in the circuit court of Hudson county. That proceeding—see *Jersey City v. Speer*, *supra*—was before a board of the general nature referred to in *Stanley v. Supervisors*, 121 U. S. 550, 7 Sup. Ct. 1239, 30 L. Ed. 1000, where the Supreme Court said:

"In nearly all the states, probably in all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they are often termed, with sometimes a right of appeal from their decision to the courts of law. * * * To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. Their action is judicial in its character. They pass judgment on the value of the property upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are not open to collateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment."

No allegation is here made that the Commission did not act in accordance with the formal statutory requirements as to notice and procedure. The plaintiff, as we have seen, was represented by counsel at the meetings, and also in court when the report came up for confirmation. The powers committed to the Commission by the act were comprehensive, and authorized them, *inter alia*—

"to examine into and fix, adjust and determine, as to each parcel of land, how much of such arrearages and subsequent taxes, assessments or water rates, if any, ought, in the way of tax, assessment or water rate, in fairness, equity and justice, to be laid, assessed and charged against and actually collected from said land," etc.

The act also provided:

"That no writ of certiorari shall be allowed to contest or set aside any tax, assessment and lien fixed or determined by the said Commissioners, or to set aside any proceedings under this act to collect the same, unless the party applying for such writ shall give a bond, with approved security, conditioned for the payment of so much of said tax, assessment and lien as shall be ascertained to be justly payable, with interest and costs, nor unless application therefor be made within six months from the confirmation of the said report."

It would therefore appear that other than the territorial questions which we have here decided, all other questions the plaintiff here seeks to raise either were such as he could have raised before the commissioners, or in the courts empowered to confirm and review their action. Of neither of these rights under the law has he availed himself, and with full opportunity to him to produce testimony and to review any adverse finding, we are of the opinion that his rights were not determined without due process of law. He had notice of the proceeding, and indeed appeared before it to contest its jurisdiction. Having thus had an opportunity to raise before a competent tribunal the administrative questions he now seeks to raise in this court, he cannot justly complain, when this court holds all such administrative questions as to the amount, scope, and lien of the taxes, questions which he could have raised before such tribunal, are settled by its decree, and cannot be attacked collaterally.

After a full consideration of the many phases of the case, we have reached the conclusion that the court below made no error in dismissing the bill. Its decree is therefore affirmed.

RICHMOND DREDGING CO. v. STANDARD AMERICAN DREDGING CO. et al.

(Circuit Court of Appeals, Ninth Circuit. October 31, 1913.)

No. 2,208.

1. ADMIRALTY (§ 6*) — JURISDICTION — VESSEL SUBJECT TO MARITIME LAW — DREDGE.

A hydraulic dredge 75 feet long and 30 feet beam, having a superstructure containing a pilot house, galley and quarters for the crew, and machinery, built to operate afloat and not otherwise and capable of making ocean voyages, is subject to the maritime law, and contracts for her hire are within the admiralty jurisdiction.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 86-98; Dec. Dig. § 6.*

Admiralty jurisdiction as to matters of contract, see notes to *The Richard Winslow*, 18 C. C. A. 347; *Boutin v. Rudd*, 27 C. C. A. 530.]

2. SHIPPING (§ 39*)—CHARTER OF DREDGES—CONSTRUCTION.

A contract by which libellant leased a dredge to respondent and respondent at the same time leased another one to libellant, construed with respect

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to its provisions for termination of the leases, and *held* to entitle libellant to demand the return of its dredge on complying with a demand for a return of respondent's.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 141–148; Dec. Dig. § 39.*]

3. SHIPPING (§ 39*)—CHARTER OF DREDGES—CHANGE OF EQUIPMENT BY CHARTERER.

Where the lessee of a dredger to fit it for heavier work removed therefrom two engines which operated its machinery and temporarily installed others which it hired for the purpose, the latter did not become a part of the craft or its equipment and as such the property of its owner, but the lessee on termination of the lease was entitled to remove them and replace them with those in use when the lease was made.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 141–148; Dec. Dig. § 39.*]

Appeal from the District Court of the United States for the First Division of the Northern District of California; John J. De Haven, Judge.

Suit in admiralty by the Richmond Dredging Company against the Standard American Dredging Company, California Reclamation Company, and Atlas Gas Engine Company. From a decree in its favor, libellant appeals. Affirmed.

This is a libel in admiralty originally instituted against the dredger Richmond No. 1 and the Standard American Dredging Company to recover the possession of the dredger, her machinery, equipment, etc.

Among other things, it is alleged "that said dredger Richmond No. 1 is a vessel consisting of a hull and superstructure, containing a galley and cabin accommodation for her crew, also all machinery necessary for and usual in an hydraulic dredger; that the said dredger Richmond No. 1 is built to operate afloat and not otherwise, and during all the times herein mentioned has been and now is operated afloat and is equipped to navigate upon the ocean and other navigable waters."

It is further alleged that the Standard Company has wrongfully withheld the dredger from libellant since August 15, 1910, under a claim which it predicates upon the provisions of certain charter parties, but which claim has no foundation in fact. The charter parties referred to are three in number. The first bears date February 10, 1909, by the terms of which the Standard Company rented from the Richmond Company the dredger Richmond No. 1 for a period of not less than four months, and for as long thereafter as the Standard Company might desire the dredger for work in Lake Merritt.

The second was entered into October 18, 1909, between the same parties, which stipulated for a renting of said dredger to the Standard Company for a period of time running from October 19, 1909, to January 20, 1910, at a rental of \$800 per month, the lessee to return the dredger "to and in the canal at Richmond in as good condition and repair as same now is, viz., in condition to immediately start work, reasonable wear and tear and loss or injury by fire excepted."

The third charter party of date February 26, 1910, was also between the same parties, the Standard Company however being the first party, and the Richmond Company the second. The provisions so far as pertinent are as follows:

"1. The party of the first part hereby lets and leases unto the party of the second part and the party of the second part hereby hires and takes from the party of the first part the said electric dredger Oakland to be used for the filling of the said lands, at and near Richmond, California, for the term of sixty (60) days from and after this date, at a minimum rental of eight hundred dollars (\$800) a month which shall pay for the use of said dredger Oakland not more than one shift, not exceeding twelve (12) hours each day; and if at any time during said term, said dredger shall be operated more than

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

(12) hours in any day, the party of the second part shall pay the party of the first part an additional rental at the rate of eight hundred dollars (\$800) a month for the extra time of operation."

"7. In consideration of the execution of this agreement, all claim of the party of the second part to increased rental, or other charge, by reason of the detention of the Richmond No. 1 beyond the term of the said charter, is hereby waived; and the term of said charter, as modified by this agreement, is hereby extended, at the rental of eight hundred dollars a month, for the term of sixty days from this date, and for such further time as shall be fixed and determined as hereinafter provided; and the rental of said dredger Richmond No. 1 to be earned, shall be applied as an offset to the rental of the dredger Oakland as far as it will go.

"8. If at the expiration of the said term of sixty (60) days the party of the first part shall not have found any other work that it desires to do with said dredger Oakland, this agreement may, at the option of the second party, be extended thereafter until the party of the second part shall have completed such amount of filling as may be desired by the party of the second part on the lands aforesaid, not exceeding a total of 400,000 cubic yards of material including the filling that shall heretofore have been done by the use of said dredger Oakland, under this agreement, or until the party of the first part shall have given the party of the second part fifteen (15) days' notice of termination of this agreement.

"9. If at any time during the term of this agreement, or any extension thereof, the party of the first part shall secure work which it desires to do by the use of said dredger Oakland, it may, at its option either require the party of the second part, after fifteen (15) days' notice in writing to operate said dredger Oakland twenty-four (24) hours each day until 400,000 cubic yards of filling (including all filling previously done by the Oakland) shall have been completed or to terminate this lease of the said dredger Oakland by giving the party of the second part (15) days' notice of such termination, and returning the dredger Richmond No. 1 to the party of the second part as in said charter provided, or paying the party of the second part at the rate of fifty (50) dollars a day for the said Richmond No. 1 for all time it shall be retained by the party of the first part after the expiration of said fifteen (15) days' notice, and the return of the Oakland to the party of the first part.

"10. It is hereby mutually agreed and understood that the rent of said dredger Richmond No. 1 shall be eight hundred (\$800) dollars per month, and that the said first party shall have the right to lease and use said dredger Richmond No. 1 at any and all periods when not in use or required by the party of the second part until January 1, 1911."

It is further averred that the Standard Company terminated the latter charter party as to the dredger Oakland on August 12, 1910, and demanded a return thereof, and that in accordance with such demand the Richmond Company on or about August 14th returned said craft; that thereupon the Richmond Company became entitled to the return to it of the dredger Richmond No. 1; and that on August 16th, and again on September 2d, the Richmond Company demanded of the Standard Company the return of such dredger and was refused. The libellant claims damages for withholding the Richmond No. 1 at the rate of \$50 per day from the date of demand, and an attorney's fee of \$300, which it is claimed was incurred in a prior endeavor to recover said dredger.

The Richmond No. 1 had installed upon it at the time of filing the libel two Atlas gas engines for operating the dredging machinery. The Standard Company filed a claim claiming to be entitled to the rightful possession of the dredger as bailee and executed a bond for its release from the attachment, conditioned that the claimant "shall answer, abide by and perform the decree of this court, and return the said dredger in the same condition in which she now is and in good repair, and shall pay all damages which may be sustained by reason of the detention of said dredger."

The Atlas Gas Engine Company filed a claim to the ownership of one of the Atlas gas engines installed upon the dredger, and the California Reclamation Company filed a claim for the other.

Later libelant filed a supplemental libel setting forth other and further and separate causes of relief:

First, that libelant is entitled to damages under the bond of respondent for detention of the possession of said dredger in the sum of \$50 per day, aggregating \$9,400 to the date of filing the supplemental libel.

Second, that libelant is entitled to damages in the sum of \$10,000 for loss sustained under a contract with Orlin Hudson as superintendent of streets of the city of Richmond, which it was unable to perform on account of the withholding from it by the Standard Company of the possession and use of the dredger Richmond No. 1, of which contract the said Standard Company had knowledge and notice when it entered into the charter party of February 26, 1910.

Third, that after gaining possession of the dredger under the bond the Standard Company removed therefrom the Atlas gas engines then installed therein, which were of the value of \$10,000.

Fourth, that the Standard Company wantonly and maliciously deprived the libelant of said dredger to the latter's damage in the further sum of \$5,000.

Exceptions to the second amended libel and a motion to strike were denied by the court, but exceptions were sustained to the second and fourth clauses of relief preferred by the supplemental libel.

The Standard Company by its answer admits the execution of the charter parties as alleged, and the proceedings had in court in pursuance of the libel, including the execution by the Standard Company of the bond, and its resuming possession of the dredger by virtue of said bond and the order of the court. And it alleges, among other things, that on or about February 3, 1911, it tendered the dredger to libelant in the canal at Point Richmond in as good order and condition as it was when received, reasonable wear and tear thereof excepted according to the terms and provisions of the charter party of February 26, 1910; that the libelant refused to accept the dredger; and that by reason thereof the Standard Company has since been required to maintain a watchman upon it at an expense of \$100 per month, which amount it claims libelant should repay.

The cause being submitted upon the evidence, the District Court decreed that libelant was entitled to the dredger, and that it recover compensation for the use of the vessel by the Standard Company subsequent to August 16, 1910, the sum of \$50 per day up to February 3, 1911. From this decree the libelant appeals.

W. H. H. Hart, of San Francisco, Cal. (H. W. Hutton, of San Francisco, Cal., of counsel), for appellant.

Ira S. Lillick and James S. Spilman, both of San Francisco, Cal., for appellees.

Before GILBERT, Circuit Judge, and DIETRICH and WOLVERTON, District Judges.

WOLVERTON, District Judge (after stating the facts as above).
[1] In the nature of the controversy the first question logically arising for decision is the one suggested by the respondent the Standard Company, namely, that admiralty has not jurisdiction of the cause.

In support of what is alleged touching the nature of the craft, it is shown by the testimony of H. C. Cutting, president of the libelant company, that her dimensions are length 75 feet, beam 30 feet, and draws 4½ feet of water; that she has a superstructure containing machinery, pilot house, galley, messroom, and cabin accommodations for crew. The witness further testifies that she "operates afloat and not otherwise"; that "she was built for the purpose of dredging a ship canal at Richmond and cleaning her out—her occupation is to clean out canals

and harbors and to make fills"—that "since her construction she has never been operated otherwise than afloat"; and that "she is equipped to navigate any place if you have a mind to take her. She has made one ocean voyage." The voyage referred to is one whereby she was taken from San Francisco Bay to Humboldt Bay and returned. The testimony of R. A. Perry, the president of the Standard Company, does not differ materially from that of Cutting as to the nature of the dredger, although he goes more extensively into the manner of her operation while at work.

The case of *North American Dredging Co. v. Pacific Mail S. S. Co.*, 185 Fed. 698, 107 C. C. A. 620, decided by this court, is in such close analogy to this, as it pertains to the character of the dredger in controversy, as to be controlling here. Without discussing the cases therefore or attempting to analyze them, we hold that the craft in question is the subject of admiralty jurisdiction.

[2] The next question presented for our decision is whether the respondent the Standard Company was entitled to the possession of the Richmond No. 1 at the time this libel was instituted and the craft was delivered to it by the marshal in pursuance of the bond and the order of the court. This depends upon the construction of the charter party of February 26, 1910. The libel was filed September 2, 1910, and was released to the Standard Company September 13th on its admiralty stipulation and the giving of the bond noted in the statement. The evidence further shows the return of the dredger Oakland was demanded by the Standard Company August 15, 1910. The Richmond Company returned the Oakland the next day, and at the same time made demand upon the Standard Company for the return to it of the Richmond No. 1, all in pursuance of the libellant's understanding of the provisions of the charter party of February 26, 1910.

Paragraph 8 of the charter party contemplates an extension of the terms of the lease upon the Oakland at the option of the Richmond Company, provided the Standard Company shall not have found any work for the dredger to do, the extension to run until the Richmond Company shall have completed the filling therein designated, "or until the party of the first part (the Standard Company) shall have given the party of the second part (the Richmond Company) fifteen (15) days' notice of the termination of this agreement." This gave the Standard Company the option to terminate the agreement notwithstanding the Richmond Company had not yet completed the filling specified. The ninth paragraph then specifically sets forth how and in what manner the Standard Company might terminate the agreement if during the term or any extension thereof the Standard Company should secure work for the Oakland. By this paragraph the Standard Company was accorded an option either to require the Richmond Company upon giving 15 days' notice to that effect to operate the dredger Oakland 24 hours each day until the specified filling was completed, or to terminate the lease of the dredger Oakland by giving also 15 days' notice of such termination and returning the dredger Richmond No. 1. The Standard Company chose to exercise the option for a termination of the lease of the Oakland, for it gave the notice demanding her return,

but it refused to return the Richmond No. 1 to the Richmond Company. The respondent claims that under the stipulation of this paragraph it yet had another option, either to return the Richmond No. 1 or to keep it and pay an increased rental, namely, \$50 per day so long as it desired to use the same. It must be admitted that the stipulation running "or paying the party of the second part fifty (50) dollars per day" lends color to that contention, but when read in connection with paragraph 10 it can be given no such construction. By the latter paragraph the Standard Company is given the right to lease Richmond No. 1, "at any and all periods when not in use or required by the party of the second part until January 1, 1911." Now, it could not well be the intentment of the charter party to give this right of leasing at \$800 per month, dependent on the Richmond Company not requiring its use, and at the same time give the Standard Company the right to retain the dredger at any rate on paying to the Richmond Company \$50 per day. In other words, an option extending to both parties the right to require and use the dredger at one and the same time is utterly inconsistent and must be harmonized upon some other basis. Considering these conditions together with the general provisions of the several charter parties, and the treatment by the parties thereto of the dredgers Oakland and Richmond No. 1, we are of the opinion, as the District Court decided, that the stipulation for the payment of \$50 per day was intended as liquidated damages in case the Richmond was not returned when the possession of the Oakland was demanded. When the Oakland was returned in pursuance of the Standard Company's demand, the Richmond Company was entitled to the return of the Richmond No. 1. Libelant was therefore entitled to the possession of the Richmond No. 1 at the time of the filing of this libel.

It also follows from these considerations that the libelant was entitled to recover \$50 per day for the retention of the Richmond No. 1 up until the 3d day of February, 1911, when the boat was tendered back by the Standard Company, and was refused by libelant. It could not recover more than this because it was its duty to accept the dredger, the same being as we find on a careful review of the testimony, in a condition contemplated by the charter party when return should be made.

We are also of opinion, in view of the whole case, that the Standard Company is not entitled to anything as reimbursement for expenses of a caretaker after tender of the Richmond No. 1 to libelant.

[3] The question is presented as to whether the two Atlas gas engines which were installed upon the dredger by the Standard Company after coming into its possession under the charter party became a part of the vessel and were not subject to removal before returning her to the lessor. The record shows that when the Standard Company received possession the dredger was equipped with two Sampson engines of a capacity each of 75 horse power. They had been previously used and needed repairs. Repairs were made by the lessee, but when repaired it was found that they developed in the aggregate 110 to 115 horse power only. To supplement these Sampson gas engines a steam engine was first installed to run the cutter. Later while

the dredger was at work under contract at Eureka, electric motors were installed without removing the gas engines, which did all the work of running both the cutter and the pump. In the meantime the gas engines were not operated at all. Still later, viz., on May 28, 1910, the Standard Company began work upon a contract at Alameda. From that time for a week or perhaps longer the Sampson gas engines were used. In the meantime, however, the Standard Company leased of the Atlas Gas Engine Company an engine and installed it anticipating heavier work under a contract to be undertaken at Walnut Grove. This was installed by bolting it on the deck of the dredger, using some timbers perhaps as a base for the purpose. A little later another Atlas gas engine was leased from the California Reclamation Company and taken from the launch Wink and installed, and the Sampson engines were removed from the dredger and rendered no further service. After the Standard Company completed its work at Walnut Grove, and subsequent to the pendency of the libel, the Atlas gas engines were detached and the Sampson engines reinstalled, the same being put in as good condition as they were first received by the Standard Company, the usual wear and tear excepted, and were in this condition when the dredger was tendered back to the libellant. The testimony upon this subject is very lengthy, entering into the minutest detail; whether material or immaterial, relevant or irrelevant, and without attempting to set it forth here or otherwise analyze it, it suffices that we have examined it with care, and find the above to be reasonably deducible as proper conclusions of fact therefrom.

These Atlas gas engines never became or were the property of the Standard Company, and as a legal conclusion we find that they never became a part of the Richmond No. 1 as equipment or otherwise. They were temporarily installed only to take the place of the Sampson gas engines for the time being, and the Standard Company was entitled to detach them and reinstall the Sampson engines.

Nor do we think that the terms of the respondent's bond require it to return the dredger to libellant with the Atlas gas engines as a part of its equipment. True the bond requires the return of the dredger "in the same condition in which she is now," but it furthermore requires that the respondent "shall abide by and perform the decree of this court," and, the decree of the court being that the Atlas gas engines were not a part of the equipment of the dredger which the respondent was bound to return to the Richmond Company by virtue of the stipulations of the charter party, the bond was satisfied when the conditions of the charter party were complied with.

This leaves but one other question for consideration, which is whether the District Court erred in sustaining the exceptions to the second and fourth claims of damages in the supplemental libel. We think there was no error in that regard. The charter party by legal intendment covers the character of damages sought to be recovered by these claims, when it is construed as we have construed it that the stipulation for the payment of \$50 per day was intended as liquidated damages for the wrongful withholding of the dredger from libellant.

These considerations lead to an affirmation of the decree of the District Court, and such will be the order of this court, with costs of appeal to the appellees.

LAW v. ILLINOIS CENT. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. November 4, 1913.)

No. 2,362.

1. APPEAL AND ERROR (§ 1039*)—REVIEW—HARMLESS ERROR—VARIANCE.

A variance about which no question was raised on the trial, which could have been cured by amendment if suggested and was of a character which could not have misled defendant, is not ground for reversal of a judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.*]

2. MASTER AND SERVANT (§ 198*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—"FELLOW SERVANT."

A boiler maker in the employ of a railroad company and his helper are fellow servants, and there can be no recovery against the company at common law for an injury to the latter through the negligence of the former.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 493-514; Dec. Dig. § 198.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2716-2730; vol. 8, p. 7662.

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

3. COMMERCE (§ 27*)—MASTER'S LIABILITY FOR INJURY TO SERVANT—EMPLOYERS' LIABILITY ACT—EMPLOYÉ "EMPLOYED IN INTERSTATE COMMERCE."

A boiler maker's helper employed in the shops of a railroad company, injured while assisting in the repair of an engine regularly in use in interstate commerce but temporarily in the shop for repairs, where it had been for 21 days, and which was returned to use two days later, was "employed in interstate commerce" at the time of his injury within the meaning of Employers' Liability Act April 22, 1908, c. 149, § 1, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), and may maintain an action for the injury under such act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action at law by John Law against the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company. Judgment for defendants, and plaintiff brings error. Reversed.

Dan F. Elliott and Bell, Terry & Bell, all of Memphis, Tenn., for plaintiff in error.

Albert W. Biggs and T. A. Evans, both of Memphis, Tenn. (Chas. N. Burch and H. D. Minor, both of Memphis, Tenn., of counsel), for defendants in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

KNAPPEN, Circuit Judge. Plaintiff sued to recover for accidental injuries received while in the employ of the defendant companies. At the close of the testimony verdict was directed for defendants. The evidence tended to show the following:

Plaintiff was a "boiler maker's helper" employed in defendants' shops in Memphis, Tenn. At the time of the accident he was helping the boiler maker, one Morgan, in repairing a "petticoat" for a freight engine regularly employed by defendants in interstate commerce. For the purpose of fastening together two sheet-iron plates, a rivet was set on end under the overlap and a nut placed on top of the plates over the rivet. The boiler maker, in striking the nut for the purpose of driving the rivet through the plates, hit a glancing blow, whereby the nut flew and struck plaintiff in the eye. The grounds on which verdict was directed were (a) that plaintiff and Morgan were fellow servants, and (b) that plaintiff was not engaged in interstate commerce. Defendants contend here that there was no proof of negligence and that the direction should be sustained on that ground.

1. The contention that the proof did not tend to show that Morgan was negligent is without merit. The testimony is that the usual way of riveting plates of the character in question is to drill or punch a hole for the rivet before inserting it; but that in this case, by reason of hurry and to save time, the course stated was followed. The testimony had a tendency to prove negligence, without invoking the doctrine of *res ipsa loquitur*.

[1] A variance between the declaration and the proof is suggested, in that the declaration alleges as ground of negligence the attempt to drive the hole through the metal with a cold rivet, when Morgan knew, or should have known, that this method was dangerous and improper; while the proof showed that the injury occurred because of the glancing blow which caused the nut to fly and strike plaintiff. This criticism is without point. If a variance existed (which we do not intimate), it is enough to say that no question of variance was raised upon the trial, that the alleged variance could have misled no one, and that, had it been suggested, it would have been the duty of the court to permit amendment. *Pennsylvania Co. v. Whitney* (C. C. A. 6th Cir.) 169 Fed. 572, 578, 95 C. C. A. 70.

[2] 2. Plaintiff claims a right of recovery both under defendants' common-law obligation and under the Second Employers' Liability Act.¹ Under the latter, Morgan's negligence would not bar action, for the act makes the negligence of a fellow servant the negligence of the defendants. *Southern Ry. Co. v. Gadd*, 207 Fed. 277, decided by this court May 6, 1913; *Central Ry. Co. v. Young* (C. C. A. 3d Cir.) 200 Fed. 359, 366, 118 C. C. A. 465. At common law, however, the negligence of the fellow servant bars recovery. Morgan was clearly plaintiff's fellow servant. The two employes were engaged in the same duties. The fact that Morgan was the boiler maker and plaintiff the helper does not alter the situation. *Illinois Central R. R. Co. v. Hart* (C. C. A. 6th Cir.) 176 Fed. 245, 247, 100 C. C. A. 49, and cases cited.

¹ Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322).

No case is presented of violation of nondelegable duty to provide a safe place to work. The place itself was safe. It was made unsafe only by the negligent operation of the fellow servant. See *Railway Co. v. Hart*, *supra*, 176 Fed. at pages 250 and 251, 100 C. C. A. 49. On the case presented, plaintiff was therefore not entitled to recover upon defendants' common-law obligation.

[3] 3. Was the plaintiff engaged in interstate commerce?

It is the well-settled rule that, in order to bring a railroad employé within the protection of the Employers' Liability Act, it is not necessary that he be directly engaged in train movements. As pointed out by Mr. Justice Van Devanter in *Pedersen v. D., L. & W. R. Co.*, 229 U. S. 146, 152, 33 Sup. Ct. 648, 57 L. Ed. 1125, the true test is whether the work in which the employé is engaged is a part of the interstate commerce in which the carrier is engaged. As illustrating this proposition: In *Norfolk & Western Ry. Co. v. Earnest*, 229 U. S. 114, 33 Sup. Ct. 654, 57 L. Ed. 1096, the employé whose recovery was affirmed suffered his injuries while piloting a locomotive (by walking in advance of it) through several switches in the railroad yards to a main track, where the locomotive was to be attached to an interstate train to assist in moving it up a grade in the direction of the next station. In *St. Louis, S. F. & Texas R. R. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, a yard clerk, whose duties were to take the numbers of, seal up, and label cars, some of which were engaged in interstate and some in intrastate traffic, was held to be engaged in interstate commerce while on his way to the performance of his duties through the yards to one of the tracks therein, to meet an incoming train from another state. In *Lamphere v. Oregon Ry. & Nav. Co.*, 196 Fed. 336, 116 C. C. A. 156, a locomotive fireman in the employ of an interstate railway company was held by the Circuit Court of Appeals of the Ninth Circuit to be engaged in interstate commerce while approaching a station at which he was to take a train for transportation to another station, to relieve the crew of an interstate train. In *Illinois R. R. Co. v. Porter* (C. C. A.) 207 Fed. 311, a trucker who received injuries through the negligence of a fellow trucker while loading a car for interstate transportation was held by this court to be engaged in interstate commerce.

Approaching more nearly the specific question presented: There can be no doubt that railroad employés are within the purview of the Employers' Liability Act while engaged in the repair of engines, cars, bridges, tracks, and switches actually in use in interstate commerce. Such was the express holding of the Supreme Court in the *Pedersen* Case. In *Walsh v. N. Y., N. H. & H. R. R. Co.*, 223 U. S. 5, 6, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, the plaintiff was at the time of his injuries engaged in replacing a drawbar upon a car in use in interstate commerce. In *Central Ry. Co. v. Colasurdo*, 192 Fed. 901, 113 C. C. A. 379, a track walker engaged in repairing a switch in the railroad yards was held, by the Circuit Court of Appeals of the Second Circuit, to be within the protection of the act.

But the crucial question remains whether the engine, at the time the work in question was being done, was so far withdrawn from

commerce as that the work of repair was not a part of the interstate commerce in which the defendant was engaged. The authorities so far cited are not directly decisive of this specific question. In the Colasurdo Case the switch and track were still in use. The bridge in the Pedersen Case does not affirmatively appear to have been actually out of use. In the Walsh Case the car was apparently still upon a track in the railroad yards, although it was of course temporarily out of use during the replacement of the drawbar.

In the instant case the engine was in the shop for what is called "roundhouse overhauling." It had been dismantled at least 21 days before the accident. Up to the time it was taken to the shop it was actually in use in interstate commerce. It was destined for return thereto upon completion of repairs. It actually was so returned the day following the accident. It clearly did not lose its interstate character from the mere fact that it was not at the time actually engaged in interstate movement, no more than did the dining car in *Johnson v. So. Pacific R. R. Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, while waiting for a train to make the return trip, or than did the car in the Walsh Case while standing on a track awaiting replacement of the drawbar. Were the repairs being made in the roundhouse between two regular daily trips, the engine, while under such repair would clearly not lose its character as an instrumentality of commerce; and plaintiff, in such case, would have been engaged in interstate commerce. We have not here a case of original construction of an engine not yet become an instrumentality of interstate commerce. It had already been impressed with such use and with such character. Its preservation as such was not a matter of indifference to defendant, so far as its interstate commerce was concerned. See *Pedersen Case*, 229 U. S. 151-152, 33 Sup. Ct. 648, 57 L. Ed. 1125. Under the existing facts, can the length of time required for the repairs change the legal situation? If so, where is the line to be drawn? How many days temporary withdrawal would suffice to take it out of the purview of the act? And is it material whether the repairs take place in a roundhouse or in general shops? Is not the test whether the withdrawal is merely temporary in character? As held in the *Pedersen Case*, the work of keeping the instrumentalities used in interstate commerce (which would include engines) in a proper state of repair while thus used is "so clearly related to such commerce as to be in practice and in legal contemplation a part of it." In *Northern Pacific R. Co. v. Maerkl*, 198 Fed. 1, 117 C. C. A. 237, the Circuit Court of Appeals of the Ninth Circuit held that an employé engaged at the railway shops in making repairs upon a refrigerator car theretofore used in interstate commerce, and intended to be again so used when repaired, was within the protection of the Employers' Liability Act. The repairs there in question were substantial in their nature, requiring at least a partial dismantling of the car, which had been in the shop two days when the accident occurred. The rule announced by this decision commends itself to our judgment. We find nothing in the decisions of the Supreme Court opposed to the conclusion so reached. On the contrary, it may be noted that the *Maerkl*

Case is cited (with apparent approval) in the opinion in the Pedersen Case, 229 U. S. 152, 33 Sup. Ct. 648, 57 L. Ed. 1125, upon the subject of the test to be applied in determining whether the work is a part of the interstate commerce in which the carrier is engaged.

It results from these views that it was error to direct verdict for defendant. The judgment of the District Court is reversed, with costs, and a new trial ordered.

DETROIT, M. & T. S. L. RY. CO. v. ELY.

(Circuit Court of Appeals, Sixth Circuit. November 4, 1913.)

No. 2,356.

CARRIERS (§ 320*)—ACTION FOR INJURY TO PASSENGER—REFUSAL OF INSTRUCTION REQUESTED.

Plaintiff and a companion went from Toledo to Detroit on defendant's interurban line and for return bought a ticket consisting of six coupons, two of which were good for the fares of the two passengers within Detroit and were given to the conductor; the next two covered the fares between the two cities and had not been called for nor given up when, near the Toledo limits, there was a collision in which plaintiff was injured. She was taken into Toledo in another car and gave the conductor the two Toledo coupons but retained the others, which she produced on the trial. *Held*, that such facts alone, and that she did not seek out the conductor prior to the collision to give him the tickets, especially in view of her testimony that she had not thought of them and the fact that defendant had in its possession the other four coupons with the same numbers, showing the date of use, did not constitute any substantial evidence that plaintiff had lost her status as a passenger through a fraudulent attempt and intent to evade payment of fare which required the court to submit that issue to the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

In Error to the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

Action at law by Flora M. E. Ely against the Detroit, Monroe & Toledo Short Line Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

King, Tracy, Chapman & Welles, of Toledo, Ohio, for plaintiff in error.

Frank Fisher and Marshall & Fraser, all of Toledo, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Defendant in error, who was the plaintiff below, sued to recover damages claimed to have been suffered by her while a passenger on defendant's line, through a head-end collision between the car on which she was riding and another of defendant's cars. The defenses were that plaintiff was not on defendant's

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

car at all; that if she was there she was riding fraudulently, without payment of fare; and that, if she was on the car and was injured, the injuries were slight. There were verdict and judgment for \$1,650. The errors assigned relate to the refusal to direct verdict for defendant, to the denial of certain requested instructions, the rejection of certain testimony, and the alleged misconduct of counsel.

1. The testimony tended to show the following facts: Plaintiff, who lived in Toledo, went on the day of the accident from that city to Detroit, with a companion. In the afternoon of that day plaintiff bought, at defendant's Detroit city office, and paid for, a ticket for return passage. The ticket was of a kind usable as a round-trip ticket for one passenger between Detroit and Toledo or a one-way trip for two passengers between those points. It consisted of six coupons, two for the Detroit city fare, two for the interurban fare between the Detroit and Toledo city limits, and two for the Toledo city fare. These six coupons were each stamped and dated, and all bore the same serial number; any coupon being good at any date for the part of the route it covered. Plaintiff and her companion entered the car at Detroit, intending to go through to Toledo on that car, which was a "local," and normally made the through trip without change of conductor. Plaintiff's companion sat with her. The two Detroit coupons were given up in due course. At the Michigan and Ohio state line (which is only a short distance from the Toledo limits) the car was switched upon a siding and while there suffered collision with a northbound car of defendant, through the latter's conceded negligence; several passengers, including plaintiff, receiving injuries. The two interurban coupons held by plaintiff had not been called for by the conductor and had not been taken up at the time of the accident. After the collision plaintiff and her companion were taken in another car to Toledo, with a different conductor. Upon surrender to the conductor of the Toledo coupons, plaintiff detached and retained the interurban coupons, producing them upon the trial as evidence of her status as a passenger. The only evidence tending to establish the defense that plaintiff when injured was trying to "steal a ride" from the Detroit limits to the Toledo limits is that the interurban coupons were not in fact delivered up; that they were detached as stated; and that plaintiff had not actively offered them to the conductor. She testified, however, that, while she "supposed" she saw the conductor go through the car from time to time, she gave no thought to the subject of her tickets from the time she surrendered the Detroit coupons until after the accident, when she surrendered the Toledo coupons. Under the well-settled rule that on a motion for directed verdict that view of the evidence must be taken most favorable to the party against whom the direction is asked,¹ the motion was properly overruled.

2. The question of fact whether plaintiff was a passenger on the car in question was submitted to the jury; she being charged with the

¹ *Mason & O. Ry. Co. v. Yockey* (C. C. A. 6th Cir.) 103 Fed. 265, 43 C. C. A. 228; *Erie R. R. Co. v. Rooney* (C. C. A. 6th Cir.) 186 Fed. 16, 108 C. C. A. 118; *Hales v. Mich. Central R. R. Co.* (C. C. A. 6th Cir.) 200 Fed. 533, 537, 118 C. C. A. 627.

burden of proof. The jury was instructed that the mere fact that plaintiff did not surrender the coupons was not enough to deprive her of the status of passenger, but that they might take into account, as affecting her credibility, whatever dishonesty or moral delinquency they might find in the retention of the tickets. There was denial of requests by defendant, variously stated, to the general effect that plaintiff was not a passenger if, to her knowledge, the conductor had gone through the car for the purpose of collecting fares and had made such collection from others riding therein, and plaintiff, with such knowledge, failed to tender a ticket or cash fare for the purpose of defrauding the defendant thereof; and again that such would be the case if plaintiff, with the knowledge stated, by any act or device intentionally misled the conductor into the belief that she had paid her fare, with the intent thereby to deprive the company thereof.

We think that if there was tangible and substantial evidence tending to establish the propositions embodied in these requests, it was error to refuse them, provided (as we assume only for the purposes of this opinion) the defense was properly pleaded. But if the inference of fraud rested at last on mere suspicion or conjecture, it was not error to refuse the request.²

Had there been proof of active measures by plaintiff to deceive the conductor, as by concealing herself³ or passing into another car, riding beyond the point to which she had a ticket without the ability or intention to pay fare,⁴ collusion with the conductor,⁵ fraudulent use of a free pass issued to another,⁶ claiming to have given up her ticket, or any one of the numerous devices which readily suggest themselves, the evidence of fraud would be substantial and tangible. But there is no evidence of any such trick, collusion, device, or active misrepresentation. As already stated, the only evidence that plaintiff was trying to "beat her way" is the failure to give up the ticket under the circumstances stated and the retention of the "interurban" coupons. True, in answer to the question whether she knew that in riding on the car she should pay cash or give a ticket she said:

"I don't see that I should get up and go after the conductor to give him my ticket. Wasn't it his place to collect the fares?"

But she followed the answer immediately (upon a repetition of the question) by the statement:

"Yes, I know I should, but I told you before I didn't give it a thought, hadn't even thought of it, that I had my ticket."

The suggestion that she must have resorted to some overt device to avoid paying fare, as by the use of an imitation hat check or otherwise,

² *Virginia & S. W. Ry. Co. v. Hawk* (C. C. A. 6th Cir.) 160 Fed. 348, 352, 87 C. C. A. 300, and cases cited.

³ *Railway v. Brooks*, 81 Ill. 245, 246.

⁴ *Southern Ry. Co. v. Skinner*, 133 Ga. 33, 65 S. E. 134.

⁵ *Purple v. Union Pacific R. R. Co.* (C. C. A. 8th Cir.) 114 Fed. 123, 51 C. C. A. 564, 57 L. R. A. 700.

⁶ *Harmon v. Jensen* (C. C. A. 6th Cir.) 176 Fed. 519, 100 C. C. A. 115, 20 Ann. Cas. 1224.

is thus wholly conjectural and speculative, especially in view of the celebration at Monroe, which caused an unusual amount of local travel just before reaching and in that city. Had plaintiff given the matter thought, she might not unnaturally have assumed that the conductor's failure to ask for her fare was due to his knowledge that she had a through ticket, and the not unheard of course, under the conditions then existing (of which course we may properly take cognizance), of first taking up the tickets of local passengers leaving the car in advance of arrival at the terminus.

For the purposes of this hearing, it must be taken as true that plaintiff had bought and paid for, and had in her possession, a ticket entitling her to through transportation; that she had been accepted as a passenger and had surrendered the coupons for the first part of the journey. Indeed, in view of her testimony that she was on the car, corroborated, as it was, by another passenger, by testimony of her presence in Detroit on that day, the possession of the interurban coupons, and the fact that both the Detroit and Toledo coupons would naturally, if taken up, have been in defendant's possession (so returned as to show the particular trip on which received), such possession not being disputed, defendant was scarcely in position to effectively deny that plaintiff had a through ticket and that she had been accepted as a passenger and had surrendered the coupons for the first part of the journey. In such circumstances, she surely did not lose her status as passenger from the mere fact that her ticket was not taken up immediately after passing the Detroit limits; and before the trip covered by the interurban coupon was completed the accident occurred. At what point, then, in the through journey did the mere retention of the undetached coupon present tangible and substantial evidence of an intent to evade paying fare?

In view of the accident, plaintiff's retention of the unsurrendered coupons, when giving up the Toledo coupons, was not so significant as to justify an inference therefrom of intent to evade payment of fare. Indeed, an intent formed at that time to keep, and even to subsequently use, the coupons, would not be enough to take away the status of passenger at the earlier period of the accident. While at least one criminal experience on plaintiff's part (an attempt to steal from the person), and falsehoods upon the trial with reference thereto, as well as relating to her husband's criminal record, naturally affect her credibility as a witness, she is not thereby deprived of the right to recover legal damages; nor should redress be denied her alone upon speculative and conjectural grounds.

Upon careful consideration, we are constrained to hold that the evidence relied upon to establish the proposition that plaintiff at the time she was injured had lost her status as passenger through a fraudulent attempt and intent to evade payment of fare is too speculative and conjectural to justify verdict for defendant thereon, and thus that no error was committed in declining to submit the question.

3. We have carefully considered the errors assigned upon the exclusion of the offered testimony and the alleged misconduct of counsel. No features are presented calling for specific discussion. We content

ourselves with saying that, under familiar rules, we think it clear that no prejudicial error was committed in the respects complained of.

The judgment of the district court is accordingly affirmed, with costs.

GOLDMAN v. GOLDBERGER.

(Circuit Court of Appeals, Sixth Circuit. November 4, 1913.)

No. 2,361.

1. APPEAL AND ERROR (§ 927*)—REVIEW—JUDGMENT ON DIRECTED VERDICT.

On review of a judgment on a directed verdict, the appellate court must take that view of the evidence most favorable to the defeated party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.*]

2. BILLS AND NOTES (§ 264*)—ACTION BETWEEN INDORSERS—PAROL EVIDENCE OF AGREEMENT.

Defendant and plaintiff, in the order named, were indorsers on a note given by a corporation in which both were interested. The note was renewed several times, plaintiff being the first indorser on the renewals, the last of which he was compelled to pay in part, and he brought an action to recover the amount from defendant, alleging an agreement by defendant, when the first note was given, to pay it personally. There was evidence tending to support such allegation, and plaintiff testified that when he indorsed the renewal notes he did not know that the order of the indorsements had any legal significance, while it appeared that defendant did know such fact. *Held*, that under the Negotiable Instruments Act of Michigan (Pub. Acts Mich. 1905, No. 265, § 70), which provides, in accordance with the rule of the general law, that while, as between themselves, indorsers are liable prima facie in the order of their indorsements, evidence is admissible to show an agreement otherwise, the evidence was sufficient to require the submission of the case to the jury, as it would have justified a finding that the agreement of defendant to pay the original note impliedly extended to the renewals.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 612; Dec. Dig. § 264.*]

In Error to the District Court of the United States for the Eastern District of Michigan; Alexis C. Angell, Judge.

Action at law by Hyman L. Goldman against Maurice Goldberger. Judgment for defendant, and plaintiff brings error. Reversed.

B. B. Selling and George E. Brand, both of Detroit, Mich., for plaintiff in error.

D. C. Rexford, of Detroit, Mich., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff in error and defendant in error were respectively plaintiff and defendant below. The action is for moneys paid by plaintiff by reason of his indorsement of a note given to the Citizens' Savings Bank, of Detroit, Mich., by the Globe Brass Works as principal maker, and indorsed by plaintiff and defendant. Upon the trial verdict was directed for defendant. The facts

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

are somewhat involved, but the following statement is sufficient for present purposes:

Defendant, who was a creditor of the Globe Brass Company, purchased its assets under statutory receiver's sale for \$20,000. For the purpose of making payment of the purchase price, he borrowed from an Indiana bank \$5,000, borrowing the remaining \$15,000 from the Citizens' Savings Bank. He gave the latter bank his notes for \$15,000, also a bond to pay the bank (which was a creditor of the Brass Company) the difference between the bank's claim and the dividends which should be paid by the receiver, securing the notes and the bond by a chattel mortgage upon all the corporate assets of the Brass Company so purchased, as well as by an assignment to the bank of the dividends receivable by defendant on his claim against the Brass Company. The evidence tended to show that defendant then proposed to sell to plaintiff (who had been an unsuccessful bidder for the Brass Company's assets) one-half of those assets for \$10,000, being one-half of the amount bid therefor by defendant, later proposing to let plaintiff have a one-third interest at \$6,666.66, and to sell to one Matthews a one-quarter interest and to one Graham a one-twelfth interest at an aggregate price of \$6,666.67; that this later proposition was accepted and a new corporation organized, plaintiff advancing the funds and materials for operation, amounting to \$3,536.45, for which the new corporation (the Globe Brass Works) gave plaintiff its note; that plaintiff paid the purchase price of his share by giving to defendant the note of the Brass Works mentioned, a note of one Prince for \$2,500, both being indorsed by plaintiff, and his own note for \$630.21, all bearing interest. The latter two notes were paid in full. The former was ultimately paid in part by the Brass Works. The subject of plaintiff's liability as indorser upon the Brass Works note so turned out to defendant is not involved in this review.

Graham and Matthews gave defendant their individual notes for the purchase price of their respective shares of the corporate assets. Arrangement was thereafter made by which the bank discharged its chattel mortgage, taking the note of the Brass Works for \$12,000 (which included the deficiency on the bank's claim against the Brass Company), indorsed by plaintiff and defendant; the defendant being in form the first indorser and the plaintiff the second indorser, and the Prince note and defendant's claim against the receiver being also pledged as collateral. Defendant then gave the Brass Works a bill of sale of the old Brass Company's assets, with full warranty of title. There was testimony tending to show that, in consideration of plaintiff's indorsement, defendant agreed to personally pay the note given the bank, using for the purpose, so far as necessary, the notes of Graham and Matthews. The note to the bank was not paid at maturity, and thereafter two successive renewals were had, through direct relations between defendant and the Brass Works. Both these renewals were indorsed by plaintiff and defendant, but in the opposite order from the indorsement upon the first note; that is to say, plaintiff appeared in form the first indorser and defendant the second indorser. Plaintiff testified he did not see the renewals after their indorsement

by defendant, and had no knowledge of the change in the order of indorsement until after the last renewal fell due, and, in fact, did not know that the order of indorsement affected the liability of the indorsers as between themselves. Defendant, however, had such knowledge when the two renewals were indorsed. The bank sued the Brass Works, as maker, as well as both indorsers upon the note, recovered judgment, collected of the Brass Works estate (then in bankruptcy) a portion of the judgment, and from plaintiff the balance above that which the corporate assets yielded.

As already stated, this suit is to recover the net amounts paid by plaintiff upon the judgment, the principal of such payments amounting to upwards of \$5,000. The direction of verdict for defendant was upon the grounds that presumptively plaintiff and defendant were liable as indorsers in the order of their indorsement; that this presumption can only be overcome by proof of an agreement between them overthrowing the presumption arising from the order of indorsement; that while there was evidence that defendant agreed, when the original note was indorsed, that he would take care of the note, his obligation was not thereby extended, because he was only agreeing to do what the order of indorsement imported he must do; that there is no evidence that defendant made further agreements with plaintiff regarding their relative responsibility on the note; and thus that the presumption afforded by the order of indorsements on the renewal note was controlling.

[1] Upon the crucial questions of fact involved the parties are in sharp conflict. For instance, defendant denies that he agreed to pay the Brass Works note or to protect plaintiff from loss thereon; denies that there was any consideration for such promise; alleges that the bank transaction was not for his accommodation, but for that of plaintiff and the Brass Works; asserts that (presumably after the first indorsement) he declined to be the first indorser; and that it is his recollection that he indorsed his signature upon one or more of the renewals below that of plaintiff in the latter's presence, at the bank. But it should be unnecessary to say that on review of this direction of verdict we must take that view of the evidence most favorable to the plaintiff. *Mason & O. R. Co. v. Yockey* (C. C. A. 6th Cir.) 103 Fed. 265, 43 C. C. A. 228; *Erie R. R. Co. v. Rooney* (C. C. A. 6th Cir.) 186 Fed. 16, 108 C. C. A. 118; *Hales v. Mich. Central R. R. Co.* (C. C. A. 6th Cir.) 200 Fed. 533, 537, 118 C. C. A. 627.

[2] We think the learned judge who presided below erred in so instructing for defendant. It is true that indorsers are *prima facie* liable in the order of their indorsements, but the evidence afforded by the order of indorsement is only *prima facie*. The Michigan Negotiable Instruments Act (P. A. Mich. 1905, No. 265, § 70, p. 400) expressly provides that:

"As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise."

Such is the generally accepted rule in the absence of statute. The burden is, of course, upon plaintiff to show the alleged agreement.

These propositions were recognized by the District Judge. The question arises over their application. There can be no doubt that, had the indorsements appeared upon the original note in the same order as on the renewals, plaintiff's testimony would have been competent evidence of an agreement making defendant in legal effect the first indorser. It is difficult to see why plaintiff is in a worse position from the mere fact that the original order of indorsement accorded with the express agreement of the parties. In our opinion, the view that it is necessary, in order to overcome the prima facie effect of the order of indorsement, that there should be evidence of a new agreement at the time of the subsequent indorsements, or subsequent to the first indorsement, overcoming the prima facie effect of the later order of indorsement, is, under the tendency of the plaintiff's case, erroneous. We think this view gives undue effect to the circumstance that the original agreement was only declaratory of the contract prima facie raised by the order of indorsement, and overlooks the effect of plaintiff's alleged ignorance that the order of indorsement had any legal significance, his denial of the making of any new agreement subsequent to the first indorsement, the fact that the later notes were but renewals of the first, and that in fact he did not know that any change in the order of indorsement had been made. It in practical effect, we think, leaves the plaintiff's situation the same as if the first indorsement had been unaccompanied by the claimed agreement between the parties.

We think the plaintiff's evidence, if believed, would have justified a finding of an implied agreement that the arrangement made when the original note was indorsed should continue with respect to renewals, and that the change in the order of indorsements occurred through a mistake of fact on his part or through the actual fraud of defendant. True, there was evidence that when the original note matured defendant asked the Brass Works to have plaintiff indorse the renewal note, as well as to sign it as treasurer, and to indicate where he desired defendant to indorse; but there is no evidence that plaintiff ever so indicated, as indeed there would seem no occasion for his doing, if ignorant that the order of indorsement had any significance. Nor is there any affirmative evidence that plaintiff was informed of such request. But, even had he been so informed, a failure to so indicate is not necessarily fatal to, or even inconsistent with, his claim that the original agreement still continued.

The judgment of the District Court is reversed, with costs, and a new trial ordered.

Petition of ROUSE.

In re OTTENWESS & HUXOLL.

(Circuit Court of Appeals, Sixth Circuit. November 11, 1913.)

No. 2,461.

BANKRUPTCY (§ 168*)—EFFECT ON PREFERENTIAL MORTGAGE—PRIORITY OF CLAIMS.

The lien of a mortgage given by a bankrupt, which is voidable as a preference under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3446), as amended by Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (U. S. Comp. St. Supp. 1911, p. 1506), is in effect made voidable by the bankruptcy for all purposes, and it cannot give a creditor secured thereby a right to priority over a prior mortgagee, who waived his mortgage and filed as a general creditor, although under the state law, for failure to record the prior mortgage, the second is entitled to priority.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 234; Dec. Dig. § 168.*]

Petition for Revision of Proceedings of the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

In the matter of Ottenwess & Huxoll, bankrupts. On petition of Guy W. Rouse, mortgage trustee, to revise order of District Court. Affirmed.

Hyde, Earl & Thornton and Wilson & Johnson, all of Grand Rapids, Mich. (L. D. Averill, of Lansing, Mich., of counsel), for petitioner.

Martin H. Carmody, of Grand Rapids, Mich., for claimant Huxoll.
Fred P. Geib, of Grand Rapids, Mich., for trustee.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SATER, District Judge.

KNAPPEN, Circuit Judge. On February 1, 1909, Ottenwess & Huxoll, copartners, on beginning business, gave to one Clemens Huxoll a chattel mortgage upon their bakery plant and outfit in Grand Rapids, Mich. The mortgage was not filed, as required by the Michigan statute, until November 30th following. On December 2, 1909, the firm gave to Guy W. Rouse, as trustee, a mortgage upon the bakery property, to secure ratably the claims of all creditors who had become such between February 1st and November 30th. This naturally excluded Clemens Huxoll. The trustee took immediate possession under his mortgage. Five days later bankruptcy petition was filed against the firm, and in due course adjudication was had. Clemens Huxoll waived the lien of his mortgage (except as to the bankrupt's exemptions), and was allowed a claim as general creditor for the amount of the mortgage debt with interest. The District Court postponed his claim to that of the other creditors.

On the review in this court the question of Clemens Huxoll's lien upon the bankrupt's exemptions, as well as the effect of the trust mortgage, were expressly passed without consideration, because reserved therefrom by the record then before us. It was here in effect held

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
208 F.—56

that (unless by virtue of the trust mortgage) subsequent creditors had no actual lien upon the mortgaged property at the time bankruptcy occurred, and that therefore Clemens Huxoll was entitled to share ratably with the general creditors.¹ The question regarding the bankrupts' exemptions has since been disposed of, and is not before us.

The referee has found that the trust mortgage constituted a preference under the Bankruptcy Act. The District Judge took the same view, and this conclusion is not challenged here. The mortgage trustee, however, contended below and contends here that by virtue of his mortgage and possession thereunder, before and at the time of bankruptcy, he had, under the Michigan mortgage filing statute, a lien enforceable under the bankruptcy act, as prior to the claims of Clemens Huxoll, and that this prior lien was not avoided by the bankruptcy. The District Judge took the view that when the trust mortgage fell, because of its invalidity under the Bankruptcy Act, all liens founded upon it fell with it; and accordingly denied to the creditors secured by the trust mortgage priority over Huxoll. The correctness of this conclusion is the only question presented for review.

We think the District Court was clearly right. Section 60b of the Bankruptcy Act declares that a preferential transfer by the bankrupt while insolvent, made within four months before bankruptcy proceedings, and received with reasonable cause to believe a preference intended, "shall be voidable by the trustee and he may recover the property or its value from such person." True, this section does not, as does section 67f, which relates to levies obtained by legal proceedings against an insolvent within four months of bankruptcy, declare in terms that the lien should be discharged; but such discharge is plainly and necessarily implied in the quoted declaration of section 60b. As well said by the District Judge:

"The lien of a preferential mortgage is as much within the ban of the Bankruptcy Act as are liens obtained by attachment, garnishment, or legal proceedings."

In *Re Martin*, 201 Fed. 37, 119 C. C. A. 363, Judge Warrington, speaking for this court, impliedly put preferential conveyances in the same class in this regard as liens obtained through legal proceedings. While the effect of a preferential transfer under section 60b of the act was not there involved, the language there used expresses our understanding of the rule applicable to such cases as well.² The doctrine that the bankruptcy trustee "stands in the shoes of the bankrupt" has no application to transactions which the trustee is, by the express terms of the act, authorized to avoid.

The mortgagee trustee, however, insists that, inasmuch as by the Michigan filing statute³ his mortgage was given priority over the

¹ In *re Huxoll*, 193 Fed. 851, 857, 113 C. C. A. 637.

² See, also, in this connection, In *re Huxoll*, 193 Fed. 851, 855, 113 C. C. A. 637; In *re Martin*, 193 Fed. 841, 113 C. C. A. 627; *Henderson v. Mayer*, 225 U. S. 631, 636, 32 Sup. Ct. 699, 56 L. Ed. 1233.

³ Comp. Laws Mich. 1897, § 9523, as amended by Act No. 332 of the Public Acts of 1907.

earlier unrecorded mortgage to Huxoll, this priority must be recognized in the bankruptcy courts, by virtue of section 64b5 of the act, which gives priority in distribution to "debts owing to any person who, by the laws of the state or of the United States, is entitled to priority"; the argument being that the filing statute is not a "general insolvency law," and so is not repealed by the bankruptcy act.⁴ It is true that the Michigan mortgage filing statute is not a general insolvency law, and that it is not repealed by the Bankruptcy Act, and further, as applied to a mortgage not under the ban of the bankruptcy statute, the priority given by the state filing statute would be respected by the bankruptcy courts. But it is an unthinkable proposition that an instrument declared wholly voidable by the express terms of the act should yet be, through the operation of the state filing statute, accorded a prior lien. The argument of inconsistency between this conclusion and our former decision rests upon a misapprehension of our former opinion, which, as already stated, took no account of the trust mortgage. Moreover, as the giving of the trust mortgage was, under section 3a2, an act of bankruptcy, the natural construction of that section is that the mortgage is "avoided as a whole when the trustee takes the goods."⁵

We are not impressed with the contention that the equities of the case demand a reversal of the District Court's order. The mortgage to Huxoll secured him alone; that to the trustee excluded him. There is no claim of fraudulent intent in delaying the filing of Huxoll's mortgage, nor was there any wrong in taking the trust mortgage. The lien of the Huxoll mortgage was discharged because it violated the public policy of the state, as embodied in its mortgage filing statute; the lien of the trust mortgage is held invalid because, as a preferential transfer within the four-months period, it contravenes the national policy, as embodied in the Bankruptcy Act. Huxoll thus loses his preference over subsequent creditors, and the latter are equally denied priority over Huxoll; but both he and they are recognized as creditors, and share ratably.

The order complained of is affirmed, with costs.

⁴ For illustrations of the application of section 64b (5), see *In re Jones* (D. C.) 151 Fed. 108; *In re Bennett* (C. C. A. 6th Circuit) 153 Fed. 673, 82 C. C. A. 531; *Henderson v. Mayer*, supra, 225 U. S. 631, 637, 32 Sup. Ct. 699, 56 L. Ed. 1233.

⁵ *Randolph v. Scruggs*, 190 U. S. 538, 23 Sup. Ct. 710, 47 L. Ed. 1165, where the above-quoted language was used in holding that no lien existed under a common-law assignment declared an act of bankruptcy by another subdivision of the same section 3a.

HANSEN v. AMERICAN TRADING CO.

(Circuit Court of Appeals, First Circuit. October 31, 1913.)

No. 1,029.

1. SHIPPING (§ 106*)—BILLS OF LADING—DUTY OF MASTER TO ISSUE.

Under Harter Act Feb. 13, 1893, c. 105, § 4, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2947), it is the duty of a master on the loading of his vessel to tender a bill of lading, although the charterer has not submitted a correct bill as required by the charter party.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 226, 414-419; Dec. Dig. § 106.*]

2. SHIPPING (§ 175*)—DEMURRAGE—DELAY THROUGH MUTUAL FAULTS.

Demurrage is not recoverable for the detention of a vessel after she was loaded because of a dispute in respect to the bill of lading where both parties were in the wrong, and the delay was not unreasonable under the circumstances.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 572-574; Dec. Dig. § 175.*]

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

Appeal from the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Libel by the American Trading Company against the bark *Loch Rannoch* and cross-libel by J. L. Hansen, master of said bark, against the American Trading Company. Decree for charterer on the cross-libel, and cross-libelant appeals. Affirmed.

For opinion below, see 192 Fed. 219.

G. Philip Wardner, of Boston, Mass. (Carver, Wardner, Cavanagh & Walker, of Boston, Mass., on the brief), for appellant.

Addison C. Burnham, of Boston, Mass. (Blodgett, Jones, Burnham & Bingham, of Boston, Mass., on the brief), for appellee.

Before PUTNAM, DODGE, and BINGHAM, Judges.

PUTNAM, District Judge. This appeal originated in a libel and a cross-libel, the libel having been brought by the American Trading Company, owner of the cargo and charterer, against the bark *Loch Rannoch*, of which Hansen was the master, for undertaking to sail from the port of Bangor without furnishing a proper bill of lading, over the terms of which the parties were in dispute. On this libel the vessel was seized. The cross-libel by the master of the vessel claimed demurrage and diminution of freight on the cargo, and some expenses. The libel was decided in favor of the charterer, and nominal damages were awarded against the master. On the face of the opinion all the questions herein involved were disposed of; and the decree entered against the master operated as an estoppel against the cross-libel on this appeal. Nevertheless, by the consent of the parties, the questions which we will discuss are left open.

The dispute out of which the questions as to the bill of lading arose involved, first, a claim that the bill of lading presented by the char-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

terer did not cover the entire amount of the superficial area of the shipment, which was lumber, the freight to be paid according to the number of superficial feet thereof; and, second, a contention that the bill of lading overstated the number of pieces of lumber shipped, throwing on the vessel the possibility of a claim at the port of discharge for shortage in that particular.

The findings of the learned judge of the District Court were to the effect that there was a custom or usage at the loading port and other ports of the state of Maine, by which a certain departure from the exact mathematical dimensions called for by the charter was allowable. This allowable variation stood in the way of the claim of the vessel for additional freight. The case, however, now leaves the question open whether or not the vessel was right with regard to the dispute which arose over the statement of the number of pieces of lumber shipped.

The brief for Captain Hansen says as follows:

"The appellant," that is, Hansen, "refused to sign the bills because they were not true bills; they were not true in his mind for two reasons, namely: Because they overstated the pieces and because they understated the feet. Although he was wrong on the second point, he was right on the first, and the bills were not true bills, and he was right in refusing to sign them."

Both parties at the outset were in the wrong, the captain as well as the shipper. Section 4 of the act of February 13, 1893, known as the Harter Act (27 Stat. 445, c. 105), expressly imposed on the master the duty of issuing a bill of lading, giving the details of the cargo, which, of course, was to be a true bill. The master never tendered it, although the provision in the charter that the charterer should submit a bill of lading did not relieve him from the ultimate performance of his statutory duty. In accordance with the statement in his brief, both he and the charterers were at fault; and it was this mutual fault which led to the delays which subsequently occurred, until finally there was a compromise, and the vessel was bonded. The vessel, being at Bangor, and afterwards down the Penobscot river, and the counsel being at Portland, where the Admiralty Court was, and also at Boston, the delay was not longer than might have been anticipated, under the circumstances, as the result of a mutual error. The loading of the vessel was finished on November 18th, and the bills of lading were first presented by the charterer that day, and objected to that day or the next day by the master of the vessel, for the reasons already stated. The vessel finally got to sea on December 12th, a detention which was not extraordinary under the circumstances, and which might reasonably have been expected to have been the ordinary result of the misunderstanding between the parties we have already stated. The parties were each in the wrong, and were jointly liable for the detention of the vessel, so that, under the circumstances, the master can claim neither the demurrage nor the disbursements to which the case relates. A very precise balancing of events pro and con might leave one party or the other a little more at fault, but it is a balancing which the courts are not required to make.

The decree of the District Court dismissing the libel is affirmed; and the appellee recovers its costs of appeal.

P. E. SHARPLESS CO. v. WILLIAM A. LAWRENCE & SON.

WILLIAM A. LAWRENCE & SON v. P. E. SHARPLESS CO.

(Circuit Court of Appeals, Third Circuit. November 25, 1913.)

No. 1,761 (List Nos. 28, 29).

TRADE-MARKS AND TRADE-NAMES (§ 100*)—DECREE—GROUNDS—REVIEW.

Where complainants sought relief against defendant company for infringement of a trade-mark and on the ground of unfair competition, and the decree awarded complainants an injunction restraining defendant's use of the infringed mark on the latter ground, but held that the trade-mark was invalid, complainants, having obtained full relief, were not entitled to insist on appeal that the decree should have been based on both grounds, and thus obtain a review of the determination as to the validity of the mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 114; Dec. Dig. § 100.*

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Mueller, 20 C. C. A. 165; Lare v. Harper Bro., 30 C. C. A. 376.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, District Judge.

Suit in equity by William A. Lawrence & Son against the P. E. Sharpless Company. From a decree (203 Fed. 762) in favor of complainants for less than the relief demanded, defendant appeals, and complainants prosecute cross-appeal. Affirmed on defendant's appeal, and complainants' cross-appeal dismissed.

Duell, Warfield & Duell, of New York City (R. W. France, of New York City, o. counsel), for plaintiffs.

Hector T. Fenton, of Philadelphia, Pa., for defendant.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. In this proceeding William A. Lawrence & Son sought relief against the P. E. Sharpless Company, averring (1) infringement of a trade-mark, and (2) unfair competition. The decree adjudged the trade-mark invalid, but granted an injunction on the second ground. Each party has appealed from the decree; the plaintiffs, from so much of it as declares their trade-mark invalid, and the defendant company, from so much as restrains the unfair competition.

The facts of the controversy are fully set out in Judge Thompson's opinion, reported in (D. C.) 203 Fed. 762, and need not be repeated here. We have carefully considered the evidence and the arguments bearing upon the subject of unfair competition, and have not been convinced that the conclusions of the court below in that respect are erroneous.

But we do not feel bound to pass upon the validity of the trade-mark. The question presented—namely, the generic character of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

device—is of some nicety, and in a case that called for its decision would need close examination and discussion. We must not be understood as intimating any opinion, or even any prepossession, either for or against the view adopted by the district judge; we merely state our opinion that, as the plaintiffs have obtained full relief against the defendant, they are not entitled to insist that it should be based upon one ground rather than upon another. The essential matter is that the defendant has been restrained from using the labels complained of; and for the present the plaintiffs must be content with that fact, although they would no doubt have preferred that both their positions should be sustained, instead of only one.

On the appeal of the Sharpless Company the decree is affirmed. The cross-appeal of William A. Lawrence & Son is dismissed, but without prejudice to their right to raise the question of the validity of their trade-mark before any other tribunal.

L. S. STARRETT CO. v. BROWN & SHARPE MFG. CO.

(Circuit Court of Appeals, First Circuit. November 14, 1913.)

No. 1,031.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—MICROMETER CALIPERS.

The Spalding patent, No. 717,296, for a micrometer caliper, is not invalid as a mere aggregation of old elements operating independently and without change of function, and discloses patentable novelty and invention which entitle it to a reasonable range of equivalents; also, *held* infringed.

2. PATENTS (§ 322*)—SUIT FOR INFRINGEMENT—REFERENCE FOR ACCOUNTING—SCOPE OF INQUIRY.

On a reference for an accounting for infringement, the question whether the patent is infringed by another structure not made by defendant until after the bringing of the suit and not passed on by the court, but with respect to which evidence was introduced, may be presented to and ruled on by the master.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 590-595; Dec. Dig. § 322.*]

Appeal from the District Court of the United States for the District of Massachusetts; Arthur L. Brown, Judge.

Suit in equity by the Brown & Sharpe Manufacturing Company against the L. S. Starrett Company. Decree for complainant, and defendant appeals. Affirmed.

See, also, 204 Fed. 588.

Robert W. Hardie, of New York City, for appellant.

Wilmarth H. Thurston, of Providence, R. I., for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. The District Court held in this case that United States patent 717,296, issued December 30, 1902, to the appellee company (hereinafter called plaintiff), as assignee of Frank Spald-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ing, was valid, and that the appellant company (hereinafter called defendant) had infringed both the claims thereof.

The patent is entitled "Micrometer Calipers."

[1] The specification begins:

"This invention has reference to an improved device for clamping the spindle of a micrometer caliper or gage."

It then continues:

"Micrometer calipers or gages consist usually of a frame having an anvil at one end and a spindle partly screw-threaded and in screw-thread engagement with the opposite end. These calipers or gages are used in the arts for the accurate measurement of parts and are usually constructed to determine microscopic differences within one one-thousandth of an inch. When the accurate measurement has been taken by a micrometer caliper or gage, it is desirable to lock the spindle, so as to retain the exact position of the same. To lock the spindle and maintain the same in position when the measurement is taken, it is important that the spindle should not be rotated or moved longitudinally in the slightest degree, so that the measurement taken will not be altered."

After which follows the statement:

"The invention consists in the peculiar and novel construction of a split-spring clamping-ring, and means for actuating the same, as will be more fully set forth," etc.

The opinion of the District Court, after quoting as above from the patent, contains the following statement of the essential features of the invention set forth, which we adopt:

"The means for locking the spindle consist of a split clamping-ring arranged to surround the spindle, the clamping-ring having an inclined or tangential surface; an actuating-ring surrounding the clamping-ring; a roller interpose between the split-ring and the actuating-ring and located in the space formed by the inclined or tangential surface; and a projection upon the split-ring which engages a slot in a portion of the frame which forms the bearing of the spindle. The projection and slot prevent the split-ring from turning with the actuating-ring.

"These parts are placed in a transverse slot formed in the micrometer frame or spindle bearing.

"The specification states:

"The split-ring *b* may now be placed into the actuating-ring *c*, the member *b*⁵ in the wedge-shaped cavity between the split-ring and the actuating-ring, as is shown in Fig. 3, and the assembled parts may be slid into the slot *a*⁷, with the projection *b*¹ in the seat *c*². The spindle is now placed in position, extending through the split-ring, which ring is held against rotation."

"The spindle may be locked by rotating the actuating-ring, thereby moving the roller toward the split-ring, to contract the ring and clamp it on the spindle. It may be released by the reverse movement of the actuating-ring."

There are only two claims, as follows:

"1. The combination with the spindle of a micrometer caliper, the bearing of the spindle, a transverse slot in the bearing and a cavity in the wall of the bearing, of a split-ring, a projection on the split-ring, a tangential plane on the split-ring, an actuating-ring inclosing the split-ring, and a member operated by the actuating-ring and operating the split-ring, as described.

"2. In a micrometer caliper, the combination with the frame of the caliper, the anvil, the spindle, the bearing for the spindle, and the micrometer mechanism, of the slot *a*, the seat *c*² in the wall of one side of the slot, the split-ring, *b*, the projection *b*¹ on one face of the split-ring, the plane *b*² and shoulder *b*⁴ on the split-ring, the member *b*⁵, and the actuating-ring *c*¹, as described."

1. The defendant contends that the invention set forth consists only in adding together three sets of old elements, each performing a separate and distinct function, and an old function, in an old way, independently of the others.

These, according to the defendant, are (1) the elements comprising the micrometer proper, (2) those comprising a clamping device, and (3) those whereby the clamping device is connected with the micrometer. Under 3 the defendant includes the transverse slot a^1 in the bearing, the seat c^2 in the wall on one side thereof, and the projection b^1 on one face of the split-ring.

The defendant then contends that nothing beyond a mere aggregation of the several functions of these different elements can result, and that the patent therefore discloses no patentable invention.

As to the set of elements 1, it is true that they can and do perform all the functions of a nonlocking micrometer without bringing into operation the sets of elements 2 and 3; and that a micrometer made according to the patent would perform those functions if the set of elements 2 were removed from it, without involving so much of the set of elements 3 as is not removable—i. e., the slot in the micrometer frame and the seat in one side of the slot.

As to the set of elements 2, constituting the clamping device, it is true that, if removed from a micrometer made according to the patent, they could be so operated as to compress the split-ring by the operation of the actuating-ring and thereby clamp anything which the split-ring could be made to surround; also that, generally speaking, clutches and locking devices may be regarded as devices distinct from the mechanism whereto they may be applied. But the set of elements 2 could not be so removed without removing also an element included by the defendant under 3, namely, the projection b^1 , which is part of the split-ring.

As to the set of elements 3, which serve to connect the clamping device with the set of elements 1 constituting a nonlocking micrometer as above, it is true that they in no way influence the action of the set of elements 1 in performing the functions of a nonlocking micrometer, nor the action of the set of elements 2, in so far as that action consists merely in the compression of the split-ring, when held against rotation, and the clamping thereby of whatever this ring may be surrounding.

All this may be conceded to the defendant's argument, but we find nothing in it to require or warrant the conclusion that no result other than a mere aggregation of functions is made to appear by the patent. It cannot be said that the mechanism described does no more than bring together the above several functions of the various elements, to be availed of independently of each other, as was the case in *Osgood, etc., Co. v. Metropolitan, etc., Co.*, 75 Fed. 670, 21 C. C. A. 491, where the patentee had provided the swinging boom of a dredging machine with the appliances required for one kind of dredging and also with those required for another; or as was the case in *Condit, etc., Co. v. Westinghouse, etc., Co.*, 200 Fed. 144, 118 C. C. A. 474, where the patentee had brought together a plurality of nonpatentable systems of electrical distribution, similar to each other and each capable of inde-

pendent action. In this case, of the defendant's three "sets of elements," the set 1 is the only one which can produce any useful result, acting alone; and so acting it produces, as has been said, only a nonlocking micrometer. Neither the set 2 nor so much of the set 3 as is separable from the set 1 can produce a useful result by itself, but combined with 1 according to the patent, they produce a locking micrometer. In order to say that the set 2 can be operated at all out of the combination, the defendant has to suppose the split-ring held against rotation by some means not included in 2; but according to the patent the split-ring is to be so held by the combined action of its projection b^1 and the seat c^2 , the former adapted to fit into the latter and the latter adapted to receive the former. The clamping mechanism of the patent is not an independent or detachable clamping mechanism, applicable to the spindle without regard to the mechanism constituting a nonlocking micrometer, but is one adapted to be included in, and to co-operate with that mechanism, in the manner specified in the patent. The defendant's proposition that the combination described produces only a micrometer plus a locking device, plus means for connecting the two, is one which we cannot accept; and we must hold that no want of patentability is apparent from the patent itself.

2. The defendant contends that the patented device has no patentable novelty in view of the prior art. There are earlier patents, as the opinion below states, for micrometer calipers or gages with means for locking the adjusting screw or spindle in position. Some of them show a slot in the micrometer frame to receive an actuating-ring which operates the locking mechanism, and such a slot appears also in a Starrett micrometer caliper, made, according to the evidence, in 1908. But the locking mechanism differs substantially in character in all these devices from that of the patent. Some of them resemble it in surrounding the spindle to be clamped with a split-ring and providing means for contracting the split-ring when desired, but in none of them do the means provided for this purpose resemble in principle those employed for the same purpose in the patent. The locking mechanism approaching most nearly in principle to that of the patent is found in the Clapp patent for a back-peddalling brake, No. 613,619, November 1, 1898, belonging to a nonanalogous art. The split-ring in this patent is not caused to contract by being itself held against rotation, as in the patent, while the balls or rollers are moved into the wedging position by a surrounding actuating-ring, but is itself moved within a surrounding stationary-ring by the rotation of an adjoining and connected sprocket wheel. Without dwelling upon other points of difference between the mechanism described in this patent and that described in the patent at suit, we agree with the court below that nothing in the somewhat complicated structure of the Clapp patent suggests that its form of clutch is better adapted than other clutches for the secure locking of a micrometer spindle and for convenient assemblage with an actuating-ring and a micrometer frame; also, that in its adaptation of a clutch operating upon this principle to the specific purpose of use in a delicate measuring instrument, wherein was involved the problem of locking a spindle with the least possibility of minute disturbance to the

adjustment thereof, sufficient invention to support the patent in suit is displayed. We find nothing in the prior art having any greater tendency than the Clapp patent to support the defendant's claim that no patentable novelty can be found in the patent in suit.

3. The plaintiff brought two alleged infringing devices before the court as part of its case. They were marked as its exhibits, "Defendant's Micrometer Nos. 1 and 2," respectively. It was stipulated that the defendant had made and sold micrometers like them after December 30, 1902, the date of the Spalding patent, and before the plaintiff's bill was filed on August 27, 1908. Both these devices are shown in patents; No. 1 in patent No. 806,594, December 5, 1905, to L. S. Starrett; No. 2 in No. 873,626, December 10, 1907, to L. S. Starrett and J. A. Adell.

In No. 1, an "annular spring tongue," formed out of a cylindrical bushing, which surrounds the spindle, is contracted to clamp the spindle by the operation of an inclosing actuating-ring, in a transverse slot in the frame, upon a ball or roller in a peripheral recess in the annular tongue, adapted to compress the same inward when the ball or roller is moved by the actuating-ring from the deeper toward the shallower part of the recess, as in the plaintiff's patent. We agree with the District Court that so much of the bushing as forms the annular spring tongue of this device substantially resembles the complainant's split-ring; that it is not to be differentiated therefrom because it forms part of a stationary bushing and therefore cannot rotate, instead of being held against rotation by a projection fitting a recess within the wall of the transverse slot; and that the co-operative action of the parts which lock the spindle is the same in both devices. We think the District Court rightly held this to be a device infringing claim 1 of the patent.

As to No. 2, shown in the Starrett and Adell patent No. 873,626, the spindle, as in the patent in suit, is clamped by a split-ring wherein it turns, and this is contracted by means of an inclosing actuating-ring turning in a transverse slot, and operating upon a ball or roller placed in a similar peripheral recess of the split-ring. The only difference between this device and that of the patent in suit is that instead of being provided with a recess to fit a projection from the split-ring, and thereby hold it against rotation, one wall of the slot carries a projection which is engaged by a lateral slot on the split-ring, and thus holds the latter against rotation. The actuating-ring has also a lateral slot which permits of its being removed from or replaced in the transverse slot after the spindle is withdrawn, notwithstanding the projection above mentioned. Removal or replacement of the split-ring in like manner is also made possible by its lateral slot already mentioned. We agree with the District Court that this difference in the method of holding the split-ring against rotation is insufficient to prevent this device from being held to infringe both claims of the patent. The general combination of coacting parts is the same, as is the result which they effect of locking the spindle without the possibility of minute disturbance in its adjustment, and the advantages in assembling which their special features secure.

Spalding's original application had four claims, the two last being those quoted above; the two first were claims of broader scope, as follows:

"1. In a micrometer caliper a clamping device consisting of a split-ring inclosing a spindle, and means for contracting the ring as described.

"2. A combination with a spindle of a caliper or gage and the bearing for the spindle, of a split-ring inclosing a spindle, means for connecting the splitting with the bearing, and actuating means whereby the split-ring is operated to lock the spindle as described."

These were rejected and canceled, with Spalding's acquiescence. The defendant contends that the result was to limit the present claims of the patent to the precise construction shown and described, and that to give them a scope so broad as to make its two devices above discussed infringing devices is to give them a scope as broad as that of the rejected and canceled claims. We are obliged to agree, however, with the District Court, that the plaintiff's patent as issued shows a sufficient advance over anything in the prior art to warrant the plaintiff's claim to a reasonable range of equivalents, instead of being limited to the exact construction described; nor, in our opinion, does such an interpretation of the patent amount to giving the plaintiff what he sought in vain to obtain by his rejected claims.

4. To a device shown in a still later patent to Starrett, No. 928,889, July 20, 1909, no reference was made in the case until after the plaintiff's prima facie case had been closed and the defendant had begun to take its proofs. Starrett himself, testifying for the defendant company, whereof he is president, volunteered, in answering a cross-interrogatory, the statement that his company had abandoned making an opening in the actuating-ring of its No. 2 micrometer, and had found a way to avoid making such an opening. On redirect examination he was asked to produce one of the devices he referred to. What he then produced is marked "Starrett Latest Micrometer," and will be referred to as No. 3. It appeared that the defendant began making such micrometers in January, 1909, subsequently, therefore, to the filing of the bill.

Later, and before the defendant's proofs were completed, the plaintiff gave notice on the record that it would claim such micrometers to be infringements, stating that the notice was given so that the defendant might have opportunity to examine its expert, who was then testifying about them.

The defendant declined to take testimony to meet the claim that No. 3 infringed, before the plaintiff had taken testimony to support it. In rebuttal the plaintiff's expert gave testimony, against objection, tending to show that No. 3 was an infringing device. The evidence was closed, and the case came on for hearing without any attempt on the defendant's part to meet this testimony by testimony in surrebuttal.

At the hearing, the defendant's objections to the plaintiff's testimony regarding No. 3 were overruled. It moved at the time, and also filed a formal motion after the hearing, for leave to take testimony in answer thereto. This motion was denied, March 28, 1912. The opinion of the District Court, dated November 13, 1912, held No. 3, as

well as No. 2, to be an infringement of both claims of the patent sued on.

The defendant then sought, by petition to this court for writ of mandamus, to obtain the reopening of the case in the District Court; in order, as its petition stated, that it might take proofs in relation to No. 3 "in answer to the *prima facie* proofs" taken by the plaintiff. In the opinion dismissing this petition without prejudice (204 Fed. 588), it was said that the questions it raised could be brought before us on an appeal in the ordinary way. The District Court had not, at the date of its opinion, entered the interlocutory decree for an injunction and accounting directed by its opinion. Such a decree was subsequently entered (July 11, 1913), and is the decree now appealed from. It adjudges the defendant to have infringed both claims of the patent, but does not specify the particular devices held to infringe, or in respect whereof the defendant is enjoined. The defendant has assigned here as error the conclusion of the District Court that No. 3 was legally before it and that it infringed, also its refusal to reopen the case for further proofs by the defendant on the question whether it infringed or not.

[2] As we have held, the plaintiff had a good cause of action, when the bill was filed, for infringement of its patent by the defendant's devices Nos. 1 and 2. No. 3, which, having been introduced by the defendant, is properly before the District Court and this court for inspection and comparison with Nos. 1 and 2, appears by such inspection and comparison to be not a device of independent and separate character, but a mere change or modification of No. 2. Strictly speaking, however, since it appeared that the defendant had not made this device when the bill was filed, a supplemental bill or petition in regard to it would appear to have been necessary, in order to warrant the District Court in adjudging that it infringed. The grounds upon which the District Court admitted evidence taken regarding it in rebuttal, without a reopening of the plaintiff's *prima facie* case, do not appear. We are not satisfied from the record that the defendant has had its day in court upon the question of infringement by its device No. 3, and hold, therefore, that for the purposes of the accounting ordered, the question is an open one. We see no reason to doubt, however, that it is a question which may properly be presented to and ruled upon by the master. *Hoe v. Scott* (C. C.) 87 Fed. 220-1007; *Walker, etc., Co. v. Miller* (C. C.) 146 Fed. 249, 252. *Walker, Patents*, § 742. By this course the defendant's rights will be fully secured, both in the District Court and on appeal. No modification will be required in the decree as it stands.

The decree of the District Court is therefore affirmed, and the case remanded to that court for further proceedings in accordance with this opinion; and the appellee recovers costs in this court.

McCREERY ENGINEERING CO. v. MASSACHUSETTS FAN CO. et al.

(District Court, D. Massachusetts. November 22, 1913.)

No. 410.

PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—PLEADING.

The overruling of a plea, filed by the defendants in an infringement suit, alleging that the subject-matter of the patent appeared from the file wrapper and contents themselves to have been in public use and on sale more than two years before the application was filed, *held* not to preclude them from raising the issue of such prior use as one of fact by their answer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507-540; Dec. Dig. § 310.*]

In Equity. Suit by the McCreery Engineering Company against the Massachusetts Fan Company and others. On motion by complainant to strike out certain depositions. Denied.

See, also, 186 Fed. 846; 195 Fed. 498, 115 C. C. A. 408.

Samuel D. Elmore, of Boston, Mass., and Chappell & Earl, of Kalamazoo, Mich., for complainant.

Roberts, Roberts & Cushman, of Boston, Mass., for defendants.

DODGE, Circuit Judge. This motion is based on the same grounds as was a motion denied March 10, 1913, to strike out a part of the answer.

What has been submitted to me by the complainant since the hearing on the present motion has little bearing upon the point regarding which I requested counsel to submit authorities; i. e., whether or not the evidence presented by these depositions would have been admissible upon the defendants' second plea, filed in this court August 30, 1910, before the appeal since determined according to the mandate under which the case is now here.

It has not been made sufficiently clear to me that the defendants are concluded by their plea referred to, and the decision regarding it, from raising the defense in support of which these depositions are taken, to warrant striking from the files either that part of the answer in which it is set up or the present depositions taken thereunder.

An examination of the plea referred to shows that it went no further than to allege that the subject-matter of the patent appeared from the file wrapper and contents themselves to have been in public use and on sale more than two years before the application, and that a manifest error of law, on the part of the Commissioner of Patents, in granting and issuing the patent, was thus clearly apparent therefrom. This seems to be fully recognized in Judge Lowell's opinion dismissing the bill. 186 Fed. 846. If not so clearly recognized in the opinion of the Circuit Court of Appeals (195 Fed. 498, 115 C. C. A. 408), the record itself leaves no doubt as to the fact.

I am unable to rule that anything more has been settled in the case than that the patent did not issue upon a manifest error in law. If not, the defendants have not yet had their day in court upon the de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fense they now raise; i. e., that the patent, though rightly issued upon what the Patent Office had before it, is nevertheless invalid because, as matter of fact, the invention had been in public use or on sale for more than two years before the application date. This defense is apparently one which must be made by answer, and cannot be made by plea. The plaintiff contends that there was an understanding between the parties that the decision on the plea should dispose of the whole question of prior public use or sale, irrespective of the manner wherein it might be raised. A letter from the defendants' counsel, dated July 13, 1910, is claimed to show such an understanding. Taken in connection with the plea itself, to which it refers, I am not satisfied that the letter is fairly open to the construction which the plaintiff puts upon it. But, whether it is or not, it forms no basis for any conclusion or ruling by the court; no stipulation between the parties relating to the matter having been signed or filed.

I must allow the depositions to stand, subject to the plaintiff's objections, and the motion to strike them from the record is denied.

UNITED STATES v. DU PEROW.

(District Court, N. D. Ohio, W. D. October 15, 1913.)

No. 7,168.

1. UNITED STATES (§ 50*)—SUITS TO RECOVER FROM OFFICERS—EVIDENCE.

In an action by the United States against an army officer charged with accountability for supplies, the certificate of the appropriate auditor of the Treasury Department, properly authenticated in accordance with U. S. Comp. St. 1901, § 886, showing property unaccounted for by defendant, when introduced in evidence makes a *prima facie* case for the government both as to the property and its value, properly charged at its cost to the government, and the burden rests on the defendant to account for it or to prove any claimed deterioration in its value.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 34; Dec. Dig. § 50.*]

2. UNITED STATES (§ 50*)—SUITS TO RECOVER FROM OFFICERS—EVIDENCE—"CREDIT."

In an action by the United States against an army officer charged with failing to account for supplies in his custody, a claim that he turned such supplies over to the proper officer to receive them is one for a "credit," within the meaning of Rev. St. § 951 (U. S. Comp. St. 1901, p. 695), which provides that in such suits "no claim for a credit shall be admitted upon trial except such as appear to have been presented to the accounting officers of the treasury for their examination," unless the failure to so present it is excused, etc., and where the defendant was repeatedly urged by such officers during three years to present any matter which would remove the charge appearing against him on the books, but failed to do so, evidence to establish such a defense is not competent.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 34; Dec. Dig. § 50.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1711-1713; vol. 8, p. 7622.]

At Law. Action by the United States against Benoni F. Du Perow. Trial without a jury, and judgment for plaintiff.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

U. G. Denman, Dist. Atty., of Cleveland, Ohio, for the United States.

Wing, Myler & Turney, of Cleveland, Ohio, for defendant.

KILLITS, District Judge. In this case the government sues the defendant at law upon a cause of action alleging that the defendant is indebted to the United States in the sum of \$1,285.78, with interest from June 30, 1902, being the money value of quartermaster's supplies, property of the United States, which had come into the possession of the defendant as captain of the Fifth Ohio Volunteer Infantry, War with Spain, and for which the defendant has failed to account; that sum being charged to him on certificate of the Quartermaster General of the United States Army, and duly certified by said Quartermaster General on the date above mentioned.

The defense is a denial of the indebtedness. A jury was waived and the case tried to the court, but, of course, the issue is to be determined by the same rules touching the admissibility of testimony as if the case were tried to a jury.

[1] The case is brought under the provisions of section 3624, Compiled Statutes of the United States, at the request of the Comptroller of the Treasury, and the government rested upon the certificate of the accounting officers of the Treasury Department that a balance had been audited in the above amount against the defendant. This certificate is offered under section 886, Compiled Statutes, which provides, in substance, that, when suit is brought in any case of delinquency of any person accountable for public money, "a transcript from the books and proceedings of the Treasury Department, certified by the registrar and authenticated under the seal of the department, or, if the suit involves the accounts of the War and Navy Departments, a certificate by the auditors respectively charged with the examination of these accounts and authenticated under the seal of the Treasury Department, shall be admitted as evidence and the court trying the case shall be authorized to confer judgment and award execution according to law." With it the government rested, having made, in the opinion of the court, a prima facie case. The certificate was properly made under the Act of March 29, 1894, c. 49, 28 Stat. 47 (U. S. Comp. St. 1901, p. 157), and, as applied to the transcript prepared under section 886, above referred to, makes a prima facie case. *United States v. Harrill*, 26 Fed. Cas. 169; *Moses v. United States*, 166 U. S. 571, 597, 17 Sup. Ct. 682, 41 L. Ed. 1119; *Laffan v. United States*, 122 Fed. 333, 58 C. C. A. 495.

Testimony in behalf of the defendant was received under the objection of the government and was to the effect that, although he obtained no receipts therefor, Capt. Du Perow had in fact turned over to the proper officer of the Quartermaster's Department—one Capt. Williams—the various articles making up the account of his alleged deficiency; the explanation being that in the confusion incident to a hurried departure from the unsanitary conditions in which Capt. Du Perow's regiment found itself the precaution of obtaining receipts was omitted, the two officers dealing with each other through their respective clerks.

Much testimony under the objection was received from various persons in position to observe and know the facts at the time, being other persons connected with the army, tending to show that substantially all the missing property was thus turned over by the defendant to Capt. Williams, and the court is inclined to believe that, substantially at least, the property in question came into the possession of Capt. Williams from the defendant, and there could not be any question but that Capt. Williams was the proper officer of the government to receive such property from the defendant.

[2] The ground of objection to the receipt of this testimony, however, is an exceedingly serious one. In the settlement of his account with the government, by way of credits upon the charges of property against him, he would be entitled to claim credit for such items as he turned over to his successor or the proper officer appointed to receive it. Section 951, Revised Statutes of the United States, provides:

"In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting any claim for such credit at the treasury by absence from the United States or by some unavoidable accident."

No claim is made in the instant case that either situation is present which prevents the operation of this statute, and it appears affirmatively that the defendant has not brought himself within the provisions of this statute, so that any claim of his that he had delivered this property to the proper officer of the government becomes competent. It appears from the correspondence between the Quartermaster General's Department and Capt. Du Perow that for a period of time from May, 1900, until August, 1903, he was repeatedly requested to either demand a board of survey to exonerate him from the charges against him, or, failing that, to forward to the department his affidavits "supported by such other vouchers or affidavits of the facts as to your failure to properly account for funds and property of the Quartermaster's Department, with which you are charged, as may be obtainable by you, with a view to considering your relief from further accountability therefor under the above mentioned act," and he was assured, "in case no corroborative evidence can be obtained, it should be so stated" in the affidavit. Attention was called, in the letter of April 29, 1903, from which the above quotation is made, to the Act of March 3, 1903, c. 990, 32 Stat. 955, which placed a limitation of two years within which all claims for credit in cases of this character should be submitted to the treasury officers, and on August 8, 1903, he was requested to reply to this letter of April, 1903, "so that the charges may be removed." Notwithstanding this assiduity on the part of the Quartermaster General's Department, it appears that Capt. Du Perow took no steps towards perfecting or formally presenting for allowance to the accounting officers of the treasury the claims for credit which he now presents to the court.

Against the contention of the government that section 951 applies to the case before us, it is argued by defendant that, in offering testimony tending to show actual delivery of the property in question to the proper government agent, he is neither claiming credit nor set-off. Of course, the question of set-off is not in the case, but we are clearly of the opinion that his defense is a claim for credit within the meaning of that term as employed in the statute quoted. He was charged with receipt of certain property of a certain value. On the redelivery by him according to regulations of any item of such property, there should have been entered on the credit side of his account such article with the pertinent value. This is obtaining "credit" on his account, having regard to the nature of his business relation with the government, involving, as it did, the power to turn back to the government any article at the value charged, or money representing such value. This is precisely the meaning of the word as defined in Webster's International Dictionary, Title Credit, par. 10, cl. b:

"The side of an account on which are entered all items reckoned as values received from the party or the category named at the head of the account; also, anyone, or the sum of these items; the opposite of debit; as, this sum is carried to one's credit, and that to his debit; A. has several credits on the books of B."

Nor it is tenable here to insist that the government must fail because it has not proven values other than those attaching to new articles, whereas the property involved had depreciated through use and exposure. It is not the theory of the government, as we understand it, that the auditor's charge is conclusive; it is so neither as to identity of articles charged nor as to values; defendant may dispute in both respects. Not only the nature of the business but because of the application of section 886, the auditor's charge establishes a *prima facie* case in both respects; the government must charge the officer with some value, and that of the cost to the government or that when issued is the convenient and proper statement. Knowledge thereafter of the deterioration of value through use or otherwise is peculiarly with the officer in possession. Whether or not section 951 should be interpreted to require the defendant to first submit to accounting officers of the treasury his claim that the property had not the value, when he was called upon to account for it, existing when debited to him, the fact remains that every consideration thrusts upon him the necessity of introducing testimony of facts best known to him, including this. He is chargeable with knowledge of the values placed to his debit, and no surprise is involved in the government's insistence that he should be held to that charge until he brings facts from his own knowledge tending to diminish it. The government could not do business on any other basis. In this case no evidence whatever of value was offered by the defense, but proof was made that deterioration of value, to an unproven extent, had occurred. These questions have been in some measure settled by the decision of *Smythe v. United States*, 188 U. S. 156, 23 Sup. Ct. 279, 47 L. Ed. 425. Respecting the failure of defendant to even offer proof of value against the government's *prima facie* proof thereof, we feel

that we are in this holding in harmony with even the dissenting opinion in that case.

Under these circumstances, it seems to us that the court has no alternative than to sustain the objections to the admissibility of the testimony that the property was redelivered, although, as we have suggested, were it admissible, it would convince the court that a very substantial amount of the property charged against him he had actually turned into the custody of a proper officer of the United States Army, as we would also be convinced that at the time it left defendant's custody it had suffered great depreciation in value.

We can find no fault with the statutes in question. Discipline in the army is part of the essence of its efficiency, and the laws which have been called into operation in this case are well calculated to enforce the rigid accountability and secure the prompt settlement which are very necessary to be had in all public transactions, and especially in military affairs. As this case must be disposed of upon legal principles, we cannot but hold that, for want of competent evidence by way of defense, the defendant has failed to meet the government's *prima facie* case, and that judgment should go against him, leaving it to Congress to relieve the defendant, if it will, from a burden which seems to be unjust, but which is upon him very largely because of his own neglect to save himself when opportunity was offered.

MEDICAL SOCIETY OF SOUTH CAROLINA v. GILBRETH.

(District Court, D. South Carolina, at Charleston. November 3, 1913.)

1. CONTRACTS (§ 164*)—CONSTRUCTION—PROPOSAL AND LETTERS.

A medical society, having \$100,000 constituting a trust fund with which to construct a hospital, advertised for bids on certain plans and specifications. Defendant, a foreign contractor, sought to obtain a contract for the work on his special "cost plus fixed sum" plan; but, complainant being unable to make such a contract, defendant's agent agreed to make a bona fide lump sum bid, and filed a "revised proposal" on one of the architect's blanks, which was a complete and inclusive proposition to furnish all the labor and materials of every description for \$109,375. With this he wrote a letter to the chairman of complainant's building committee, referring to a guaranty of completion within the time specified, and offering to give a bond, if required, and then stated that in giving the completion date defendant expected complainant to close the contract "on our special method of construction," which allows speed work, and that such method of construction insured speed beyond question. *Held*, that such letter, though construed in connection with the proposal, did not change the latter from a bid for a lump sum to one on defendant's special "cost plus fixed sum" plan.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 746-748; Dec. Dig. § 164.*]

2. REFORMATION OF INSTRUMENTS (§ 16*)—MISTAKE.

Where a written contract is drawn and executed that professes or is intended to carry into execution an agreement previously made, in writing or by parol, but by mistake of the draftsman, either as to fact or law, the contract as written does not fulfill or violates the manifest in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tention of the parties, equity will grant reformation so as to conform the writing to the agreement.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 68; Dec. Dig. § 16.*]

3. REFORMATION OF INSTRUMENTS (§ 16*)—BUILDING CONTRACT—OFFER AND ACCEPTANCE—MISTAKE.

Appellant, having a trust fund with which to construct a hospital, procured plans and advertised for bids. Defendant's agent attempted to obtain the contract on defendant's special "cost plus fixed sum" plan, but on numerous occasions was informed that complainant had no power to enter into a contract on that basis, whereupon he filed a lump sum bid to do the work, for \$109,375. After the bids had been opened, defendant's agent was informed that his bid had been accepted, whereupon he produced a written contract, which he desired to have executed at once. This was taken to complainant's attorney and, after a cursory examination and some slight additions, was executed, and it was not until after it was discovered that the buildings were costing defendant much more than his bid that it was found that the contract contained a clause which converted it from a lump sum contract into one binding complainant to pay the actual cost of the work, plus \$10,000. *Held*, that the contract between the parties was complete on the oral acceptance of defendant's "lump sum" bid, and that the written contract, executed as a memorial thereof, was subject to reformation, either because of mutual mistake or the mistake of complainant and fraud of defendant's agent.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 68; Dec. Dig. § 16.*]

4. EQUITY (§ 7*)—JURISDICTION—MISTAKE OF LAW—FRAUD.

A mistake of law by both parties to a contract, or by one party, induced or brought about by such conduct of the other as makes it inequitable on his part to take advantage thereof, is remedial in a court of equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 15, 16; Dec. Dig. § 7.*]

5. REFORMATION OF INSTRUMENTS (§ 23*)—WRITTEN CONTRACT—MISTAKE—RIGHT TO RELIEF.

Defendant's lump sum bid for the construction of certain buildings for complainant for \$109,375 having been accepted, defendant's agent procured the execution of an instrument which changed the contract to one obligating complainant to pay the cost plus \$10,000. This was not discovered until it was ascertained that the buildings were going to cost defendant much more than his bid, when, for the first time, he claimed that complainant was liable for the cost plus \$10,000. When this was denied, he abandoned the work, and complainant completed it at a cost of \$12,000, and liens had been filed to the amount of \$7,000, and suits brought for their enforcement, after which defendant instituted an action at law for the recovery of a large amount alleged to be due for materials furnished in the construction of the building, and complainant claimed that it had expended a sum in completing the building which it sought to recover from defendant. *Held*, that the completion of the work did not bar complainant's right, under such circumstances, to a reformation of the instrument for mistake.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 82; Dec. Dig. § 23.*]

6. COURTS (§ 347*)—FEDERAL COURTS—PRACTICE—EQUITY RULES.

Under Equity Rule 19 (33 Sup. Ct. xxii), providing that the court at every stage of the proceeding must disregard any error or defect in the procedure which does not affect the substantial rights of the parties, if

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a bill can be viewed in more than one aspect, the courts will adopt that view which best justifies the relief to which complainant is entitled.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

In Equity. Suit by the Medical Society of South Carolina against Frank B. Gilbreth for reformation of a building contract. On exceptions to the report of a special master. Decree for complainant.

Theodore G. Barker, James Simons, J. P. K. Bryan, and Mitchell & Smith, all of Charleston, S. C., for complainant.

T. Moultrie Mordecai, of Charleston, S. C., and Meyer M. Friend, of New York City, for defendant.

CONNOR, District Judge. Upon the maturity of the pleadings the cause was referred to Mr. W. C. Miller, as special master, to hear the evidence, and find and report to the court his conclusions of fact and law. Upon the coming in of the report both parties filed exceptions. The form of the report, while comprehensive and intelligent, is such that it is difficult to discuss the questions raised, by the exceptions, consecutively. Many of the exceptions are directed to findings of evidentiary facts, rather than ultimate conclusions. From the finding of the master that the parties did not make any contract, that there was no meeting of their minds upon the terms of a proposal, he logically concluded that the bill should be dismissed.

[1] The record evidence and admissions in the pleadings disclose the following case: The General Assembly of South Carolina, at its session of 1794, incorporated the Medical Society of South Carolina, with power to hold property and do such acts and things as were necessary and convenient to the purposes for which it was organized.

"The advancement of the science of medicine, the maintenance of the honor and character of the profession, and the promotion of the public health, together with the care of such public charities and bequests as may be legally under its control."

By the will of Thomas Roper, admitted to probate May 25, 1829, certain funds were bequeathed to said Medical Society "for the purpose of erecting and maintaining a hospital for the reception and treatment of sick, maimed and diseased paupers as need medical aid, without regard to religion, complexion, or nation." The city of Charleston, S. C., being the owner of certain property known as the city hospital, and an infirmary, complainant, Medical Society, presented to the city council a memorial, proposing to purchase said property and to remove, or alter, the buildings thereon and transform the same by the erection of a new hospital and infirmary to be known as the "Roper Hospital," and, for that purpose, to expend out of the fund held by complainant, as trustee, under the terms of said will, a sum not exceeding \$100,000. The city council, on June 14, 1904, accepted the proposition. The memorial and proceedings of the council are matters of public record on the minutes of the council, and were published in the newspapers in the city of Charleston. For the purpose of se-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

curing authority from the court having jurisdiction in the premises to carry out the terms of said agreement, a suit was instituted by complainant in the court of common pleas of Charleston county, setting forth the proposal and its acceptance, by the council, and, upon proceedings had therein, in accordance with the course and practice of the court, a decree was duly entered in said court, authorizing the complainant trustee and the said city council to carry into effect the said agreement.

Pursuant to said decree, the city council executed a deed for said property to complainant, in which said proceeding is set forth. In the proceedings in said cause, and the deed, in which special reference to said proceeding was made, the limitation of \$100,000, upon the expenditure to be made by complainant, was set forth. It was necessary that a limitation, upon the amount to be expended by the committee, be fixed because of a provision in the decree that, upon certain contingencies named therein, the city should resume control and take a reconveyance of the property by paying to the complainant the amount expended. Complainant appointed a building committee to carry out said plan, and the city council appointed Mr. Lebby, one of its members, to represent the council in carrying out said agreement. Said committee, of which Dr. R. S. Cathcart was chairman, advertised in the newspapers of Charleston, inviting bids to furnish the labor and material necessary to erect said buildings, etc. The building committee employed, as its architect, W. M. Aiken, to whom was committed the duty of preparing plans and specifications for said proposed building and supervising its construction. H. F. Cook was employed as superintendent of construction. Defendant, Frank B. Gilbreth, a resident and citizen of New York, was engaged in the business of contracting for, and constructing, buildings. His operations extended over different states. Charles R. Clemence was his accredited agent and manager, with authority to submit proposals, and make contracts, for the construction of buildings. Gilbreth had adopted, in his business, a system, or plan, of contracting for buildings, which he termed "the cost plus fixed sum" plan, or basis. The special master says:

"This method, in brief, means, in so far as the amount to be paid by the owner is concerned, a contract whereby the owner pays the actual cost of labor and material, plus a fixed sum to the contractor for his compensation or profit."

Upon the invitation of complainant's architect, Clemence had, prior to the 18th day of April, 1905, begun to make an estimate on the cost of the building, based upon Gilbreth's system. On April 12th, he wrote Dr. Cathcart: That he had been "taking off quantities preparatory to an estimate on the hospital to be built at Charleston." That he had called on Aiken, "and talked over our method of construction, and I am inclosing to you our pamphlet No. 20, termed 'Rapid Construction,' and wish you would carefully look over the same; either Mr. Gilbreth or myself personally anticipate being in Charleston about the 17th, in order to take up this matter with you and your committee. This is in accordance with my talk to-day with Mr. Aiken." Clemence reached Charleston, as he anticipated, met

Dr. Cathcart, other members of the committee, Mr. Lebbby, and Mr. Cook, superintendent, and explained to them the Gilbreth, or cost plus fixed sum, method, and each of them told him that the committee was limited to an expenditure of \$100,000 and could not consider his plan. Clemence was present with the committee, either at the time of, or immediately after, the bids were rejected. He did not put in a bid; said that he was not prepared to do so. The bids were rejected because they exceeded the limit to which the committee was restricted; this was stated in the presence of Clemence—was well known to him. It was then determined by the committee to instruct Mr. Aiken to revise the plans to bring the cost within the sum of \$100,000 and the chairman directed to do so. Clemence explained to the committee the Gilbreth system, and was told that it could not be considered; "that the committee was administering a trust fund and were limited to an expenditure of \$100,000." He stated, however:

"That he intended to bid on the second bidding; when the revised plans and specifications were bid on, he intended to submit a bid, and would, in this instance, submit a bona fide bid for a lump sum price, the same as any other contractor, and his reasons for doing so, making an exception to the Gilbreth system, generally, that he wished a foothold in the South, especially a large public building designed by a New York architect, and it would lead to other business; in other words, it was a question of advertisement, and that was his reason stated why he should submit a lump sum bid when the second bids were called for."

Clemence denies this. All of the members of the committee were then present. He further said that if he had made a bid, at that time, it would be in the neighborhood of \$141,000, and that, if the committee was in a position to trade that day, he would contract to do the work for \$125,000. He was told, again, that the committee would not entertain, or consider, a bid upon his plan; that they were dealing with a trust fund under a specific limitation of \$100,000. Clemence denies this, and says that the committee did not tell him that they would not deal with him on the cost plus fixed sum plan; that they made no objection to doing so; they did not tell him that they were handling a trust fund, and could not exceed their limit; or that he would have to submit a bid in the same way as other bidders. He says that he was told by the committee that they could not deal on the percentage basis, and not on the cost plus fixed sum basis. He contradicts, and is contradicted by, every witness who was present at that and other meetings while in Charleston, April 19th and 20th. The weight of the evidence is against him. It is difficult, if not impossible, to find, in the light, not only of the positive, direct evidence of all the witnesses, and the surrounding conditions, that he is correct in his version of what occurred in Charleston at that time. There was no suggestion made by any one that the cost plus fixed sum plan would be considered. Mr. Aiken says that, after Clemence returned to New York, he came to his office and urged the adoption of the Gilbreth plan; that he (Aiken) told him:

"That it had to be done on a lump sum bid, that the committee had made up their minds upon that point, and, inasmuch as they were awarding the

contract, and not he (the architect), their decision was final, and that all bids would be called for on exactly the same basis; identical form to be filled out by each contractor, exactly the same, which was the government contract or city contract, as had been my custom."

Aiken had been in the service of the government and of the city of New York as architect. Aiken says that on another day, April 29th, Clemence was in his office when they were discussing reductions, and again urged the cost plus fixed sum basis, and he told him:

"That it was too indefinite, had no limit whatever; that the committee had decided that there should be a limit; that he had been instructed to cut down the plans and specifications to bring it within or to that amount. * * * He was informed that was the limit without any qualification whatever—absolutely."

This occurred before Dr. Cathcart and Mr. Lebby reached New York. Clemence admits that, after his return from Charleston, he met Aiken in New York and talked over the reductions. He not only denies that Aiken told him that the committee would not consider bids on the cost plus fixed sum basis, but that he said:

"That under the cost plus fixed sum contract these deductions could be made and handled in a more satisfactory way than they could under a lump sum basis, inasmuch as we could save time by starting the building at an early date, and receiving low cost by using that system."

To weigh the testimony of the witnesses and consider the contradictions, it is necessary to notice that, in another important respect, Clemence's testimony is positively contradicted by three witnesses. For the purpose of showing that Dr. Cathcart and Mr. Lebby, at the request of Mr. Aiken, visited New York on April 29, 1905, for the purpose of taking the matter up with him and, as will be seen later, to sustain his version of what occurred on that visit, he says that, at the meeting with Aiken in New York, when he (Aiken) said the reductions could best be made under the cost plus fixed sum basis, Aiken stated:

"That he thought it advisable, in order to hurry matters, to wire or write Dr. Cathcart and Mr. Lebby to see if they could not come to New York, and we would meet in joint session, as to what changes would have to be made, what amount could be expended in the work."

Dr. Cathcart and Mr. Lebby both say that their sole purpose in going to New York was to see Mr. Aiken in regard to the reductions or modifications to reduce the cost to \$100,000; they had no other purpose. Mr. Lebby says that he was invited by Dr. Cathcart to go with him to New York to see Mr. Aiken; no suggestion of seeing Clemence. Mr. Aiken says:

"I did not request the presence of Dr. Cathcart and Mr. Lebby; they were sent there by the Medical Society. I was informed by telegraph that Dr. Cathcart and Mr. Lebby would come on to meet me in my office for the purpose of conference, consultation as to cutting down the various details to bring it within the amount; at that time the amount was \$100,000."

Dr. Cathcart says:

"I went at the request of the building committee, also requested Mr. Lebby to go. I wired Mr. Aiken we were coming. We had absolutely no agreement to meet Mr. Clemence."

On cross-examination, he says that he may have suggested to Mr. Aiken, in a letter, that he would meet Mr. Clemence in New York. I am brought to the conclusion that Mr. Clemence is in error in saying that Dr. Cathcart and Mr. Lebby were called to New York by Aiken to confer with Aiken and himself. The weight of the evidence is against him. Mr. Clemence had, on every occasion while in Charleston, been told that the committee could not, and would not, deal with him, or consider a bid upon his plan—cost plus fixed sum. He must have known this; he also knew the reason why they could not do so. This was the status of the matter when Dr. Cathcart and Mr. Lebby reached New York on April 29, 1905—well understood by them, by Mr. Aiken, their architect, and Mr. Clemence. Clemence came to Mr. Aiken's office in response to a phone message sent with Dr. Cathcart's approval. The invitation is entirely consistent with the testimony of Dr. Cathcart and Mr. Lebby, regarding his declaration at Charleston that he intended making a "lump sum" bid after the reductions were made, at the second bidding, and also with Aiken's statement to them that Clemence had been going over reductions with him. Clemence says that, at this meeting, he told Dr. Cathcart, Mr. Lebby, and Mr. Aiken that he could not put in a lump sum bid, could not put in a bid in that form; that Mr. Lebby said that he did not see how bids could be considered on cost plus fixed sum basis. Mr. Aiken stated that, inasmuch as the time that the local or Southern bidders wanted was excessive, if the cost plus fixed sum basis was used, a clause could be inserted into the bidder's form, making time the essence of letting the contract; that would give the committee a right to consider the cost plus fixed sum basis in case the other bids were still unsatisfactory, when opened, as to price. That he said he could not put in a bid on that form, even with that form inserted, unless he wrote a letter, mailing it at the same time the estimate was mailed, making the acceptance by the committee of his bid conditional at the time the contract was awarded, if it was awarded, to him. That Dr. Cathcart stated that:

"With the time limit in the contract, and that with the letter following the bid, that that would be sufficient for the committee to consider that bid, but he did not want anything put in the bidder's form that would arouse any suspicion with the Charleston bidders. * * * That was generally assented to by the parties present; it was left with Mr. Aiken to prepare his bidder's form."

This statement is contradicted by Dr. Cathcart, Mr. Lebby, and Mr. Aiken. They each say that no such suggestion was made or assented to. Mr. Lebby says that, after Clemence came, the question of reductions was discussed.

"The statement was again made of the limit of \$100,000, but that he, representing the city council, thought that if they found it impossible to construct the building for \$100,000 that it was possible that he could get the city council to raise the amount to \$105,000 or \$110,000. That he was simply a member of the committee and had to submit the whole matter to the whole committee, but he felt confident that the city council would do it. Mr. Aiken was then requested to proceed to modify the plans and specifications so that

the building could be constructed for \$100,000, and the revised plans and specifications were to be bid on, and the bids opened publicly at some time in May."

He states, "positively," that there were no arrangements with Clemence "as to his position as a bidder on that work"; that the only purpose of Dr. Cathcart and himself in going to New York was to confer with Mr. Aiken "to see if the plans could not be modified so as to bring it within the limit of \$100,000." "There was nothing ulterior, or beyond that. * * * That was the sum total of our going to New York." Both Dr. Cathcart and Mr. Lebby say that, at this meeting, in New York, Clemence repeated that he intended, contrary to his general rule, to put in a lump sum bid, at the second bidding. That he was again told that the committee would not consider a bid based upon the cost plus fixed sum plan; that it must be a pure and simple lump sum proposition according to the plans and specifications of the architect. He was also told so by the architect. Both Dr. Cathcart and Mr. Aiken sustain Mr. Lebby in this statement; they plainly and positively contradict Mr. Clemence. Mr. Aiken's testimony at this point is clear, positive, and specific. He leaves no room for controversy as to what he says and intends to say. His statement, and reasons given, are irreconcilable with Mr. Clemence's statement. Mr. Aiken prepared the form of the proposal, sent it to Mr. Cook, and a second advertisement was inserted in the Charleston papers for bids, to be made upon the forms, plans, and specifications which would be furnished upon application to Dr. Cathcart, chairman of the committee; they were required to be in by May 15, 1905. Mr. Cook says that the form was the same and the advertisement the same as used for first bids, April 20, 1905.

On May 9, 1905, Mr. Cook, superintendent, inclosed one of the forms of "Revised Proposal" to Mr. Clemence, writing him that he did so at the request of Dr. Cathcart; that he wanted him "to fill out one of the proposed sheets in same form as the other bids." He directed Clemence to send it to Dr. Cathcart not later than May 15, 1905. On May 13, 1905, Clemence mailed to Dr. Cathcart, chairman, the "Revised Proposal," signed by himself as manager of Mr. Gilbreth. The "form" is entitled "Revised Proposal for Roper Hospital, Charleston, S. C.," setting forth the work to be done, according to the plans and specifications prepared by Aiken. It is complete as to details, leaving blank the name of the proposer, the amount for which the work was to be done, and the material furnished. Reference is made to contemplated additions and blanks left for the insertion of the amounts bid. The time at which the work was to be completed was fixed at November 15, 1906. "Number of working days, one hundred and sixty." Bidders were required "to guarantee time stated by him, wherein to complete all work indicated by the drawings and specifications." It is further provided that:

"The trustees hereby reserve the right to consider the said time of completion in awarding the contract. * * * No bid, or estimate, will be accepted unless filled out as called for on this form of proposal."

The blanks were "filled in," and defendant's name signed to the proposal by Chas. R. Clemence, manager. The proposal, as signed, is a complete and an unqualified proposition "to furnish all the labor and materials of every description * * * for the sum of "one hundred and nine thousand, three hundred and seventy-five (\$109,375.-00) dollars" (written in ink). The provisions relating to the infirmary and to contemplated additions are not material at this time, except to note that the amounts to be paid for them are also fixed—inserted in writing. At the same time, and by the same mail, by which Clemence sent the "Revised Proposal," he wrote, or dictated, and signed, a letter, a correct understanding of which can be had only by its insertion in full:

"May 13, 1905.

"Dr. R. S. Cathcart, Chairman Building Committee, Roper Hospital, Charleston, S. C.—Dear Sir: In your form of proposal for revised bids we notice that you require each bidder to give a satisfactory guarantee of the time limit of the completion of work. We are seldom ever called upon to give a guarantee, any further than that of our reputation, for doing speed work, but in this instance are ready, if requested by you, to give a surety bond. In giving you the completion date we have mentioned in the proposal, we would expect you to close the contract, with us, on our special method of construction, which allows us to do speed work by working in direct harmony with your architect, through his local representative at Charleston. This method of construction insures speed work beyond question, and we can give you the most satisfactory recommendation of this form of contract by not only owners, but also architects and engineers for whom we have done work on this basis. We will be very glad to receive your further consideration of this matter, and would state at this time that in open meeting with your architect, William Martin Aiken, Councilman Lebby and yourself, the advantages of many kinds that you would derive through this method of doing business were fully gone over and understood by all in this meeting. The writer intends to reach Charleston, if possible, not later than Tuesday, and will be very glad to close this matter up finally and commence operations at once in order to complete the building even quicker than the time mentioned in proposal, which I believe is possible.

"Very truly yours,

[Signed] Frank B. Gilbreth,

"By Chas. R. Clemence."

This letter was received by Dr. Cathcart at the time the proposal came to him, and, before the proposal was accepted, it was read by him to the building committee, together with all other letters accompanying the bids. Its very peculiar language, in the light of the testimony and surrounding circumstances, invites a careful scrutiny. If it was written and sent under the circumstances and for the reasons testified to by Clemence, and this was known to the building committee, while essentially contradictory of the terms of the "Proposal," the two, read together, may reasonably be construed to constitute a proposition to furnish the material and do the work upon the cost plus fixed sum basis, if so explained to, and understood by, the building committee. If the agreement was made in New York and the committee informed of it, the letter would be read in the light of the agreement and so modify the terms of the bid. The amount named, in that view, would be understood to be merely an estimate. If, however, no such agreement, or understanding, was had between Dr. Cathcart, Mr. Lebby, and Mr. Aiken, on the one part, and Mr. Clemence,

on the other, as testified by the latter, the letter indicates a purpose on the part of Mr. Clemence to make an unconditional proposal to furnish the labor and material for the construction of the hospital for a fixed sum, accompanied by a letter, the terms of which to men unskilled in such business are so obscure as were calculated to mislead them into supposing that it referred only to the "speed limit." To accept Mr. Clemence's testimony convicts Dr. Cathcart, Mr. Lebby, and Mr. Aiken of conduct utterly at variance with their positive, previous assertions, the instructions given them by the committee, the exercise of ordinary intelligence, the character which their position in their professions and community conceded to them by counsel for defendant.

Mr. Lebby's testimony is very clear and satisfactory. He says that he is engaged in the machinery and supply business and is manifestly a man of intelligence and business experience. He fully understood, and clearly saw, the insurmountable difficulty which prevented the committee from dealing with Clemence on the cost plus fixed sum basis, and so stated on every occasion when it was mentioned. He was there for the special purpose of seeing that the terms of the agreement with the city council were observed. Neither ingenuity nor charitable construction can avoid the conclusion that, if they entered into the plan testified to by Mr. Clemence, they violated the trust reposed in them by the Medical Society, the other members of the building committee, and the city council, practiced a legal fraud on other bidders, and subjected themselves to personal liability for an amount dependent altogether on the accuracy and integrity of Gilbreth and Clemence. Defendant's contention, as to what occurred in New York, is supported only by the testimony of Mr. Clemence, who says that this plan or scheme was entered into at the suggestion of Mr. Aiken, Dr. Cathcart, and himself and "assented to by those present." He says that he saw nothing wrong in it. That is a question of ethical standard of business methods.

Postponing, for the present, further comment, it will be well to follow the transaction in its further development. On the morning of May 15, 1905, the bids, of which there were several, were opened by the committee, while in session. On May 16th, Clemence reached Charleston. The bids were tabulated and the building committee, being in session at midday, told him that, his bid "being the lowest," the contract was awarded to Gilbreth. The witnesses present concur in saying that Clemence was told that the contract was awarded to him "as the lowest bid"; that Clemence said "that he was very glad, was very much obliged, etc., that he was ready to sign the contract." Dr. Cathcart says he produced a paper out of his pocket, typewritten paper, and said he wanted to sign immediately; that he told him that they were handling a trust fund, and a paper of that kind would have to be executed in the office of their solicitor; that he would not sign it then, but made an engagement to meet him later in the day at Maj. Barker's office. They met accordingly in the afternoon of that day. Clemence said he was in a hurry to get off that afternoon. The master finds that, in what occurred up to, and including, the ac-

ceptance of the bid of \$109,375, as set forth in the "Revised Proposal," the minds of the parties did not meet, because while the "Revised Proposal" was a lump sum bid, free from ambiguity, Clemence never intended to make such a proposal or bid; that he not only intended, but, by sending the letter, he made a bid, the terms of which are to be found in the two papers, the "Revised Proposal" and the letter. He says: "The complainant accepted the proposal unqualified by the letter of May 13th." I interpret this, in the light of other language used by him, especially his "Conclusion of Law"—as finding that the building committee, which was the only agent of the complainant authorized to make a contract, accepted the bid as set forth in the "Revised Proposal," "unqualified" by the language of the letter. Of course this includes the conclusion that, either the alleged secret agreement was not made or, if made, not communicated to the other members of the committee. If, as insisted by Clemence, the letter was written to Dr. Cathcart, for the reason and for the purpose claimed by him, of course the latter understood what was meant and intended by the letter. If this is true, he concealed such knowledge from the other members, constituting a majority of the building committee. If the secret agreement was made, as claimed by Clemence, that fact would, as the master says, show his "mental attitude."

It is not quite clear what opinion the master held in regard to the claim that the agreement was made in New York. His finding leaves the question open. I am of the opinion that the question whether the proposal, with the letter and the acceptance by the committee, constituted a contract and, if so, its terms, cannot be decided until the preliminary question is disposed of. If Clemence's version is correct, it explains why he wrote the letter. If Dr. Cathcart, together with Mr. Lebby and Mr. Aiken, made the alleged agreement with Mr. Clemence, he necessarily knew why the letter was written, and that Clemence did not intend to make a bid as set out in the "proposal." He further knew that, by his silence, he was permitting his associates to enter into a contract which was essentially different from what they understood and intended, a contract which they had repeatedly and uniformly declared they would not make, one which they had no legal power to make. The results following this conclusion are so far reaching and so serious to all parties concerned that it should be reached only upon satisfactory proof. There is not a scintilla of evidence that the other members of the committee had any knowledge of the alleged New York agreement to give the contract to Gilbreth upon his own plan. I am unable to find that any such scheme was entered into in New York. I have not overlooked the entire evidence, some of which tends to sustain Clemence.

Rejecting defendant's contention that there was such understanding between Dr. Cathcart, Mr. Lebby, and Mr. Clemence, the case, in respect to what occurred at Charleston on the morning of May 16th, comes to this: The proposal is made by Gilbreth to furnish the labor and material for the fixed sum of \$109,375. The evidence shows that, prior to that time, the city council had consented to extend the limit to \$110,000, as suggested by Mr. Lebby in New York; it is signifi-

cant that the bid of Clemence is within \$625 of that amount. It is also significant that no estimate—that is, no detailed estimate—had been submitted either to the committee or the architect. Eliminating the letter, there is no room for controversy as to the terms or construction of the proposal and its acceptance. The letter cannot, however, be eliminated because it was received by the chairman and read to the committee. Dr. Cathcart says that he did not “take it that the letter referred in any way whatsoever to the cost plus fixed amount, because Clemence had been told so repeatedly. We took it, his special method of construction was in regard to his speed work, in regard to how he said he had his organization fixed, how he took different contracts all over the country, knew how to get good men and get quick delivery, and in this way he knew how to do speed work. We thought that referred to speed work, and did not connect it in any way with his cost plus fixed sum amount.” It is manifest that the other members of the committee did not understand the letter to refer to the cost plus fixed sum plan; they had repeatedly stated that they would not consider it; there is no suggestion that they, or either of them, had seen Clemence since he left Charleston on April 20th, or expressed any change of opinion in respect to his plan or its acceptance. There can be no doubt of the interpretation which they put upon the letter; this is found by the master. Did they properly interpret the letter, in the light of the “Revised Proposal,” and what had preceded it? Was it reasonably open to the construction which they put upon it?

While it is true that the minds of the parties to a negotiation must meet, there must be a proposal and an unconditional acceptance before a contract is made. It is also true that, if one make a proposal, complete in its scope, clear in its terms, constituting the basis for an acceptance, and the party to whom it is made accepts the proposal in good faith and incurs obligations thereby, the proposing party will not be permitted, afterwards, to insist that, by reason of language used by him at the time of submitting the proposal, obscure and ambiguous in its terms, which misleads the other party, whether so intended or not, that he did not intend, by his proposal, to be bound by its terms; that his real purpose was to so modify the proposal by a contemporaneous writing, or statement, that upon its acceptance, a different agreement, directly contrary to that contained in the proposal, results. The law will not permit a man to so act, impose obligations, and cause large outlays of money, upon the other party, acting in good faith, upon a reasonable construction of both papers or statements. He must be understood to mean what he says. The original purpose of Clemence was to induce the building committee to make a contract with him in which there would be nothing definite or fixed in respect to the obligations, except his own compensation. The weight of the evidence shows that, failing in this, he expressed his purpose to make a bona fide lump sum bid, and this is what he did, unless it was nullified by the letter. If, on the other hand, his letter to Dr. Cathcart is so clear in its terms that he and the other members of the building committee, as reasonable, sensible,

intelligent men, should have seen and understood that he meant that the proposal was conditioned upon the adoption of the cost plus fixed sum basis, they will not be permitted to say that they did not understand it.

The law is both reasonable and just in the standard which it fixes by which to measure the conduct of men and the extent of their obligations; it demands fair dealing and the exercise of common prudence and fair intelligence. It is worthy of notice that, although the term, which seems to be of his own coinage, "cost plus fixed sum," is used by Clemence in his testimony, it runs through, giving color to all of his conversation, yet, when he is writing a letter, by which it is sought to convert a lump sum proposal into one entirely different, this term is not used by him. The letter opens with a reference to the requirement, in the proposal, that a guaranty would be required as to time of completion, a statement that this was unusual for him to give and the reasons therefor, but that he would give it, in this instance. The use of the term "method of construction," as explanatory of his reason for being able to do "speed work," followed by an enumeration of the conditions under which this "method of construction" enabled him to do "speed work," is significant. It is manifest, either that the letter referred only to the time limit, or was skillfully worded to create that impression. He says, "In giving you the completion date, we have mentioned in the proposal, we would expect you to close the contract with us on our special method of construction"; and the expression used "this form of contract" and "this method of doing business," carefully avoiding the use of the term "cost plus fixed sum," which he had theretofore been so careful to use—is not found in the letter. If the words "cost plus fixed sum" had been used, is it not manifest that the members of the committee would have, at once, recognized the obstacle, which they had so uniformly met and pointed out to him, as preventing them from considering a bid based on that system?

Again, he refers to the fact that "in open meeting with your architect, William Martin Aiken, Councilman Lebby and yourself, the advantages of many kinds that you would derive through this method of doing business were fully gone over and understood by all in this meeting." This is true; he did, in New York, urge "the many advantages" which he insisted they would derive, etc. If, as he says, the cost plus fixed sum basis was agreed upon at that time as the basis of his bid, and the scheme by which it was to be adopted was "assented to by all present," why did he not say so? As bearing upon the construction which should be given definite, unambiguous language in a contract, when in a subsequent clause obscure, ambiguous terms are used and sought to be so construed as to modify or nullify the first portion of the contract, Mr. Bishop says:

"If the main body of the writing is followed by a proviso wholly repugnant thereto, it must necessarily be rejected because otherwise the entire contract will be rendered null." Contr. § 387.

In *Jones v. Casualty Co.*, 140 N. C. 262, 52 S. E. 578, 5 L. R. A. (N. S.) 932, 111 Am. St. Rep. 843, Hoke, J., says:

"While clauses in a contract * * * must be reconciled, if it can be done by any reasonable construction, yet a proviso which is utterly repugnant to the body of the contract and irreconcilable with it will be rejected; likewise, a subsequent clause, irreconcilable with a former clause and repugnant to the general purpose and intent of the contract, will be set aside."

In *Johnson v. Insurance Co.*, 143 Fed. 950, 75 C. C. A. 22, Judge Hook, rejecting a suggested construction of language used in a contract, says:

"Such a construction is irreconcilable with that which the unambiguous conduct of the parties shows that they adopted for their own guidance."

As illustrating the cannon of construction used in the interpretation of obscure, ambiguous language, Walker, J., in *Wilkie v. Insurance Co.*, 146 N. C. 513, 60 S. E. 427, says:

"Words in a contract are to be construed against the party using them if there is any ambiguity. * * * Any other construction would annul plainly expressed provisions of the contract and subvert the leading idea of the parties in making it."

In *Garrison v. U. S.*, 7 Wall. 688, 19 L. Ed. 277, it is held that it is a well-settled rule of construction of contracts that "doubtful expressions should be construed most strongly against the party" using them.

In *Noonan v. Bradley*, 9 Wall. 406, 19 L. Ed. 757, it is said:

When "a party who takes an agreement prepared by another, and upon its faith incurs obligations," he "should have a construction given to the" language used, "favorable to him. * * * When an instrument is susceptible of two constructions, the one working injustice and the other consistent with the right of the case, that one should be favored which standeth with the right."

In *Smith v. Hughes*, 6 L. R. (1870-71) Q. B. 587 (607), Blackburn, J., says:

"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party, in the belief, enters into the contract with him, the man thus conducting himself would thus be equally bound as if he had intended to agree to the other party's terms,"

—cited with approval in *Phillip v. Gallant*, 62 N. Y. 256.

These well-settled principles are founded upon reason and justice. They make for righteousness and honesty. Defendant will not be permitted to convert a proposition, made to the building committee, to construct the building for a "lump sum" into a proposition to build it upon an estimate made by him, by resorting to obscure language which misled the other party, and, when his expenditure exceeds the amount "estimated" by many thousands of dollars, evade its legal consequences. He is estopped by his conduct to say that no contract was made by the proposal and its unqualified acceptance. But it is strongly urged that the subsequent conduct of the parties sustains defendant's contention. Upon being informed that the contract had been awarded to Gilbreth "as the lowest bidder," he either produces, or prepares, a contract which he wishes signed. When told that it must be submitted to complainant's solicitor, an appointment is made

to meet for that purpose, at the office of Maj. Barker. When he meets Dr. Cathcart, Mr. Aiken, and Mr. Cook, at Maj. Barker's office, he produced a typewritten paper styled an "Agreement." Consideration of what occurred at this meeting will be postponed. The present quest is for the truth as to whether a contract was made by the acceptance of the proposal.

It will be well to keep in mind that, in accordance with a provision in the proposal, \$1,600 was fixed as the sum to be paid if sheathing was used on the exterior of all buildings when studding and metal lathing is specified; this was agreed upon when the proposal was accepted, at a fixed sum. Some time thereafter, other changes were found to be desirable. The city council, upon representation made to it, consented to extend the amount to be expended to \$120,000. After some negotiation, the fixed sum of \$9,025 was agreed to be paid for this extra work; it is significant that this sum, added to \$109,375 plus \$1,600, equals \$120,000, the final sum to which the city council assented. If the amount to be paid for the building was not fixed, if it was a simple estimate, why so careful to make the final bid for additions equal the final amount fixed, \$120,000? Stress is laid upon the fact that, when the work was begun, the estimates for material, sub-contracts, and the pay rolls were submitted to complainant, and its superintendent, and approved by them; that they kept a supervision over the work and the material going into it. It is said, and expert witnesses are introduced who testify, that this is unusual when the contract is let out on a lump sum basis. On the other hand, it is said that it was necessary to enable them to keep in touch with and informed as to the character and quality of the material and work, the various subcontracts, etc. Mr. Aiken, who had long experience as an architect, had been in the employment of the government and the city of New York, says:

"By looking at bills of material and labor, if the architect is at all familiar with current prices, he can generally grade whether they are up to the usual standard required and, in approving such things, such vouchers, he was enabled to familiarize with the grade of material and labor going into the building of which he was in charge. * * * It is the architect's duty to preserve the general integrity of the building straight through, both in materials and labor."

Aiken is asked: "Is it usual in your business, when you have a lump sum contract, to instruct your superintendent to approve the pay rolls?" He says: "Not customary, no." Mr. Clemence had stated when this contract was awarded to him that this was an exceptional thing for him to do, that he was not doing the customary and usual thing for him, nor was I doing the usual and customary thing for me; he began by saying it was an unusual thing for Gilbreth to make such a contract as this, and his correspondence, his proposed sheet, and this addenda (the \$9,025 extra), named definite amounts, no percentage whatever."

I am unable to see anything unusual, or inconsistent with a due regard to the discharge of the duty imposed upon them, in the conduct of the building committee, and their superintendent, in inspecting the sub-contracts and pay rolls of the defendant. They were intrusted with a

trust, the proper execution of which imposed a grave responsibility upon the Medical Society and the city council—the erection of a public hospital and its appointments, the administration of a public charity for the benefit of the poor, the sick, and the maimed, created many years before by the humane and comprehensive generosity of a deceased physician. This was well calculated to call forth vigilant and constant attention. It was also important that a careful lookout be kept on the amount paid with reference to the progress of the work and the total amount of the cost. Defendant was a resident of a distant state. The possibility of his receiving an amount in excess of the progress of the work, the danger of liens by materialmen and laborers attaching under the state statutes, demanded a careful watchfulness on the part of the committee and superintendent. The result shows that, notwithstanding the vigilance exercised by them, liens to the extent of several thousand dollars for material are filed and their enforcement sought against the property. When we examine the testimony regarding the conduct of the members of the committee, we find that it is consistent with their construction of the contract. The bills are made out by the parties furnishing material and subcontractors, to Gilbreth. Upon two separate occasions—one, when expensive tiling was being used, the other, in regard to the use of mahogany instead of pine—Dr. Cathcart, in company with Dr. Simons, called Clemence's attention to the fact that the change would cost more than the plans called for and that the committee could not pay for extras; that the cost could not go beyond the amount fixed in the contract; that Clemence on each occasion said that he understood that, and he would take care of the extra cost; that he had saved money on some other contracts, etc. Dr. Cathcart is corroborated by Dr. Simons. Mr. Cook also spoke to Clemence about it, and Mr. Aiken, who, during the time the work was going on, had been to Europe, says that, upon his return, he went to Charleston and called Clemence's attention to the fact that he had made these changes involving additional cost, when he said that he would take care of them, had saved something on subcontracts, etc. Something occurred in regard to a change in the porch. Clemence does not very distinctly contradict the witnesses in regard to these matters. They are not very important, except as reflecting light upon the controversy in regard to the terms of the contract and the understanding of its terms.

After the work had progressed for several months, it was ascertained that Gilbreth had been paid \$118,468.63. Clemence had been called upon for a statement. He at first said that he was within the limit. Later he said that he was behind some \$6,000, and finally that it would require \$15,000 to complete the building. Dr. Cathcart says:

"I told him that there was a committee meeting and the committee wanted him to come in. He came into the committee and stated to the committee, for the first time in the whole proceeding, that the contract was not for a fixed sum, and that the contract was for cost plus fixed sum, and that he would overrun the account \$15,000 and that was his version of it. At that meeting Mr. Clemence was asked to put his statement in writing, and I was instructed to write Frank S. Gilbreth a letter stating the position of the building committee."

Cook says that, when it was found that Clemence was behind, he said that he would make up his figures and take them to Mr. Aiken in New York.

"I said: 'Mr. Aiken wants you to send a list out, but what is the good of sending a list? Anything that costs over \$120,000 Gilbreth has to pay, so I don't see any use of your making a list up.' He said, 'Yes,' he knew that, and that was about all. He afterwards said that he was about \$15,000 behind, and 'this contract was a fixed sum for Gilbreth, and that the building committee had to pay the total cost of the building.'"

Dr. Cathcart wrote Mr. Gilbreth that the committee would pay no more, and demanded that he proceed to complete the building. He claimed that the contract was on the cost plus fixed sum basis and declined to do so. In consequence of this correspondence, Mr. Aiken was requested to call on Mr. Gilbreth, in New York. Clemence was present when he did so. Mr. Aiken says:

"In the presence of Mr. Gilbreth I asked Mr. Clemence, I put him this question: Were you not aware that the total sum agreed upon as to the cost of this building, this plant, was \$120,000? He acknowledged that he did know it. I asked Mr. Gilbreth if he was aware of the nature of the contract that he was doing work under. He declared that he did not. He confessed his ignorance of how his own business was being carried on. * * * Then I said to him, 'Well, apparently, Mr. Clemence has got you in a hole, and you decline to take care of him, you have gone back on him.' He did not deny it."

Mr. Aiken came to Charleston on December 25, 1905; Mr. Clemence came on the same train. On December 26th, Aiken says that he met Clemence at the St. Johns Hotel. He says:

"I then called his attention to the fact that there was a fixed sum for this contract, \$120,000, and asked him if he was not aware of it. He acknowledged that he was; he did not deny it. * * * I asked him how it was that he permitted the cost of the building to so far exceed the amount which had been previously agreed upon, and his reply was that he had expected to take care of it by economical letting of subcontracts, but they had apparently far exceeded his original scheme and got beyond his control, and there he was. Never, at any time, do I recall, from the time the contract was signed, Mr. Clemence denying that he knew what the total cost of this contract was; on the contrary, many times he was asked if he knew it, and he said he did know it."

Clemence, in a general way, and in many instances, specifically contradicts this testimony.

While it is impracticable to set out, or more specifically refer to, other testimony, more or less conflicting and contradictory, I have carefully examined all of the testimony and given it such consideration as was in my power. There is, of course, much in the conduct and declarations of both parties which it is difficult to explain. This is not unusual in transactions of this character. Giving the evidence the most careful and anxious consideration, impressed not only with the large financial interests, but also with the deeper and more personal element unfortunately involved, I am brought to the conclusion that the complainant, through its building committee and the defendant by his agent, C. R. Clemence, on May 16, 1905, entered into a valid contract, by which defendant undertook and obligated to furnish the labor and material, according to the plans and specifications of W..

M. Aiken, architect, for the construction of the "Roper Hospital," for the fixed sum of \$109,375 plus \$1,600 for sheathing; that the terms of said contract are to be found in the "Revised Proposal" (Exhibit No. 10) filed herein; and that complainant, by accepting said proposal unqualified by the letter, undertook and obligated itself to pay said sum for said labor and material, according to the terms of said "Revised Proposal." The master finds that the additions were made for the fixed sum of \$9,025.

We are thus brought to a consideration of the testimony respecting the occurrence in Maj. Barker's office at 4 o'clock p. m. on May 16, 1905. It is manifest that it was the purpose of the parties to incorporate into the "Agreement" the terms of the "contract" which they had made. Neither of them intended to make a new or different contract, or to change the one which they had made. It is essential to clearness of thought to keep in mind the distinction between the declarations and conduct of the several individuals, who figure in this transaction, from the conduct of the building committee. It, and it alone, was authorized to enter into a contract binding complainant. Neither the chairman, architect, superintendent, nor Mr. Lebby, who was not a member of the committee, but represented the city council, charged with the duty of seeing that complainant carried out the terms of the agreement made between them, was authorized to make a contract, or change the terms of that which had been made. Their acts and declarations, while acting within the scope of their assigned duties and powers, is competent and relevant upon the ultimate question—whether a contract was made and, if so, what its terms were.

It will be well to refer to the testimony of Maj. Barker, in regard to the transaction at his office. Mr. Clemence, Dr. Cathcart, Mr. Aiken, Mr. Cook, and Dr. Simons were present. Maj. Barker says that he had been shown the proposal which had been, earlier during the day, accepted; that it was "before us" at the meeting.

"I understood that the purpose of that meeting was to reduce to writing the contract which had been made; that contract consisted of the proposal or bid and the oral acceptance of it. I was informed, in Mr. Clemence's presence, that he was extremely anxious to get off to New York that afternoon."

It was in evidence that the train for New York left Charleston at 5:30 p. m. He says that Mr. Clemence produced a paper (Exhibit 11) which he handed to him. He read it over and compared it with the proposal or bid; thought that it corresponded in its provisions. The proposal or bid set forth the terms upon which Gilbreth proposed to do this work.

"The impression made upon me was that (section 7) was a corresponding provision with the provision of the proposal which read 'for the sum of \$109,375, etc.' * * * It is further agreed that no item of cost entering into the erection of this building will vary the fixed sum of \$10,000 dollars, hereinbefore mentioned, except an increase in the cubic contents of the building. * * * I noticed at the time that there was a possible room for confusion as to contractor's compensation, and I advised that the following words should be inserted after the word 'dollar' and after the figures '\$109,375,' 'which includes the sum of ten thousand dollars to be received by the contractor for compensation for his services and profits.' I also thought those words were necessary in order to prevent any doubt as to whether the \$10,-

000, called in this paper 'fixed sum,' was to be included in the \$109,375, or was to be added to it. This was done in the presence of Mr. Clemence, and he acquiesced in the insertion of these words. I also advised, in the presence of Mr. Clemence, and with his acceptance, the insertion of the words, after article 8, 'It being understood and mutually stipulated and agreed that the contractor will furnish to the owner a security bond conditioned for the sum of twenty five thousand dollars. for the proper performance of this contract.' * * * That hasty consideration of that paper styled 'Agreement' brought me to the conclusion that this paper carried out, as far as I could understand it, the contract which consisted of the bid and the acceptance of the bid."

He submitted the paper to Mr. Aiken, who approved it. He read it over to the parties. It does not appear that Dr. Cathcart read it. The other persons present substantially concur with this testimony. Clemence says that he consented to the proposed changes. He did not think they changed the contract. They are found written into the "Agreement" in the handwriting of Maj. Barker. He was examined, at much length, in regard to the terms of the surety bond, and of the addition made on May 31, 1905, when the amount to be expended was extended to \$120,000. Maj. Barker drew the agreements, pleadings, decrees, etc., in the proceeding in the chancery suit, the deed, etc. The "Agreement" prepared by Mr. Clemence, which it is the purpose of this suit to have reformed, contains the usual provisions found in such agreements in regard to the construction of buildings. There is some controversy as to the time and place at which it was written. Dr. Cathcart says that Mr. Clemence, immediately after he was notified that Gilbreth had been awarded the contract as "the lowest bid," said that he was ready to sign a contract and produced a paper from his pocket. Mr. Clemence denies this and says that he went to his room at the hotel and drew the "Agreement." He says:

"That form was composed by similar contracts under cost plus fixed sum basis, copies of which form I had with me at all times."

Dr. Cathcart is asked whether, while at Maj. Barker's office, or while Clemence was in Charleston, anything passed between Clemence and himself in regard to the work being done on a commission basis. He answered, "Absolutely nothing." It is significant that, although the proposal and acceptance were made before he says he drew the agreement, the date and amounts are written in ink, into the typewritten form. It is also worthy of note that, although he says he had the form of the cost plus fixed sum contract with him, and drew the "Agreement" from "that form," he did not use the "form of contract" upon which he says the acceptance of the proposal was conditioned pursuant to the New York scheme. Mr. Cook corroborates Dr. Cathcart in regard to Clemence's taking the paper from his pocket. An analysis of the "Agreement" discloses that:

"Article 1 is substantially in the words of the 'Revised Proposal.'"

"Articles 2 to 4, inclusive, relate to details not affecting the substance of the contract."

"Article 5 refers to the time of completion—not later than November 15, 1905."

"Article 6 reserves the right to the 'owner' to furnish any material required for the work contracted for and to discharge any man or men employed on the work."

In article 7 we find the germ of the trouble:

"It is hereby mutually agreed by and between the parties hereto, that the sum to be paid to the contractor by the owner for said work and materials shall be the actual cash cost of the work herein contracted for plus the fixed sum of \$10,000 dollars, which latter sum is to be received by the contractor in full compensation for his services and his profits. The contractor's itemized book estimate of the work, as per plus plans and specifications on which he bases his fixed sum of \$109,375 dollars (in Maj. Barker's handwriting) which sum includes the sum of ten thousand dollars to be received by the contractor for compensation for his services and profits. It is further agreed that no item of cost entering into the erection of this building will vary the fixed sum of \$10,000 dollars hereinbefore mentioned, except an increase in the cubic contents of the building."

Article 8 provides that the cost of labor and materials are to be paid for during the process of construction; the bills to be carefully checked by the contractor and forwarded to the owner, etc. To this section Maj. Barker made the addition in regard to the bond.

Article 9 provides that the books of the contractor shall be open at all times to the authorized representatives of the owner.

Article 10 provides that:

"The contractor's profit, above referred to, is to be paid by the owner monthly in proportion to the progress of the work, the final payment to be made thirty days after the completion of the work."

It will be observed that every article in this "Agreement," except the seventh, relates to matters of detail, not affecting the substance or changing, in any material respect, the terms of the "Revised Proposal" and acceptance. This section eliminated, the remainder, read in the light of the proposal, expresses the essential terms of the contract made by the building committee and the defendant, by his manager, Chas. R. Clemence. The seventh article differs essentially from the basic character of the contract. It converts it from a lump sum contract for \$109,375 into a contract to pay "the actual cash cost of the work, plus the fixed sum of \$10,000." The chairman of the building committee had no authority to make this change. In ascertaining what Maj. Barker understood, I am not inadvertent to the correspondence between him and Gilbreth in regard to the condition of the bond, or the additional work for which the master finds that the parties agreed upon the fixed amount of \$9,025. It is evident that there was confusion of thought in regard to some of the provisions of the "Agreement." This is not surprising in view of the insertion of several of its provisions, and the hasty examination of it before signing. That an estimate, claimed to be the basis of a proposal made by one engaged in the business of making estimates for building, should fall short by \$24,940 plus \$12,000, of the cost of the building, is, to a layman, startling. The result more than justifies the caution of the building committee and its insistent refusal to accept an "estimate" as a basis for making a contract.

It is, however, strongly, with ability and learning, insisted that a court of equity either has no power to give relief or, by reason of the manner in which complainant's bill is drawn, cannot do so in this suit.

I concur with the master in his conclusion that the insertion of the suggested clause would not make the agreement conform to the terms of the proposal and acceptance. There is evidence on the part of members of the building committee that, in some of the conversations had with Clemence, he said that complainant would receive the benefit of any saving in purchases and in subcontracts. This may be accounted for by the evident disposition on the part of Clemence to "puff" his "system," or "basis." Several of them say that he was very "loquacious"; no such provision or suggestion is found in the "proposal," and it is to this that we must look for the terms of the contract. The master is of the opinion that there was no contract "to which the agreement should be made to conform." For the reasons set out, I cannot concur in this conclusion. Is the complainant, upon the allegations in its bill and the evidence, entitled to the relief prayed for, or to any other relief in this court? The bill is drawn with a view of invoking the equitable remedy of reformation, based upon mutual mistake and inadvertence. The material facts upon which relief is prayed are fully set out. There is the usual prayer for other and further relief. The briefs filed by counsel for the respective parties are full and helpful.

[2] Care must be observed to keep in mind the fact that the relief demanded here is not based upon the allegation that a mistake was made in the treaty, or negotiation, resulting in the formation of a "contract," the terms of which were not understood. The terms of the proposal and its acceptance were sufficient to bind the parties, if nothing further had been done. Nothing was written into the proposal, or said at the time of its acceptance, about any further writing. When made and accepted, there was no suggestion that any other writing was necessary. The question of details would have been solved by applying the standard of the trade, custom, etc., in the performance of such work. The plans and specifications were, by express reference to them as the basis of the bid, written into the proposal. No controversy has arisen in regard to either. If the conclusion reached, that the proposal and its acceptance constituted a contract, is correct, it follows that the "Agreement" not only does not correctly express the terms of such contract, but radically changes them; the two cannot stand together. I am not inadvertent to the attitude of defendant to the contrary, his insistence that the "Agreement" correctly expresses the terms of the contract, and that, if it does not, complainant, for other reasons, is not entitled to relief.

In *Walden v. Skinner*, 101 U. S. 583, 25 L. Ed. 963, Clifford, Justice, says:

"Where an instrument is drawn and executed that professes or is intended to carry into execution an agreement, which is in writing or by parol, previously made between the parties, but which by mistake of the draftsman, either as to fact or law, does not fulfill or which violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement; the reason of the rule being that the execution of agreements fairly and legally made is one of the peculiar branches of equity jurisdiction."

In *Snell v. Insurance Co.*, 98 U. S. 85, 25 L. Ed. 52, Harlan, Justice, discussing a bill for reformation of an insurance policy, says:

"In the attempt to reduce the contract to writing there has been a mutual mistake, caused chiefly by that party who now seeks to limit the insurance to an interest in the property less than that agreed to be insured. The written agreement did not affect that which the parties intended. That a court of equity can afford relief in such a case is, we think, well settled by the authorities."

The language of the learned justice is applicable to the evidence in this case. He says:

"He (plaintiff) trusted the insurance agents with the preparation of a written agreement which should correctly express the meaning of the contracting parties."

In *Thompson v. Insurance Co.*, 136 U. S. 287, 10 Sup. Ct. 1019, 34 L. Ed. 408, in which the reformation of an insurance policy was sought, Mr. Justice Harlan again says:

"If, by inadvertence, accident, or mistake, the terms of the contract were not fully set forth in the policy, the plaintiff was entitled to have it reformed, so as to express the real agreement, without the necessity of resorting to extrinsic proof."

In this case there was a demurrer to the bill. There, the bill charged that the terms of the contract of insurance were agreed upon and that "by inadvertence, accident, or mistake, upon the part of both Kearney and the company, the policy was not so framed." Upon demurrer the court made a decree reforming the policy to express the terms of the contract.

In *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 435, 12 Sup. Ct. 239, 245 (35 L. Ed. 1063), Fuller, C. J., says:

"The jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, is undoubted; but to justify such reformation the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court."

In *Elliott v. Sackett*, 108 U. S. 132, 2 Sup. Ct. 375, 27 L. Ed. 678, plaintiff contracted to purchase a tract of land upon which there was an outstanding mortgage; he contracted to take title subject to the mortgage. When the deed was written, and received by him, it contained a clause stating that he assumed the payment of the mortgage debt. Upon a bill to reform the deed by making it conform to the terms of the contract, Blatchford, Justice, says:

"The actual contract of the parties, as understood by both of them, is shown by the written agreement. Nothing was agreed upon to vary that. Sackett, as he shows by his testimony, knew the difference as to liability which the difference in the language would make, and knew what the language of the written agreement was, and must be held to have understood it to mean what it does mean, and to have known that Elliott understood it in the same sense. * * * Under all the circumstances proved in this case (and every case of the kind must depend very largely on its special circumstances), Elliott had a right to presume that the deed would conform to the written agreement, and was not guilty of such negligence or laches, in not observing the provisions of the deed, as should preclude him from relief. * * * The deed did not effect what both parties intended by the actual

contract which they made, and the cause is one for the interposition of a court of equity."

"When the instrument purports to carry into execution an agreement which it recites, and exceeds or falls short of that agreement, there is no difficulty in rectifying the mistake; for there is clear evidence in the instrument itself that it operates beyond its real intent. If, however, there is no recital of any agreement, but a mistake is alleged, and extrinsic evidence tendered in proof that it was made, the limits of the equity for correction are more difficult to define. * * * It seems, however, that the instrument may be corrected if it is admitted or proved to have been made in pursuance of a prior agreement by the terms of which both parties meant to abide, but with which it is in fact inconsistent." *Adams' Eq.* 170.

"If an instrument has not been drawn so as to express the true intention of the parties, to enforce it, in its existing condition, would be simply to carry out the very mistake or fraud complained of; while to set it aside altogether might deprive the plaintiff of the advantages of a contract to which he is lawfully entitled. It is obvious, therefore, that the only true measure of justice in such a case is the equitable remedy by reformation (or correction as it is sometimes called), by means of which the instrument is made to conform to the intention of the parties, and is then enforced in its corrected shape." *Bispham, Eq.* § 460.

As said by the author, this power to correct, or reform, an instrument, does not carry with it the power to make a contract for the parties.

"The occasions which most frequently give rise to this equitable remedy are cases of mistake or fraud. Thus, when a settlement is executed with the design of carrying out prior articles, but which is so drawn by mistake that it fails to conform to the intention as expressed in the articles, a bill in equity will lie for the purpose of reforming the instrument so that the original intention of the parties to the settlement may not be defeated." *Id.*

[3] The foregoing, and many other authorities, state and illustrate the distinction between a bill in which a correction or reformation, in respect to the terms of the contract, entered into between the parties, is sought, and one in which the writing, by which it was intended to express, make a memorial of, a contract theretofore made and entered into, by reason of accident, inadvertence, or mistake, fails to correctly perform the purpose for which it is executed. Complainant's case is dependent upon maintaining the primary proposition that the contract was made by the proposal and acceptance. In the structure of the bill this averment is made the foundation upon which equitable relief is asked. If, as the master finds, there was no contract, or if, as alleged by the defendant, there was a contract the terms of which were as he contends, of course the remaining allegations of the bill have no basis upon which to rest, and the conclusion reached by the master that the bill should be dismissed is, for that reason, correct. Defendant insists that, upon the evidence, no mistake, either of fact or law, is shown in the terms of the "Agreement"; that it correctly sets forth and expresses the terms of the "contract." He further says that, conceding, *pro hac vice*, that Dr. Cathcart, the chairman of the committee, was mistaken in supposing that the terms of the "Agreement" expressed the terms of the "Proposal," "unqualified by the letter," Mr. Clemence was not mistaken in that respect; that he knew that the terms of the "Agreement" corresponded with and expressed the terms of the "Proposal" as qualified by the letter; that

there was therefore no mutual mistake in respect to the terms of the "Agreement." He concludes that, from this condition of the case, complainant is not entitled to reformation of the "Agreement"; that the only relief, from any viewpoint which can be given, is cancellation.

The witnesses concur in saying that it was their purpose to incorporate the contract, or, as Maj. Barker says, "the written proposal and parol acceptance," into the "Agreement." There was no suggestion that any change or alteration in its terms was to be made, nor was any one authorized by the building committee to do so. Mr. Clemence expressed anxiety that it be executed at once as he was anxious to get off to New York. This may have been accidental; but it resulted in a hurried execution of a paper which involved a large sum of money and required a much more careful examination than could be given to it within the time intervening before he left the city. There was undue haste in its examination and execution. In the obscurity lurking in the language, there was ample room for mistake as to its meaning, especially by one not accustomed to making such contracts and not familiar with their form. To say the least, the draftsman may have easily made it much clearer. The proposed insertion by Maj. Barker indicated that he did not comprehend the legal import of the language used. In our quest for the truth in such transactions, incidents and language, conduct and omissions apparently trivial, linked together, point the way to truth.

From the view which I take of the testimony, the drafting and procuring the execution of this "Agreement" was the concluding act in the attempt, the determination, to secure from the building committee a contract which its members and all others representing it had repeatedly and uniformly declared that it would not make with Clemence. The question arises why, if he understood at that time that the secret scheme, which he says was entered into in New York, had been successfully consummated, the "Revised Proposal" having served the purpose assigned to it, had no further part to play in the transaction, did he not frankly say so, and not, by his silence, permit Maj. Barker to advise his client upon the supposition that the contract consisted in the "proposal" and its acceptance? He makes no reference to the letter, which he claims was the basis of the contract. That Dr. Cathcart made no such reference is consistent with his testimony that he did not understand it as affecting the terms of the proposal. The overwhelming weight of the evidence, sustained by the reason of the thing and "inherent probabilities," shows that Dr. Cathcart, the chairman of the committee, executed the agreement under the belief that it conformed to the contract; that he was mistaken in respect to the legal effect of the language contained in the seventh article, upon the essential terms of the contract—it was a mistake of law. It is equally clear that, in advising its execution, Maj. Barker and Mr. Aiken were also mistaken as to its effect. The real question, however, is the state of mind under which the chairman acted. It is also clear that Mr. Clemence knew that they were laboring under the mistake. It is difficult, if not impossible, to avoid that conclusion.

[4] That a mistake of law of both parties, or by one party, induced, or brought about, by such conduct of the other as makes it inequitable on his part to take advantage of such mistake, is remedial in a court of equity, is well settled by the best-considered authorities.

Prof. Pomeroy says:

"Whatever be the effect of a mistake pure and simple, there is no doubt that equitable relief, affirmative or defensive, will be granted, when the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be effected, is induced, procured, aided, or accompanied by inequitable conduct of the other parties. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud; it is enough that the misconception of the law was the result of, or even aided or accompanied by, incorrect or misleading statements, or acts of the other party. When the mistake of law is pure and simple, the balance held by justice hangs even; but, when the error is accompanied by any inequitable conduct of the other party, it inclines in favor of the one who is mistaken. The scope and limitations of this doctrine may be summed up in the proposition that a misapprehension of the law by one party, of which the others are aware at the time of entering into the transaction, but which they do not rectify, is a sufficient ground for equitable relief. A court of equity will not permit one party to take advantage and enjoy the benefit of an ignorance or mistake of law by the other, which he knew of and did not correct." 2 Eq. § 847.

"A mistake exists when a person, under some erroneous conviction of law or fact, does or omits to do some act which, but for the erroneous conviction, he would not have done or omitted. It may arise either from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence." Bispham's Eq. § 185.

In *Griswold v. Hazard*, 141 U. S. 261, 11 Sup. Ct. 972, 999, 35 L. Ed. 678, it appeared that a writ of *ne exeat* had been served upon one Durant at the suit of Hazard. He was arrested by the sheriff and confined in jail. At the request of a mutual friend, Griswold went to the jail for the purpose of aiding in securing Durant's release by giving bond. He met, at the jail, counsel of Hazard and also of Durant. There was a discussion between them respecting the character, and an agreement made as to the terms of the bond to be given. The parties thereafter met, and a bond was executed by the terms of which Griswold was made liable for the performance of such judgment as might be rendered in the suit against Durant. A decree was rendered against him for a large amount. Griswold, alleging that, in signing the bond, he supposed that he became responsible only for Durant's appearance, that he was mistaken in that respect, filed a bill in equity asking a decree for reformation, etc. The bill was dismissed in the Circuit Court. As indicating the grounds upon which defendant resisted and the court refused relief, Mr. James C. Carter, counsel for plaintiff, assigned as error:

"That the court below erred in acting upon the view that, in order to entitle the complainant to relief, it was necessary to show that both parties to the instrument understood that it was a bond for the appearance only of Durant in the equity suit, and that it was not enough to show that the complainant, Griswold, supposed it to be of that character, and that the obligees took it, well knowing, or having good reason to know, that such was the belief under which the complainant Griswold was acting."

The evidence was discussed at length by Mr. Justice Harlan. He finds, rejecting the contention of defendant, that the bond was executed under a mutual mistake "as to the legal effect of the instrument. There was no mistake as to the words of the bond, for it was drawn by one of Hazard's attorneys, and was read by Griswold before signing." While it is true that the learned justice finds that, although written by one of Hazard's attorneys, and its language understood by him, as well as by Griswold, Durant's attorneys, all eminent in their profession, being also present, yet he says:

"The instrument does not express the thought and intention which the parties had at the time of its execution. And this mistake was attended by circumstances that render it inequitable for the obligees of the bond to take advantage of it. The instrument was drawn by one of Hazard's attorneys and was presented and accepted as embodying the agreement previously reached. * * * A court of equity ought not to allow that mistake, satisfactorily established, and thus caused, to stand uncorrected, and thereby subject a surety to liability he did not intend to assume and which, according to the decided preponderance of the evidence, there was, at the time, no purpose to impose upon him. While it is laid down that a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts, yet the rule that an admitted or clearly established misapprehension of the law does create a basis for the interference of courts of equity resting on discretion, and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best-considered and best-reasoned cases upon the point, both English and American."

It will be noted that the court found, against the positive testimony of several witnesses, that the mistake was mutual. Of the witnesses it was said:

"They were intelligent, of equal credibility and had equal opportunities to know what occurred" and "without any reason to suspect that they would intentionally deviate from the line of absolute truth."

Great weight was attached to "the inherent probabilities of the case." The learned justice proceeds to say:

"The conclusion reached upon this branch of the case is the only one consistent with fair dealing towards those who were willing to become sureties for the appearance of Durant. * * * If the attorneys of Hazard intended to obtain, by means of a bond, more than he was entitled to, by such bond as the writ of ne exeat called for, and more than the court would ordinarily have given them upon Durant's application to discharge the writ; if they intended to secure a bond that would make Griswold personally liable within the penal sum, for any money decree passed against Durant—then a fraud was perpetrated upon him which entitles him to relief. * * * It must be assumed that Hazard's attorneys knew that he signed the bond in the belief that, pursuant to the previous understanding, it was one to secure Durant's appearance, nothing more, and yet they failed to inform him, at the time, that it was drawn so as to impose upon him a much larger responsibility. Their silence upon the question was, under the circumstances, equivalent to a direct affirmation that the bond meant what Griswold supposed it did."

The contention that Griswold was guilty of laches was also discussed and rejected. The discussion of that question is enlightening, here. The court reached the conclusion that, if Durant was living, the plaintiff was entitled to a decree reforming the bond; but, as he was dead, an injunction was granted against the prosecution of any action against Griswold on account thereof.

In *Cathcart v. Robinson*, 5 Pet. 266, 8 L. Ed. 120, Judge Marshall, after discussing the evidence, says:

"These circumstances, taken together, satisfy the court not only that Mr. Cathcart signed the agreement, believing that it left him at liberty to relieve himself by paying the penalty, but that Mr. Robinson knew how he understood it. * * * No untruth has been suggested; but if Mr. Robinson knew that Mr. Cathcart was mistaken, knew that he was entering into obligations much more onerous than he intended, that gentleman is not entirely exempt from the imputation of suppressing the truth."

"When a man, through misapprehension or mistake of the law, parts with, or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired." *Kerr on Fraud & Mistake* (4th Ed.) 467, cited with approval in *Reggio v. Warren*, 207 Mass. 525, 93 N. E. 805, 32 L. R. A. (N. S.) 340, 20 Ann. Cas. 1244.

Mr. Bispham says:

"The true conclusion, as to the general rule, would seem to be that equity will not interfere in the case of a pure mistake of law; but that any additional circumstance will readily be laid hold of by the court, as constituting sufficient grounds for interposition. Thus, when ignorance of the law exists on one side, and that ignorance is known and taken advantage of by the other party, the former will be relieved." *Eq.* 188.

[5] I do not perceive any reason for refusing relief because of the status of the subject-matter of the controversy. Complainant has paid the full amount due upon the contract. Defendant has not performed any work, or furnished any material, since complainant notified him that it would pay no more. Although he claims that he made an estimate that the building would cost \$99,375, without any notice to the committee, he now asserts that it cost him some \$25,000 in excess, to which amount must be added the sum expended by complainant to complete it, alleged to be some \$12,000. Liens to the amount of some \$7,000 have been filed and suits brought for their enforcement against the building. The contract has been executed, the building completed. The necessity for application to equity for relief is found in the fact that defendant has instituted an action at law against complainant for the recovery of a large amount, alleged to be due for material furnished in the construction of the building. It further appears that complainant alleges that it has expended a large sum in the completion of the building which it seeks to recover of defendant. The bill prays for a decree reforming the "Agreement," so that it shall conform to the terms of the contract, and for the sum expended by it in completing the building, also for an injunction enjoining defendant from prosecuting his action at law, and for other and further relief.

[6] I am of the opinion that, under a fair construction of the allegations of the bill, and of the case made by the evidence, a decree should be entered so reforming the "Agreement" that it shall correctly express the terms of the contract. While this cause was begun and argued before the new equity rules were put in force, the language of rule 19 (33 Sup. Ct. xxii):

"The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties"

—expresses the conclusion to which courts of equity had arrived before the adoption of the rule.

"If a bill can be viewed either as one sort of a bill or another, the courts will adopt that view of it which best justifies the relief to which plaintiff is entitled." Street's Fed. Eq. Prac. § 288.

In *Griswold v. Hazard*, supra, the conditions having so changed that reformation of the bond did not meet the equities, the court directed that defendant be perpetually enjoined from prosecuting an action on the bond as executed.

A decree will be drawn so correcting and reforming the "Agreement" that it shall conform to the contract, the terms of which are found in the "Revised Proposal," and its acceptance, by complainant's building committee. As the master held that the bill should be dismissed, he did not pass upon complainant's prayer for a decree directing the payment of the amount expended in the completion of the building. The questions involved in that branch of the case, both of law and fact, are re-referred to the special master, with direction to report his conclusion of fact and law in regard thereto. Let a decree be drawn accordingly.

SOUTHERN PAC. CO. et al. v. RAILROAD COMMISSION OF OREGON et al.

(District Court, D. Oregon. September 29, 1913.)

Nos. 5,860, 5,845-5,847, 5,849-5,852.

CARRIERS (§ 2*)—CONSTITUTIONAL LAW (§§ 242, 298*)—STATE REGULATION OF RATES—VALIDITY OF STATUTE.

The Oregon Initiative Act adopted November 5, 1912, relating to classification ratings of property transported by railroads wholly within the state, considered, and *held* unconstitutional and void as depriving the railroad companies of their property without due process of law and denying them the equal protection of the laws and constituting an unreasonable interference with their business, in that its provisions are not only incongruous and inconsistent with themselves, but by fixing an absolutely rigid percentage spread between car load and less than car load rates without regard to the commodity carried, the origin of shipment or distance of carriage would compel the carriers in some cases to accept unreasonably low rates on car load lots or to establish unreasonably high and unlawful rates on less than car load lots.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 4, 5; Dec. Dig. § 2;* Constitutional Law, Cent. Dig. §§ 691, 847; Dec. Dig. §§ 242, 298.*]

In Equity. Suits by the Southern Pacific Company and the Oregon & California Railroad Company, by the Oregon-Washington Railroad & Navigation Company, by the Spokane, Portland & Seattle Railway Company, by the Oregon Electric Railway Company, by the Northern Pacific Railway Company, by the United Railways Company, by the Pacific & Eastern Railway Company, and by the Oregon Trunk Rail-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

way, against the Railroad Commission of Oregon; Clyde B. Aitchison, Thomas K. Campbell, and Frank J. Miller, as Commissioners, members of and constituting said Railroad Commission of Oregon; A. M. Crawford, as Attorney General of the State of Oregon; George J. Cameron, as District Attorney of the Fourth Judicial District of the State of Oregon; E. B. Tongue, as District Attorney of the Fifth Judicial District of the State of Oregon; John H. McNary, as District Attorney of the Third Judicial District of the State of Oregon; Edwin R. Bryson, as Prosecuting Attorney of the Fourth Prosecuting Attorney District of Oregon; B. F. Mulkey, as Prosecuting Attorney of the First Prosecuting Attorney District of Oregon; and George M. Brown, as Prosecuting Attorney of the Third Prosecuting Attorney District of Oregon. Final hearing on bill and answer. Decree for complainants.

Wm. D. Fenton, Ben C. Dey, R. E. Moody, and Kenneth L. Fenton, all of Portland, Or., for complainants Southern Pac. Co. and Oregon & C. R. Co.

W. W. Cotton and A. C. Spencer, both of Portland, Or., for complainant Oregon-Washington R. & Nav. Co.

Carey & Kerr and C. A. Hart, of Portland, Or., for complainants Spokane, P. & S. Ry. Co., Oregon Electric Ry. Co., Northern Pac. Ry. Co., United Rys. Co., Pacific & E. Ry. Co., and Oregon Trunk Ry.

A. M. Crawford, Atty. Gen., and I. H. Van Winkle, Asst. Atty. Gen., both of Salem, Or., for defendants.

Before GILBERT, Circuit Judge, and WOLVERTON and BEAN, District Judges.

WOLVERTON, District Judge. These suits are instituted by the transportation lines against the State Railroad Commission and the District Attorneys of the several judicial districts of the state to enjoin the putting into operation and the enforcement of an Initiative Act adopted by the people November 5, 1912. Demurrers to the bills were first interposed. These were overruled, and the causes were finally submitted on bill and answer. The act, with its title, is in language following:

"An act entitled 'An act to provide for a uniform percentage in the relationship of the classification ratings, providing for the establishment of minimum car load weights, to fix the maximum rate on basis of the less than car load rate of the article and the minimum car load weight that may be charged on car load shipments of property, defining the rating upon which the car load rate shall be computed, and prescribing penalties for violations of the provisions of the act.'

"Be it enacted by the people of the state of Oregon:

"Section 1. The classification ratings of freight shall bear a uniform relationship of one class to another class, and the percentage of the first class shall be 100, and the other classes shall be the following percentages of the first class:

Classes	1	2	3	4	5	A	B	C	D	E
Percentages	100	84	70	59	50	42	35	29	24	20.

"Sec. 2. A minimum car load weight shall be provided for each article, but no minimum car load weight shall be greater than the actual weight that can be loaded in a car, nor shall a small minimum car load weight be fixed with

the sole object to secure a high car load rate. Where no minimum car load weight is provided for each article by a railroad, or fixed by an order of the Railroad Commission of Oregon, the minimum car load weight shall be 30,000 pounds.

"Sec. 3. It shall be unlawful for any railroad, as the term is defined in chapter 53, Laws of Oregon for the year 1907, creating a railroad commission, to demand, charge, collect or receive a greater compensation for the transportation of property in car load lots than the following: When the minimum car load weight for an article is fixed at 20,000 pounds or less the car load rate shall not exceed 70 per cent. of the less than car load rate provided for the article. When the minimum car load weight for an article is fixed at more than 20,000 pounds and not in excess of 30,000 pounds the car load rate shall not exceed 59 per cent. of the less than car load rate provided for the article. When the minimum car load weight for an article is fixed at more than 30,000 pounds and not to exceed 40,000 pounds the car load rate shall not exceed 50 per cent. of the less than car load rate provided for the article. When the car load minimum weight for an article is fixed in excess of 40,000 pounds the car load rate shall not exceed 42 per cent. of the less than car load rate provided for the article.

"Sec. 4. When two or more less than car load ratings are given an article the car load rate shall be computed on the lowest less than car load rating given the article, and when two or more articles are permitted to be shipped, or are provided to be shipped, as a mixed car load the car load rate shall be computed on the article contained in the car load which is given the highest less than car load rating.

"Sec. 5. If any railroad shall demand, charge, collect or receive a greater compensation for the transportation of car loads of property between points wholly within the state of Oregon as provided in section 3 of this act, it shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished for each offense by a fine of one hundred dollars and the cost of the prosecution.

"Sec. 6. Each car load shipment against which an unlawful charge is made shall constitute a separate offense."

In epitome, the effect of the act is to provide, by its first section, a standard for the classification ratings of freight, to require, by its second section, that a minimum car load weight be provided for each article, and, by its third, to establish a maximum percentage of rates for minimum car load weights with reference to less than car load charges, above which it is declared to be unlawful for the carrier to charge or receive compensation for the service of transportation. A penalty of \$100 and costs is imposed for each offense of charging or receiving an excessive rate; each car load constituting the basis of a separate offense.

In the development of rate regulation, there has been brought into vogue for the territory west of Chicago, including the Pacific Coast states, what is known as the "Western Classification," which is made the basis or standard for the classification of all freight for the purpose of establishing the rates and charges for transportation by rail. This classification has been recognized and adopted by the Interstate Commerce Commission, and also by the Railroad Commission of Oregon, and is as follows:

Classes	1	2	3	4	5	A	B	C	D	E
Percentages	100	85	70	60	50	50	40	30	25	20.

Generally, perhaps not universally, the first four classes have been used in practice for fixing the schedule rates pertaining to less than

car load freight, and the other six classes have been adopted as the standard for ratings on car load shipments. There appears to be no rule among carriers requiring ratings to be so made, nor is there any law imposing the obligation. It is simply a usage that has grown up in the effort to establish rates for the carriage of freight, and the authorities intrusted with the power of imposing reasonable and undiscriminating rates have adopted it as convenient and useful in regulation.

It may be further noted that less than car load freight is loaded and unloaded by the carrier, while the car load freight is loaded and unloaded by the shipper. This fact, and the fact that the larger the car load the less, proportionately, is the expense of carriage, are dominant features in rendering less than car load rates higher than car load rates.

Before passing from the subject, it should be understood that it is not requisite in usage, nor by the exactions of the Interstate Commerce or the State Railroad Commission, that all freight shall be rated according to classification. There are certain commodities which are carried in large quantities that are excepted from the classification and permitted to take exceptionally low rates, which are called commodity rates. By rule 36 under the Western Classification, whenever a car load (or a less than car load) commodity rate is established, it removes the application of class rates to or from the same points on that commodity in car load quantities (or less than car load quantities, as the case may be), except when the alternative use of class and commodity rates is provided for. So that a commodity may be excepted from the classification, and a specific rate provided for both car load and less than car load, and when so provided it becomes the controlling rate without reference to the classification.

Referring to the classification and the practice and usage pertaining thereto as previously existing, not all articles of commerce are given car load rates in the classification, and many articles accorded such rates are made to depend upon the manner in which they are prepared for shipment. Whether all commodities having classification in car load rates also have classification in less than car load rates, we are not prepared to say. It will be noted that the classification under the Initiative Act differs from the Western Classification in several particulars. Mr. Frank H. McCune, who is the author of the Initiative Act, gives as the reason for adopting the former classification that uniformity might obtain in the descending scale in the ratio of approximately 84 per cent. of the preceding class. We quote his language:

"It has been observed that the ratios used to prescribe the relationship that shall exist between the various classes have been followed with slight variations from the outset of steam railroads, and the rule in section 1 of the Initiative Act merely fixes these uniformly on a descending scale of approximately 84 per cent. of the preceding class in lieu of the irregular variation of the intermediate classes as contained in the Commission's scale."

This is the only reason assigned for making the changes in classification. Standing alone, if the classification feature were the only purpose of the act, it might serve in practice for rate-making as well or

better than the old method. As to this, however, we do not now express an opinion. But in order to arrive at the true purpose and meaning of the classification, as well as of the entire act, all of the provisions of the act must be read together and thus construed.

By the first section of the Initiative Act, classification ratings must bear a uniform relationship between classes; the table of classes with their percentages being prescribed. Section 2 makes it incumbent upon the carrier to provide a minimum car load weight for each article. It is not required that all freight shall be classified, for the statute does not command as much, though it would seem that all freight not excepted out of the classification and given commodity ratings should be classified. But the injunction of section 2 covers all freight, for a minimum car load weight is required to be provided for each article thereof. This covers freight, whether classified or given exceptional or commodity ratings. This section and section 3, when read together, presuppose that a less than car load rate has also been fixed for each article. Section 3 provides for a maximum percentage for a car load with reference to the less than car load rate. Thus it will be observed that the statute is not dealing with, nor does it pretend to provide, maximum rates above which it is rendered unlawful for the carrier to make a charge, but it deals with a maximum percentage for a minimum car load, having relation to the less than car load rate. Thus it is rendered unlawful for the carrier to charge a greater compensation or rate than 70 per cent. of the less than car load rate provided when the minimum car load weight is fixed at 20,000 pounds or less. And so, by gradation, if the car load weight is more than 20,000 pounds, and not in excess of 30,000 pounds, the percentage is not to be more than 59 per cent. of the less than car load rate; if above 30,000 pounds, and not in excess of 40,000, 50 per cent.; and, if in excess of 40,000 pounds, 42 per cent.

These regulations apply to all freight, whether taking classified or commodity rates, but in application under the classification table they will be found somewhat incongruous. It will be found in many instances—indeed, very many—that the 70 per cent., or the 59 per cent., or the 50 per cent., etc., as the case may be, of the less than car load rate, will not conform to any lower classification of the same article, assuming that the article has received a less than car load rating in classification. To illustrate, take an article X, and we will suppose that it is assigned to classification 3 for fixing a less than car load rate, which would be 70; that being the classified percentage of 100, the first-class rate. A minimum car of 20,000 pounds or less takes a maximum rate of 70 per cent. of the less than car load rate, which would bring the rate of the car load to 49 cents. Under section 3 of the act the carrier is entitled to this maximum of 49 cents as compared with first class, but the classification gives him but 42 cents as the highest rate obtainable, for he cannot charge 50 cents, the nearest classified rate to 49 cents, as that would be in excess of 70 per cent. of the less than car load rate. So, if the minimum car weight is more than 20,000 and less than 30,000, the maximum percentage of 59 applied to

the 70-cent less than car load rate gives as a result 41.30 cents, and we find no classified rate conforming to that. The nearest is 42, but the carrier cannot take that, and must take the next lower, represented by B, or 35 cents, or else revise his less than car load rating. If, however, the minimum car carries 30,000 pounds and less than 40,000, it would take a rate of 50 per cent. of less than car load, with a result of 35 cents for car load classification. This would conform exactly with class B, and the carrier would get all under the classification that the maximum percentage would give him under section 3 of the act. This illustration is a demonstration that the carrier cannot in many cases, if not the greater proportion, obtain his maximum rate under section 3, and at the same time adjust his ratings according to the classification table prescribed by section 1. As to the commodities given exceptional ratings for less than car load, there would be no inharmony, for the classification does not apply; but, as to classification, the first three sections of the act are incongruous and wholly irreconcilable, and cannot be observed in practice unless the carrier waives some portion in many cases of the maximum percentage of the less than car load rate, and this the law does not require of him. The act therefore cannot be enforced without doing injustice to the carriers, which is tantamount to taking property without due process of law.

There is yet another feature of the act which requires notice. It exacts an arbitrary and perfectly rigid spread between the car load and less than car load rates, and this applies to all kinds of articles and commodities offered for transportation, whatever their character and regardless of the length of carriage. To illustrate the effect of the act as compared with present operation under the Railroad Commission Act, it is alleged by the complainants, and not controverted by the defendants, that articles moving under the fifth class in car load lots are classified in most part as fourth class in less than car loads. Under the Initiative Act, fourth class is 59 per cent. and fifth class 50 per cent. of first class. Taking, therefore, a minimum car load weight of more than 30,000 and less than 40,000 pounds, the maximum relative rate under the act is 50 per cent. of the less than car load rate and 50 per cent. of the fourth class, or 59 cents, would make the car load rate 29.50 cents, which would be less than class B and slightly greater than class C, thus making the spread three points, and nearly four, whereas, under the old law and as classified, the spread was but one point covering one class. This is an instance where the application of the maximum relative to the less than car load rate would greatly reduce the cost of transportation from that which obtained under the old law, namely, from 50 per cent. to 29½ per cent. of first class.

Other instances are shown where the result is to very greatly increase the rate of carriage in car loads. For instance, it is shown that the present rate on 30,000-pound minimum weight from Woodburn to Salem is 5½, while under the Initiative Act it would be increased to 7.84. Another instance among many is found in the transportation of

logs from Wendling to Coburg. The present rate is \$1.10 per 1,000 feet. Under the act the rate would be increased to \$4.36. Still another, respecting the commodity soft wood, is demonstrated by the following table, found at page 64 of the Southern Pacific Company bill:

Commodity	"Rates in Cents Per Cord.							
	10 Miles	20 Miles	30 Miles	40 Miles	50 Miles	60 Miles	70 Miles	80 Miles
Soft Wood—CL Min. Wt. 50,000 lbs.								
Present Rate	70	80	90	100	110	120	130	140
New rate	93.6	136.8	172.8	201.6	230.4	252	280.8	304
Advance	23.6	56.8	82.8	101.6	120.4	132	150.8	164
Reduction								

Western Classification Rating: Car loads, Class E, Min. Wt.

36,000 lbs.

Less car loads, 3d Class.

Rate per cord under new rate made by estimating weight per cord at 3,600 lbs."

Thus it will be found that, in the application of car load rates under the Initiative Act, assuming that the less than car load remains the same, the rates will be largely increased for the carriage of coal, hay and straw, lumber, brick, sand and stone, live stock, viz., cattle and horses, and other articles instanced in the bill, while, on the other hand, there will be a reduction as to such commodities as grain, flour, salt, groceries in their several forms, etc. So that it is at once apparent that the Initiative Act, if applied for the regulation of freight rates, will work a very radical change in practically all rates, and require an almost complete readjustment in car load and less than car load rates within the state.

With the policy of the law we have nothing to do. That is a matter solely for the lawmaking power. We can only determine whether the law is consistent with itself so that it is susceptible of practical operation, and whether it stands within the purview of the Constitution, state or national, the court having jurisdiction as a federal court.

From the very nature of things, there are many considerations that enter into the problem of rate-making and rate regulation. They involve the kind and quality of the commodity, the manner in which it is packed or prepared for shipment, the quantity offered, the distance of carriage, the facility with which it may be handled, its weight, bulk, and liability to breakage and deterioration, etc., and many conditions too numerous to specify or mention. Some commodities are well adapted for carriage by less than car load and others by car load, and perhaps not all are suited to carriage by both methods. It becomes manifest, from a consideration of all these conditions and relations, that it is hardly possible to adopt and apply a rigid spread in classification between less than car load and car load, so as to promote the best interests of either the carrier or shipper, or of both. A wide spread in this respect may be admirably suited to the transportation of some commodities, while a narrow one may be much better suited for the handling of other commodities. And so with relation to the distance

of carriage, the extent of the spread might affect distinct localities differently. So that an arbitrary or rigid spread is illy adapted for just, equitable, and reasonable, and, we may say, nondiscriminatory rate-making for all commodities and under all conditions.

Mr. Commissioner Meyer, in the now celebrated case of *In the Matter of the Suspension of Western Classification No. 51, I. C. C. No. 9, Opinion No. 2,110, p. 465*, has this to say respecting the relation between car load and less than car load rates:

"It appears that an excessive difference between the car load and the less than car load rates on the same commodity results in an undue preference to the car load shipper of that commodity. Both the assignment of a commodity to its place in the classification and the tariff rate made applicable to the respective classes by individual carriers determine the relationship of car load to less than car load shipments expressed in dollars and cents, which, after all, is the relationship which interests the public."

And again (page 467):

"It appears to us that one of the great purposes in the construction of a uniform classification should be the establishment of just relations between car load and less than car load quantities in accordance with some consistent principle throughout the classification and the rate schedules which may be constructed upon it."

The "consistent principle" spoken of is manifestly not the principle of an arbitrary and rigid spread applied to all commodities of whatsoever nature and under all conditions of haul and locality.

This brings us to the second point of real and pivotal significance: Does the act trench upon the natural and constitutional rights of the carrier?

The authority of the people to enact the act under consideration, if valid, is referable to the police power of the state. The United States Supreme Court has held an act of the Legislature of the state of Michigan void as unduly trenching upon the just rights of the carrier, because in violation of that part of the Constitution of the United States which forbids the taking of property without due process of law and requires the equal protection of the laws; the act being one requiring the carrier to sell 1,000-mile tickets to persons contemplating passage over the lines at a less rate than the regular passenger tickets. *Lake Shore, etc., Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. We cannot better set forth the principles upon which the court based its action than to quote from the opinion of Mr. Justice Peckham, and we may be pardoned if we quote therefrom extensively:

"The question is presented in this case whether the Legislature of a state, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies, with the limitations above stated, and having power to alter, amend, or repeal their charters, within certain limitations, has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs and to discriminate and make an exception in favor of certain persons, and give to them a right of transportation for a less sum than the general rate provided by law.

"It is said that the power to create this exception is included in the greater power to fix rates generally; that, having the right to establish maximum rates, it therefore has power to lower those rates in certain cases and in favor of certain individuals, while maintaining them or permitting them to be

maintained at a higher rate in all other cases. It is asserted also that this is only a proper and reasonable regulation.

"It does not seem to us that this claim is well founded. We cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases and without discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success. This is a very different power from that exercised in the passage of this statute. The act is not a general law upon the subject of rates, establishing maximum rates which the company can in no case violate. The Legislature, having established such maximum as a general law, now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statute regulating rates and charges, and notwithstanding such rates it assumes to provide for a discrimination, an exception in favor of those who may desire and are able to purchase tickets at what might be called wholesale rates—a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. And it assumes to regulate the time in which the tickets purchased shall be valid and to lengthen it to double the period the railroad company has ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law. We speak of the general right of the company to conduct and manage its own affairs; but at the same time it is to be understood that the company is subject to the unquestioned jurisdiction of the Legislature in the exercise of its power to provide for the safety, the health, and the convenience of the public, and to prevent improper exactions or extortionate charges from being made by the company. * * *

"The power of the Legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation. We do not deny the right of the Legislature to make all proper rules and regulations for the general conduct of the affairs of the company, relating to the running of trains, the keeping of ticket offices open, and providing for the proper accommodation of the public. * * *

"Regulations for maximum rates for present transportation of persons or property bear no resemblance to those which assume to provide for the purchase of tickets in quantities at a lower than the general rate, and to provide that they shall be good for years to come. This is not fixing maximum rates, nor is it proper regulation. It is an illegal and unjustifiable interference with the rights of the company.

"If this power exist, it must include the right of the Legislature, after establishing maximum freight rates, to also direct the company to charge less for carrying freight where the party offering it sends a certain amount, and to carry it at that rate for the next two or five or ten years. Is that an exercise of the power to establish maximum freight rates? Is it a valid exercise of the power to regulate the affairs of a corporation? The Legislature would thus permit not only discrimination in favor of the larger freighter as against the smaller one, but it would compel it. If the general power exist, then the Legislature can direct the company to charge smaller rates for clergymen or doctors, for lawyers or farmers or school teachers, for excursions, for church conventions, political conventions, or for all or any of the various bodies that might desire to ride at any particular time or to any particular place.

"If the Legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain

persons or classes free. If the maximum rates are too high in the judgment of the Legislature, it may lower them, provided they do not make them unreasonably low as that term is understood in the law; but it cannot enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the Legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free or for a less sum than is provided for by the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the Legislature cannot thus interfere with the conduct of the affairs of corporations."

As has been remarked, this is not an act to fix maximum rates beyond which the charge is rendered unlawful, but it establishes a maximum relative charge for car load transportation in certain percentages of the less than car load rate. It contemplates a fixing of minimum car load weights and of a less than car load rate upon every article or commodity, and then a maximum spread, of absolute proportions, between the less than car load and car load rate, which must be observed under penalty of an infraction of the law.

From the bills of complaint, it appears that reasonable maximum rates have already been established by the State Railroad Commission for the regulation of the transportation companies. Observing these regulations, the companies have been left to the regulation in large measure of the spread between car load and less than car load rates, and it would seem now to fix an absolutely rigid spread, for their observance is unduly trenching upon the just rights of the companies to adjust the relationship. We do not deny that the Legislature, the people, or the Railroad Commission may determine and adopt a reasonable spread as applied to specific commodities and for the protection of given localities; but that is a very different question from one arising from an edict that a certain definite and rigid spread shall be applied to all commodities, whatsoever may be their kind or character, origin of shipment or destination. Indeed, the act would seem to defeat itself. It will either compel the carrier to accept unreasonably low rates on car load lots as it respects some commodities, which would be unjust and confiscatory, or to fix unreasonably high rates on less than car load lots, which the law will not permit, in order to adjust the car load rates within the maximum relative rates for minimum car load weights; or it might constrain the carrier, in order to afford the public a very low rate on commodities that would justify it, to carry the same commodities less than car load, at an unreasonably low rate.

We think that the act is not only violative of the just rights of the carrier to manage his own affairs and exercise his own judgment respecting the spread between car load and less than car load rates, so long as he keeps within the bounds of reasonable maximum rates and does not discriminate between persons and localities, but it would compel him in many instances to accept unreasonably low rates, in order to comply with its provisions and avoid criminal prosecution. It cannot be denied that such an act is violative of his constitutional right, which forbids the taking of property without due process of law

and requires the equal protection of the laws. We conclude therefore that the Initiative Act is unconstitutional and void, and must be so treated.

Based upon these considerations, the injunction prayed must be allowed and made permanent, with costs to the complainants.

This order will obtain in each of the cases.

DUCKWORTH v. APPOSTALIS.

(District Court, E. D. Tennessee, N. D. January 24, 1913.)

No. 1,669.

1. PLEADING (§ 204*)—DEMURRER TO PART OF DECLARATION—COUNT STATING DISTINCT CAUSE OF ACTION.

Under the Tennessee practice a demurrer, if confined to the defective part of the declaration in an action at law, should be sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486-490; Dec. Dig. § 204.*]

2. INNKEEPERS (§ 10*)—INJURY TO PERSON OF GUEST—ASSAULT BY SERVANT.

An innkeeper, who retains in his employ a servant after knowledge of his violent and quarrelsome character and his disposition to assault guests, is liable to a guest for a wrongful assault made upon him by such servant.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. §§ 14-16; Dec. Dig. § 10.*]

At Law. Action by S. L. Duckworth against George A. Appostalis. On demurrer to second count of declaration. Overruled.

This suit was brought by the plaintiff to recover damages for personal injuries alleged to have been received by him while a guest in a restaurant owned and operated by the defendant through an unlawful and unjustifiable assault alleged to have been inflicted on the plaintiff by an agent of the defendant employed in the restaurant for the purpose of waiting upon the guests. The first count of the declaration alleged generally that this assault was committed in the course and within the general scope of the agent's employment, without adequate cause or excuse, and in violation of the defendant's duty as proprietor of the restaurant. The second count further alleged that the defendant's agent who committed the assault upon the plaintiff, was of a violent, uncontrollable and reckless temper, and had previously, without excuse, violently assaulted other guests in the restaurant and shown himself unfit and dangerous to guests; that the defendant knew of the violent and uncontrollable temper of said agent, and knew, or, in effect, should have known, of the previous assaults committed by him upon other guests; and that he was negligent in retaining said agent in his employment. The defendant demurred to so much of the second count as related to the temper, disposition and previous conduct of said agent and the defendant's knowledge thereof, and predicated liability on his alleged negligence in retaining said agent in his employment.

Pickle, Turner & Kennerly, of Knoxville, Tenn., for plaintiff.

Shields, Cates & Mountcastle, of Knoxville, Tenn., for defendant.

SANFORD, District Judge. The defendant demurs to so much of the second count of the declaration as, in effect, predicates liability to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the plaintiff on the ground of the defendant's alleged prior knowledge of the habits and disposition of his agent and of previous assaults alleged to have been committed by said agent upon other guests.

[1] 1. As these allegations are made as a distinct and separate ground of liability, I am of opinion that if they do not show a cause of action in law, the demurrer will lie to this portion of the declaration. It is true that, generally, if a count of a declaration contains harmless surplusage, as where it is unnecessarily prolix or states frivolous or irrelevant facts, such as unnecessary and particular allegations in the nature of evidence of the ultimate facts, the count will not be vitiated thereby, but such surplusage may be stricken out. *Caruthers, History of a Lawsuit* (3d Ed.) 111, 112; 5 Enc. Pl. & Pr. 873. This rule is not, however, in my opinion, applicable where the additional facts are alleged as a distinct and substantive cause of action. In such case the rule of practice in Tennessee appears to be that a demurrer, if confined to the defective parts of the declaration, should be sustained. *Brooks v. Smith*, 1 Shan. Tenn. Cas. 158, citing 1 Chitt. Plead. 663, 664. And see *Hester v. Hester*, 88 Tenn. 270, 12 S. W. 446, in which it was held that a demurrer going to the whole of a declaration, consisting of one count, which was good as to some distinct grounds of action therein averred but bad as to others, was "therefore too broad" and should be overruled. See also *Ewart Mfg. Co. v. Cycle-Chain Co. (C. C.)* 91 Fed. 262. This is in direct analogy to the general rule that while a demurrer to an entire bill in equity must fail if any part of the bill is good (*Stewart v. Masterson*, 131 U. S. 151, 9 Sup. Ct. 682, 33 L. Ed. 114; *Phoenix Ins. Co. v. Day*, 4 Lea [Tenn.] 247), yet if the demurrer be confined to the part of the bill only which is bad, it should be sustained (*Giant Powder Co. v. Powder Works*, 98 U. S. 126, 25 L. Ed. 77; *Market Street Ry. Co. v. Rowley*, 155 U. S. 625, 15 Sup. Ct. 224, 39 L. Ed. 284; *Gay v. Skeen*, 36 W. Va. 588, 15 S. E. 64; *Crowder v. Eldridge*, 3 Head [Tenn.] 359, 360).

[2] 2. After careful consideration, however, I am of opinion that the demurrer is not well taken in point of law. I find in the authorities a wide divergence of opinion as to the liability of an innkeeper for the negligent or tortious act of his servant. See, for example, *Clancy v. Barker*, 71 Neb. 83, 98 N. W. 440, 103 N. W. 446, 69 L. R. A. 642, 115 Am. St. Rep. 559, 8 Ann. Cas. 682, *Rahmel v. Lehdorff*, 142 Cal. 681, 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. Rep. 154, and *Clancy v. Barker* (8th Circ.) 131 Fed. 161, 66 C. C. A. 469, 69 L. R. A. 653. There appears to be no case directly in point on the precise question involved in this demurrer, which goes to the liability of the innkeeper to a guest for an assault committed by a servant whom the innkeeper retained in his employ after previous knowledge of violent conduct to his guests. However in *Rahmel v. Lehdorff*, supra, in which the Supreme Court of California denied liability of an innkeeper for an assault committed upon a guest by a waiter at the table, the court said:

"There is neither allegation nor finding that the defendant was negligent in employing or retaining the waiter who committed the assault."

The obvious inference is that in the opinion of the court the innkeeper would have been liable if he had negligently employed or retained the waiter who committed the assault. And see note to *Clancy v. Barker* (8th Circ.) *supra*, 69 L. R. A., at p. 642. Furthermore this conclusion seems to me to follow as a corollary from the undoubted general rule that an innkeeper is under obligation to exercise reasonable care for the safety, comfort and entertainment of his guests. *Clancy v. Barker* (8th Circ.) *supra*, at p. 163, and cases cited. So that even if an innkeeper be not ordinarily liable for the tortious act of his servant, a point not now in any way determined, I think that nevertheless he would clearly be liable, if, having knowledge of the violent and quarrelsome character of an employé and of his disposition to assault guests, he should negligently retain such employé in his service, and such employé should, while so retained, wrongfully assault a guest. This conclusion finds direct analogy in the well-settled rule of law that, although a master is not ordinarily responsible to one servant for the negligence of a fellow-servant, yet he is responsible if he had employed or retained such fellow-servant with previous knowledge of his incompetency. Note, 25 L. R. A. 710.

An order will accordingly be entered overruling the demurrer.

Ex parte TOSCANO et al.

(District Court, S. D. California, S. D. November 5, 1913.)

No. 659.

1. TREATIES (§§ 4, 12*)—VALIDITY—CONSTRUCTION AND OPERATION OF THE HAGUE TREATY—"INTERMENT."

The provision of chapter 2, art. 11, of The Hague Treaty of October 18, 1907, ratified by the United States and by Mexico November 27, 1909 (36 Stat. 2324), that "a neutral power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theater of war," which act of internment consists in disarming such troops and keeping them in honorable confinement, does not violate any provision of the Constitution of the United States, nor require legislation to render it effective, and is therefore a part of the law of the land which the President has full power to execute.

[Ed. Note.—For other cases, see Treaties, Cent. Dig. §§ 4, 12; Dec. Dig. §§ 4, 12.*]

2. TREATIES (§ 5*)—CONSTRUCTION AND OPERATION OF THE HAGUE TREATY.

The two parties engaged in civil war in Mexico are belligerent parties according to the law of nations, and the fact that the United States has not accorded official recognition to either does not affect its right and duty to execute such treaty provision with respect to troops of either party who seek asylum in its territory.

[Ed. Note.—For other cases, see Treaties, Cent. Dig. § 5; Dec. Dig. § 5.*]

3. CONSTITUTIONAL LAW (§ 251*)—"DUE PROCESS OF LAW"—MEANING.

The words "due process of law" as used in Const. U. S. Amend. 5, were intended to convey the same meaning as the words "by the law of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

land," as found in the twenty-ninth chapter of the Magna Charta, and mean process due according to the law of the land.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 726, 727, 732; Dec. Dig. § 251.*

For other definitions, see Words and Phrases, vol. 3, pp. 2227-2256; vol. 8, p. 7644.]

Petition of Higinio Toscano and others for writ of habeas corpus. Writ denied.

H. R. Gamble, of El Paso, Tex., for petitioners.

Albert Schoonover, of San Diego, Cal., U. S. Atty., for the United States.

WELLBORN, District Judge. Petitioners, 208 in number, and the respondent have stipulated on this hearing the following facts:

"That since the early part of March, 1913, a state of civil war has existed in the republic of Mexico, and particularly in that part which is contiguous to the United States, and that one of the parties to this civil war is known as the Federalists, and the other party is known as the Constitutionalists, and that both the Federalists and the Constitutionalists have raised large numbers of troops, and armed and equipped them and formed them into a military organization, and that since March, 1913, a number of engagements and battles have taken place between the armed forces of the Federalists and the Constitutionalists.

"That the United States is not a party to said civil war, and is not allied with either the Federalists or the Constitutionalists, but at all times has and does now occupy the position known in international law as a neutral between the said contending parties.

"That on April 13, 1913, all the petitioners herein were officers or soldiers in the army of the Federalists, or were connected in some other capacity with said army, and were stationed on duty with said army at Naco in the state of Sonora, Mexico, and that none of said petitioners are citizens of the United States.

"That for several days prior to April 13, 1913, an armed force of the Constitutionalist army attacked the same town of Naco, and on April 13, 1913, the petitioners and other Federalist troops occupying the said town were defeated and driven out of said town of Naco, and were pursued by the victorious Constitutionalist troops, and to avoid surrendering to the Constitutionalist force, the Federalist troops fled with their arms across the boundary line between the United States and Mexico, and sought refuge and asylum from the pursuing enemy in the United States.

"That immediately upon crossing the said neutral boundary and reaching United States soil, the said petitioners and other Federalist troops belonging to said belligerent army voluntarily surrendered themselves to the armed forces of the United States, which said armed forces of the United States, acting under authority of the President of the United States, thereupon disarmed said belligerent troops and detained and interned them pending the removal of said belligerent troops to a point within the territory of the United States at a distance from the theater of said civil war.

"That thereafter, on or about April 25, 1913, said belligerent troops, including all of said petitioners, were removed by said armed forces of the United States, acting under the authority of the President of the United States, to Ft. Bliss, a military post of the United States near the city of El Paso, in the state of Texas, and on August 5, 1913, in pursuance of said authority, were removed to Ft. Rosecrans, Cal., a military post of the United States located at a distance from the theater of said civil war, and ever since such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

removal have been and now are detained and interned in a camp set apart for such purpose.

"That said belligerent troops, including all of said petitioners, were so received on United States territory and disarmed, and have ever since been held in honorable detention and internment for the purpose of depriving them of the power to leave American soil to renew hostilities.

"That said detained and interned petitioners, ever since being so received on United States soil, have been and still are a part of the Federalist army of Mexico, and as such have, ever since their detention and internment, received from and been paid by said Federalist army pay and allowances as soldiers of said army according to their rank therein.

"So far as concerns the hearing on the application for writ of habeas corpus herein, it is agreed that none of the petitioners are charged with violation of any statute of the United States, and that no complaint or indictment has been made against the petitioners or any of them."

[1] The government bases its authority for detaining petitioners on chapter 2, art. 11, of the Convention at The Hague, October 18, 1907, ratified by the contracting powers, including the United States of America and Mexico, November 27, 1909, which provides that:

"A neutral power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theater of war.

"It may keep them in camps and even confine them in fortresses or in places set apart for this purpose.

"It shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission."

36 U. S. Stat. L. 2324.

The first contention of petitioners is that said treaty provisions are violative of the Constitution of the United States, or, more specifically, this contention is, quoting from their brief, as follows:

"It would seem clear, then, that these petitioners are being deprived of their liberty without due process of law in violation of the fifth amendment. And they are entitled to the protection of the fourth and sixth amendments as well as the fifth. They were arrested without warrant, in violation of the fourth, and have been detained more than four months without trial or hearing of any kind, in violation of the sixth."

Petitioners' references to the fourth and sixth amendments in no way strengthen their argument. If they are in custody by due process of law, their detention, of course, does not violate the fourth amendment, which is directed against "unreasonable" searches and seizures, nor has the sixth amendment, which simply requires certain procedure in criminal prosecutions, any application, because the case at bar in no way relates to a criminal prosecution.

Petitioners are not charged with any offense against either municipal or international law; indeed, The Hague Treaty impliedly allows, where humane considerations require, a neutral power to give refuge on its own territory to alien belligerents, exacting, however, as a matter of common justice, that the neutral power shall take suitable precautions to prevent the belligerents from leaving the neutral territory to renew hostilities.

The real issue between the parties may be accordingly stated thus: Are petitioners deprived of their liberty without due process of law, in violation of the fifth amendment?

Petitioners' assumption that said treaty provisions are criminal measures is at once the groundwork and chief infirmity of their argument. Internment is not a punishment for crime, but simply an appropriate means agreed upon for the temporary care of alien forces who seek asylum in neutral territory, and is defined as follows (underscoring mine):

"Modern practice, which ignores Bynkershoek's contention that flying troops may be followed into a neutral state, imposes upon such state the duty of receiving them under such conditions as will deprive them of the power to start again from its soil in order to renew hostilities. To secure that end, and at the same time to satisfy the claims of humanity, belligerent troops are disarmed as soon as they cross the neutral frontier, and detained in *honorable* confinement until the end of the war. While thus detained they are said to be interned—a condition which they must not resist, and the expense of which their government is in honor bound to bear." Taylor on International Public Law, p. 672.

Internment, in many respects, closely resembles the temporary confinement necessary to the exclusion or deportation of aliens, both being means respectively employed for the execution of laws—a treaty in the one case, and an act of Congress in the other.

The broad distinction between such temporary confinement and imprisonment as a punitive sanction is well illustrated in *Wong Wing v. United States*, 163 U. S. 228, 235, 16 Sup. Ct. 977, 980 (41 L. Ed. 140). There the court says:

"We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character, and while arrangements were being made for their deportation. Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense. * * *

"Thus, in the case of *Fong Yue Ting v. United States*, 149 U. S. 730 [13 Sup. Ct. 1028, 37 L. Ed. 905], Mr. Justice Gray used the following significant language: 'The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a "banishment," in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not therefore been deprived of life, liberty, or property without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.' * * *

"No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the

sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial."

See, also, *Turner v. Williams*, 194 U. S. 279 [24 Sup. Ct. 719, 48 L. Ed. 979], wherein the court says:

"Repeated decisions of this court have determined that Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers; that the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law; and that the provisions of the Constitution securing the right of trial by jury have no application. * * * Detention or temporary confinement as part of the means necessary to give effect to the exclusion or expulsion was held valid, but so much of the act of 1892 as provided for imprisonment at hard labor without a judicial trial was held to be unconstitutional."

[3] The meaning of the phrase "due process of law" is succinctly given in petitioners' brief as follows:

"The principle, if not the language of the constitutional prohibition, is taken from *Magna Charta*, and it is well settled that the words 'due process of law' were intended to convey the same meaning as the words 'by the law of the land' found in the twenty-ninth chapter of that instrument. Lord Coke, in his commentary on those words, says they mean due process of law. The requirement of due process of law by the fifth and fourteenth amendments, then, means process due according to the law of the land."

This extract from petitioners' brief is a quotation from the *Encyclopedia of United States Supreme Court Reports*, vol. 5, p. 508.

That a treaty made under the authority of the United States is a law of the land is unquestioned (Const. art. 6), and, quoting again from petitioners' brief:

"There is no doubt that a treaty, when self-executing, is equivalent to an act of Congress."

On this subject, the Supreme Court has said:

"A treaty that operates of itself without the aid of legislation is equivalent to an act of Congress, and while in force constitutes a part of the supreme law of the land. *Foster v. Neilson*, 2 Pet. 253, 314 [7 L. Ed. 415]." *Chew Heong v. United States*, 112 U. S. 540, 5 Sup. Ct. 256, 28 L. Ed. 770.

Petitioners, however, contend, that *The Hague Treaty*, relating to internment, is not self-executing. This position is untenable. 38 Cyc. 972. The treaty is full and complete, and no legislation is necessary to its enforcement. It is true, that Congress might have expressly designated some one for that purpose, but in the absence of such legislation, the duty devolves upon the President.

By section 1 of article 2 of the Constitution, the executive power is expressly vested in the President, and section 3, of the same article declares, "He shall take care that the laws be faithfully executed." This power with reference to the execution of treaty stipulations was expressly asserted in an opinion of the Attorney General, dated December 15, 1870, as follows:

"The Secretary is an officer of the executive department of the government. It is established by a long course of authoritative opinion and conforming

practice, that in many cases the executive of the United States can execute the stipulations of a treaty without provision by act of Congress. In some instances this has been done as a general executive duty, when the treaty itself pointed out no particular mode of execution. This was the course taken in the case of Thomas Nash, otherwise called Jonathan Robbins, who was delivered up by the direction of President Adams to the British authorities in execution of the treaty with Great Britain of 1794. An attempt to bring the censure of Congress upon the President for this act was encountered by an argument from Chief Justice Marshall, then a Representative from Virginia, which conclusively established the power." 13 *Opinions of Attorneys General*, 358.

From said argument I take the following extracts:

"The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him.

"He possesses the whole executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.

"He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he, and he alone, possesses the means of executing it.

"The treaty, which is a law, enjoins the performance of a particular object. The person who is to perform this object is marked out by the Constitution, since the person is named who conducts the foreign intercourse, and is to take care that the laws be faithfully executed. The means by which it is to be performed, the force of the nation, are in the hands of this person. Ought not this person to perform the object, although the particular mode of using the means has not been prescribed? Congress unquestionably may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but, till this be done, it seems the duty of the executive department to execute the contract by any means it possesses."

Annals of Congress, 6th Congress, 1799—1801, p. 614.

This argument was made on March 7, 1800, and on the day following the House gave it unqualified indorsement, by rejecting, on a vote of 61 yeas to 35 nays, the resolution of censure. See, also, *In re Neagel*, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55.

Except in its statement of some general principles, about which there is no controversy, *Ex parte Orozco*, 201 Fed. 106, has no application here. The Hague Treaty, upon which the government justifies its detention of the petitioners herein, was not even referred to by the learned judge who decided the latter case. I agree with him that the power to deprive an individual of his liberty without due process of law has no existence in this country, but here "due process of law" is found in The Hague Treaty, its execution by the President, and the admitted facts which bring petitioners under its operation.

[2] Petitioners further contend that, as the government of the United States has not accorded official recognition to either party to the civil war in Mexico, neither of said parties is a nation, within the meaning of the international law, and therefore the principles of international law do not apply. These views, however, are unsustained by authority. On the contrary, the Supreme Court of the United States quotes with approval from Vattel, as follows:

"A civil war breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent par-

ties, who consider each other as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

"This being the case, it is very evident that the common laws of war—those maxims of humanity, moderation, and honor—ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, etc., the war will become cruel, horrible, and every day more destructive to the nation."

Prize Cases, 2 Black (67 U. S.) 667, 17 L. Ed. 459.

At page 669 of 2 Black (17 L. Ed. 459) of the same case, the court further says:

"It is not the less a civil war, with belligerent parties in hostile array, because it may be called an 'insurrection' by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or state be acknowledged in order to constitute it a party belligerent in a war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of the Santissima Trinidad, 7 Wheat. 337 [5 L. Ed. 454], this court say: 'The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war.'"

Petitioners' contention, therefore, that Mexico, because of the civil war, is not subject to international law, or more specifically The Hague Treaty, is without merit.

My conclusions are: First, that the petitioners are completely within the provisions of chapter 2, art. 11, of The Hague Treaty; second, that said article violates no provision of the Constitution of the United States, requires no legislation to render it effective, and is accordingly the law of the land; and third, that the President has full authority, and it was and is his duty to execute said treaty provisions.

The writ and petition, therefore, will be dismissed, and petitioners remanded to the custody of the respondent.

In re BEIERMEISTER BROS. CO.

(District Court, N. D. New York. November 22, 1913.)

BANKRUPTCY (§ 16*)—ADJUDICATION—JURISDICTION—CORPORATIONS—PRINCIPAL PLACE OF BUSINESS.

The articles of a bankrupt corporation organized in 1904 stated that its principal place of business was in the city and county of New York, in the Southern federal district, and for some time thereafter the corporation had a factory, as well as an office, or place of business for selling its product, keeping books, etc. in New York; but in 1908 it removed its entire plant to Albany, in the Northern district, where all its subsequent business was transacted, except that it continued to rent and maintain an office and salesroom in New York under the management of one of its directors, who was also secretary and resided in that city, using the room to exhibit samples of goods and supply small orders. No meeting of stockholders was ever held in New York, and with one exception all meetings of directors for more than six months prior to the filing of the bankruptcy petition had been held in the Albany office. *Held*, that the corporation's principal place of business was in the Northern district, notwithstanding the provision of its articles, and that the court of that district had jurisdiction of the bankruptcy proceeding against it, under Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), applicable to corporations and providing that the federal District Courts are invested, within their territorial limits, with such jurisdiction as will enable them to exercise original jurisdiction in bankruptcy and adjudge persons bankrupt who have had their principal place of business within their respective territorial jurisdiction for the preceding six months or a greater portion thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. § 16.*]

In Bankruptcy. In the matter of the Beiermeister Bros. Company, bankrupt. On motion to vacate an order appointing a receiver, and also to vacate the adjudication in the Northern district of New York, for want of jurisdiction. Denied.

Jesse S. Epstein, of New York City, for receiver in Southern district of New York and Greenwich Bank of the City of New York.

Edward Murphy, 2d, of Troy, N. Y. (H. D. Bailey, of Troy, N. Y., of counsel), for bankrupt.

Tracey, Cooper & Townsend, of Albany, N. Y. (B. Jermain Savage, of Albany, N. Y., of counsel), for George Hatt, 2d, receiver.

RAY, District Judge. On the 3d day of November, 1913, certain creditors of the above-named bankrupt, Beiermeister Bros. Company, filed a petition against said corporation in involuntary proceedings in the Southern district of New York, and without notice on the same day obtained an order appointing Wm. Henkel, Jr., receiver of the property of the alleged bankrupt in such district. On the 4th day of November, 1913, the above-named Beiermeister Bros. Company filed a voluntary petition in bankruptcy in the Northern district of New York, and adjudication followed as matter of course. In that proceeding Geo. Hatt, 2d, of the city of Albany, was on the same day ap-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
208 F.—60

pointed receiver of the property of the bankrupt and took possession of the property in the Northern district. In the involuntary petition filed in the Southern district of New York it was claimed or alleged that the principal place of business of the alleged bankrupt was in the Southern district of New York. In the voluntary proceeding the petition executed by the corporation pursuant to a resolution of the board of directors alleged and set out that the principal place of business of the corporation was and for several years had been in the Northern district of New York. When the corporation was organized or incorporated the principal place of business was in the articles of incorporation stated to be at a certain place in the city and county of New York, which is in the Southern district. For some time the corporation (incorporated in 1904) had a factory in the city of New York, as well as an office or place of business for selling its product, keeping books, receiving and sending mail, etc. It also had a bank account in the city of New York, and most or all of its bills, letters, etc., were dated at New York. It had letter heads reading:

Telephone 939 Stuyvesant.

Factory, Albany, N. Y.

Beiermeister Brothers Co.

(Incorporated 1904)

Importers and Manufacturers. Ladies' Wear, Collars and Cuffs, 18, 20, 22, 18th St., Between Broadway and 5th Avenue.

New York, —————, 19—.

It had bill heads reading:

New York, —————, 19—.

M—

To Beiermeister Bros. Co., Dr.
18, 20, 22, E. 18th St.
Waists.

Blouses.

Dresses.

Terms:

Five years ago this corporation removed its entire manufacturing plant to the city of Albany, in the Northern district of New York, where all of its manufacturing has been done. There it has rented a plant for this purpose, and at the plant it had an office for the transaction of business. It also kept and had a bank account in one of the banks of the city of Albany. At the same time the corporation changed the nature and character of its business from contract manufacturing to manufacturing on its own account. The corporation has since rented and maintained an office and salesroom in the city of New York (18 East 18th street) under the management of William H. Peabody, one of the directors, who is also the secretary of the corporation, who resided in that city. This salesroom was maintained for the purpose of exhibiting samples of goods and supplying small orders. For some years the officers and directors had been Fred. Beiermeister, president, who at all times has resided in the city of Troy, a short distance from the city of Albany, in the Northern district of New York, Frederick J. Beiermeister, who at all times has resided in the city of Albany, Northern district, and said Peabody. No meeting of the stock-

holders had ever been held in the city of New York, and with one exception all the meetings of the directors of the corporation for more than six months prior to filing its petition have been held at the Albany office, where they have met for the transaction of the business of the corporation at least twice each month. The only directors' meeting held in the city of New York during such time was a special meeting for the purpose of entering into a contract with Lichtenhein & Stern, bankers of New York City, notice of which meeting was waived by all the directors. The debts of the bankrupt aggregate about \$50,000, and the assets are inventoried at some \$45,000, all of which, except some fixtures in the New York office and some samples of goods, all worth not to exceed \$2,500, are in the Northern district of New York at the Albany factory.

Probably two-thirds of the creditors in amount reside in the Southern district of New York. Something like \$20,000 is owing to parties in Albany and vicinity. There is no contest over the claims of any of these creditors. It was stated on the argument by those representing the New York City petitioning creditors that it was their purpose to remove these assets to New York City for sale there and abandon the Albany plant now being run for the purpose of completing garments cut out and saving a large amount of material that otherwise will be a dead loss. For some years substantially all deliveries of goods manufactured and sold have been made from the factory at Albany, and substantially all goods purchased have been delivered there. Sometimes small packages purchased at different places in New York City have been taken to this New York office, put in one large package, and sent on to Albany. Some of the books of the corporation have been kept at the New York office, but all the facts and information entered and contained therein relative to the sale and shipment of goods has been obtained from the books at the Albany office. It appears from the books of the corporation, which were removed to the Albany office prior to the filing of either petition in bankruptcy, that during the eight months immediately preceding the filing of the petition in bankruptcy the bankrupt had expended in its business for merchandise purchased, rent, labor, and other expenses incident to the conduct of its business the sum of about \$180,000, of which there was checked out of the First National Bank of the city of Albany, where the account was kept, more than \$120,000. The bankrupt owes said bank over \$9,000, and only owes the Greenwich Bank in New York some \$2,500. The Northern district creditors request and urge in writing over their own signatures the retention of these bankruptcy proceedings in the Northern district of New York. The New York City creditors in the main by attorneys request and urge that the proceedings be had in the Southern district.

It cannot be denied that the administration of the estate in the Northern district of New York will proceed more rapidly and at a much less expense than is possible in the Southern district. There can be no question that for at least a year last past, and surely for more than the six months last past, the actual, main, and principal place of

business of the bankrupt corporation has been at the city of Albany, in the Northern district of New York, and Fred and Frederick J. Beiermeister, two of the three directors, the other not being found, and principal officers so state under oath, and also state that it was the intent and purpose to change the main and principal place of business to Albany at the time the mode of doing business was changed some years ago. For the year last past, at least, but little business has been done in the city of New York, and this of the character before stated. By section 2 of the bankruptcy act it is provided:

"That the courts of bankruptcy * * * are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation or in chambers and during their respective terms, as they are now or may be hereafter held, to (1) *adjudge persons bankrupt who have had their principal place of business*, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof," etc.

This applies to a corporation. The language is, "*who have had their principal place of business*," and this means what it says and refers, not to the place of business mentioned in the articles of incorporation, but to the *actual* principal place of business for the time mentioned. It was not intended to deprive a court of one district of jurisdiction of a corporation doing *all* its business and having *all* its property in that district, and also having an office there for the transaction of business, for the reason that the corporation, *when organized*, in its articles of incorporation had *designated* a certain place in some other district as its principal place of business and had not changed such designation. This will be the result if it is held that the place so designated in the articles of incorporation, and not changed by supplementary articles or action, determines the jurisdiction. The actual, principal place of business for the period of time required determines jurisdiction. And General Orders 6 and 7 (32 C. C. A. ix, xi, 89 Fed. v.) do not affect this question. General Order 6 says:

"In case two or more petitions shall be filed *against* the same individual in different districts."

And General Order 7 says:

"Whenever two or more petitions shall be filed *by creditors* against a common debtor," etc.

Here two petitions have not been filed "*by creditors* against a common debtor," and two petitions have not been filed "*against*" this corporation (same individual). The domicile of this corporation is the state of New York. It is a corporation of the state of New York and jurisdiction of it is given to the bankruptcy court in that district of the state of New York in which the corporation actually had, for the six months preceding the filing of its petition in voluntary bankruptcy, its principal place of business. The corporation is presumed to know where it has had its principal place of business, and when the corporation itself files its petition jurisdiction is conferred on the court where

filed, subject to a showing *in that court* that the principal place of business was or had been elsewhere. No prior creditors' petition filed in another district deprives such court of jurisdiction, or of the power to determine its own jurisdiction over the corporation filing a voluntary petition therein and alleging such district to be the one in which it has and has had its principal place of business for the preceding six months and more. The Supreme Court, in adopting the General Orders referred to, had no such situation in mind, and in no event could it change the bankruptcy act itself as to jurisdiction.

In *Burdick v. Dillon et al.* (In re Matthews Consolidated Slate Co.) 144 Fed. 737, 75 C. C. A. 603 (C. C. A. 1st Circuit), a New Jersey corporation owned and operated slate quarries in Vermont and in New York and a slate mill in New York. Its product of roofing slate and structural slate was principally produced and stored in the states of Vermont and New York. But its principal office was in Boston, Mass. Here was the executive office and the selling agency. Here the directors met, the books of account were kept, the general correspondence was conducted, the great bulk of sales were negotiated, and from here the bills were sent out and payments received. The principal banking was done in Boston through the Boston office, and "supreme direction and control" were exercised from the Boston office. It was properly and necessarily held that Boston was the principal place of business of that corporation. In this case now under consideration the facts are widely different. Whatever the situation was more than a year ago, for more than the six months last past and during such time the actual supreme direction and control of the corporation has been determined at and exercised from the Albany office, where two of the three directors resided (in effect, as Troy is within 15 minutes' ride of Albany) and where the directors met frequently. Here was the executive office. Here was the factory at which all the manufacturing was done and from which all orders were filled, and here some books were kept, the actual books of original entry, and here, at Albany, the principal banking was done and payments made. In *Re Marine Machine & Conveyor Co.* (D. C.) 91 Fed. 630, the corporation had shut down its manufacturing plant at Warren, R. I., and for more than six months ceased to do business of any kind there; but it continued its business (not of manufacturing) at New York City, where it had its only office, and where its directors met and its banking was done, etc. It was necessarily held that New York was its principal place of business. It was its only place of business.

In 1 *Loveland on Bankruptcy* (4th Ed.) 404, it is said:

"The principal place of business of a corporation is usually where the general offices or headquarters are located *without regard to the place named in the charter* as the principal place of business. It is where the *actual business* of the concern is *chiefly* transacted and managed. * * * Where a corporation has several places of business, located in different districts, its principal place of business is where the affairs of the corporation *are actually managed*. This is a question of fact to be determined by the circumstances of each particular case."

Applying this rule, which meets the approval of this court, to the case in hand, and it must be held that the principal place of business of

Beiermeister Bros. Company at the time the petitions referred to were filed was, and that for more than six months prior thereto same had continuously been, at Albany in the Northern district of New York.

The motion to revoke and annul or vacate the order appointing George Hatt, 2d, receiver, is therefore denied, as is the motion to open and vacate the order of adjudication.

UNITED STATES v. THIRTEEN CRATES OF FROZEN EGGS.

(District Court, S. D. New York. November 21, 1913.)

FOOD (§ 24*)—"ADULTERATED FOOD"—DECOMPOSED EGGS.

Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1911, p. 1354) § 2, prohibits the introduction into one state from another state of any article of food which is adulterated. Section 6 declares that the term "food" shall include all articles used for food, whether simple, mixed, or compound; and section 10 provides for the seizure and condemnation of any article of food that is adulterated within the meaning of the act and which, having been transported in interstate commerce, remains unsold, etc. *Held* that, where decomposed canned eggs, which had not been denatured and therefore could have been used either for food or tanning purposes, were shipped in interstate commerce from one warehouse of the owner to another, they were "an adulterated article of food" within the definition and meaning of the act, and it was no defense to a proceeding by the United States to condemn them that the owner intended that they should be used only for tanning purposes.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 17; Dec. Dig. § 24.*

For other definitions, see Words and Phrases, vol. 3, p. 2856; vol. 1, p. 211.]

Libel by the United States for condemnation under the Pure Food and Drugs Act (Act Cong. June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]) of thirteen crates, each containing two cans of frozen eggs claimed by Armour & Co. Judgment for plaintiff directing verdict of condemnation.

H. Snowden Marshall, U. S. Atty., and Addison S. Pratt, Asst. U. S. Atty., both of New York City.

Breed, Abbott & Morgan, of New York City, for Armour & Co., claimant.

RAY, District Judge. The claimant, Armour & Co., of Chicago, Ill., having a plant and place of business there, is a purchaser of and dealer in eggs and other food products, not a producer. At Chicago, Ill., it purchased and had on hand these eggs in question and others like them. They were released from the shells and frozen but by reason of decay had so far decomposed that they were not fit for human food or consumption as such. As unfit for human consumption these with others had been selected and segregated by claimant at Chicago, Ill., from their other eggs. It is conceded that these eggs had reached such a stage of decomposition as to come within the definition and description of "adulterated" article of food if handled, shipped, or sold, or in-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

tended to be shipped and sold as an article of food. Eggs in this condition may be sold and used as an article of food, or for tanning purposes (that is, for use in the tanning of leather), and claimant had sold eggs of this description, selected and segregated at the same time as these, to a tannery or tanning firm located and doing business at a point not far distant from Chicago for tanning purposes. It had not shipped or sold any of its eggs of this description to be used and consumed as an article of food and did not contemplate doing so.

The 13 crates of frozen eggs seized and sought to be condemned in this proceeding were shipped by the claimant, Armour & Co., in interstate commerce from Chicago, Ill., to New York City, N. Y., where that corporation had and has a warehouse and place of business and had been received there, but had not been sold or disposed of or offered for sale when the seizure was made. There are tanneries in the vicinity of New York, and in fact the intention of the claimant in so transporting these eggs in question from Chicago to New York was to offer them for sale and dispose of them, if possible, at New York for use in tanning and not for use or consumption as food. This intention or purpose of the claimant had not been disclosed in any way or manner to any person or by any labeling or branding. The eggs in question had not been denatured or subjected to any chemical or other process. They were rotten, decayed eggs, unfit for human food, and came within the definition "adulterated" for the reason they consisted in whole or in part of a filthy and decomposed or putrid animal or vegetable substance. See subdivision 6, section 7, of the Food and Drugs Act of June 30, 1906, 34 Stat. 768. By section 6 of the act it is provided that "the term food as used herein shall include all articles used for food * * * whether simple, mixed or compound." By section 2 the introduction into one state from another state " * * * of any article of food * * * which is adulterated * * * within the meaning of this act, is hereby prohibited." Section 10 provides for the seizure and condemnation of "any article of food * * * that is adulterated * * * within the meaning of this act" and which, having been transported in interstate commerce, remains unsold, etc.

The contention of the United States is that eggs are an article of food and that they remain such if not denatured or subjected to some chemical process which destroys them as an article of food, and that when they become decomposed and therefore unfit for food they are, within the meaning of the act (section 7, subd. 6), an adulterated article of food and subject to the condemnation of the act. The contention of the claimant is that, while the eggs prior to decomposition were an article of food, when decomposed they have lost their character as an article of food if the owner does not intend to use, transport, or sell them as an article of food but does intend to transport them and sell them for tanning purposes only and transports them for that purpose only. The contention is that an undisclosed intent to transport in interstate commerce and sell decomposed eggs, which are actually unfit for food, for use in tanning only takes the same out of the category of "adulterated article of food."

The difficulty with this contention is that these eggs, or eggs of this

character, not denatured, come squarely within the definition of an adulterated article of food. The character of the thing does not depend on the intent or purpose of the owner in transporting it or selling it, or the purpose the owner may have in selling it. It seems to me clear that the purpose of Congress was to prohibit the transportation of articles in interstate commerce which come within the definition given in the statute and make them subject to seizure and condemnation if so transported. If such is not the purpose, then interstate commerce may be flooded with eggs of this character and the government will be compelled to prove that the intent of the one transporting the article was to use or sell same as an article of food. Even if the burden is not shifted and the presumption is that it was intended to use or sell such an article as food or as an article of food, still the owner so transporting the article will escape the operation of the statute by swearing to an undisclosed intent which the government will be unable to disprove, unless the article has been actually put on sale or sold as an article of food. If these eggs had been denatured so as to destroy them as an article of food (that is, take them outside the statutory definition of "adulterated" article of food), the case would be entirely different. It is no hardship to give a construction to this pure food and drugs act which will make it effective and accomplish the purpose intended so long as it is not made oppressive. In all cases of the transportation of frozen eggs so far decayed as to render them unfit for human food, the owner may denature them before shipping or perhaps label them; but in any event, so long as the statute stands as it does, the transportation in interstate commerce of frozen eggs, or eggs not frozen but so far decayed or decomposed that it may be said they consist "in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance," is prohibited, as eggs, whether the contents of the shell be therein or removed and in cans or other receptacles and frozen or unfrozen, are an article generally and almost universally used and dealt in as and for food and are adulterated when they consist of a "decomposed animal or vegetable substance." Eggs are either an animal or a vegetable substance. Clearly they are not a mineral substance. The title of the Food and Drugs Act declares it to be:

"An act to prevent the manufacture, sale or transportation of adulterated, or misbranded, or poisonous, or deleterious foods, drugs, medicines and liquors, and for regulating traffic therein, and for other purposes."

Would it be an answer to the seizure and attempted condemnation of a car load of partly decomposed beef being transported from Chicago to New York, for the owner to say, "I did not intend it to be used or sold in New York for food, but as soap grease or a fertilizer"; such purpose not having been in any manner disclosed? *Philadelphia Pickling Co. v. U. S.* (C. C. A. 3d Circuit) 202 Fed. 150, 120 C. C. A. 429, while not on "all fours" with this case in all its facts, is, it seems to me, on "all fours" in principle, unless it can be said that inasmuch as partially decayed eggs, a decomposed article of food, having become unfit for food, are no longer an adulterated article of food, but an article for use in tanning leather, and hence not within the act at all as they may be and sometimes are used for that purpose. This con-

tention cannot be sustained. If decomposed eggs were incapable of being used for food, as in making cakes and the like, the case would be different. The construction of this Pure Food and Drugs Act contended for by this claimant would open the door to the unrestrained transportation in interstate commerce of partially decomposed eggs, as the owner and dealer would, it might be honestly, transport them for sale in another state for use in tanning and actually, so far as he is concerned, sell them for that purpose or to some one claiming to purchase them for such purpose, when in fact the purchaser was intending to use them as an article of food or to dispose of them to some one to mix with flour, etc., and use as an ingredient in an article of food, such as cake, etc.

In *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364, the object of this Pure Food and Drug Act is declared to be:

"To keep adulterated articles out of the channels of interstate commerce, or if they enter such commerce to condemn them while in transit, or in original or unbroken packages after reaching destination; and the provisions of section 10 of the act apply not only to articles for sale but also to articles to be used as raw material in the manufacture of some other product."

In that case the "other product" was an article of food as the eggs were to be used for baking purposes, but I do not see that such fact affects the force of the decisions as to the purpose of the act, which is to prevent the transportation in interstate commerce of adulterated articles which these eggs, within the definition of the lawmaking body, are conceded to have been.

Eggs released from the shell, and frozen or unfrozen, are an "article of food," and, if adulterated, their transportation in interstate commerce is prohibited, and the act says (section 7):

"That for the purposes of this act an article shall be deemed to be adulterated * * * in the case of food: * * * Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not," etc.

The fact that decomposed eggs ought not to be used for food or as an ingredient of some food article does not remove them from the category of adulterated article of food, they being within the statutory definition, nor does the fact that they may be used for tanning purposes. If the statute is to be construed so as to make it effective to prevent the interstate transportation of eggs, decomposed or partly decomposed, and hence unfit for human consumption, and thus carry out the intent and purpose of Congress, the eggs in question must be held to be within the operation of the act and subject to condemnation.

There will be an entry directing a verdict of condemnation and a judgment accordingly.

In re ELECTRON CHEMICAL CO.

(District Court, E. D. New York. November 28, 1913.)

1. BANKRUPTCY (§ 91*)—ACTS OF BANKRUPT—TRANSFER WITH INTENT TO PREFER.

Bankr. Act July 1, 1898, c. 541, § 3a2, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), provides that acts of bankruptcy by a person shall consist of his having transferred while insolvent any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors. *Held* that, where an involuntary bankruptcy petition is based on such act of bankruptcy, the burden of proving insolvency is on the petitioning creditors, provided the bankrupt appears and produces his books under section 3d, providing that, when a person against whom a petition has been filed as provided under the second and third subdivisions of the section takes issue with and denies the allegation of insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and give testimony concerning his solvency, etc., and in case of his failure so to attend the burden of proving his insolvency shall rest on him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 137-139; Dec. Dig. § 91.*]

2. BANKRUPTCY (§ 91*)—INSOLVENCY—EVIDENCE.

On an answer to an involuntary bankruptcy petition, seeking an adjudication for the making of an alleged preference, evidence *held* to require a finding that the alleged bankrupt was insolvent at the time the payment was made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 137-139; Dec. Dig. § 91.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Electron Chemical Company, alleged bankrupt. On objections to adjudication. Overruled.

William H. Clark, of New York City, for petitioner.

Briesen & Knauth, of New York City, for alleged bankrupt.

CHATFIELD, District Judge. [1] An involuntary petition was filed on September, 15, 1913, charging a preferential payment of \$600 on August 20, 1913. As this alleged act of bankruptcy is set forth in section 3, subd. a2, the burden of proving insolvency is placed upon the creditors if the alleged bankrupt appears and produces its books. Section 3d. Hence in this case the question of insolvency at the time of this payment is substantially the only issue involved.

The alleged bankrupt has appeared in court, submitted its books, and considerable testimony has been taken, from which it appears that the corporation began business without much capital. Whatever has been obtained since for capital stock has apparently been used in the payment of debts. One payment of \$2,500, from the money put in by the president and principal stockholder in return for his stock, went to the Butterworth-Judson Company, assignee to a petitioning creditor, whose account at that time was \$7,435.28, and at the time of the filing of the petition in bankruptcy is claimed to have amounted to \$7,481.32.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2] A statement of the assets and liabilities of the Electron Chemical Company was made up as of August 20, 1913, by the treasurer, as follows:

Assets.		Liabilities.	
Cash	\$ 235 16	Butterworth-Judson Co. ...	\$ 6,757 58
Merchandise	4,047 56	Other Creditors	3,089 51
Accounts receivable	5,279 02	Surplus	1,622 16
Auto truck	1,006 00		
Furniture and fixtures.....	687 72		
Unexpired insurance	213 79		
	<hr/>		<hr/>
	\$11,469 25		\$11,469 25

—and a further statement from the books was made up as of September 30, 1913, showing the following:

Assets.		Liabilities.	
Cash	\$ 211 75	Accounts Payable.	
Notes	54 00	Butterworth-Judson Co. ...	\$ 6,810 93
Merchandise	3,563 27	Other Creditors	2,199 98
Accounts receivable	4,415 27	Surplus	1,229 79
Auto truck ...	1,006 00		
Furniture and fixtures.....	687 72		
Stationery stock, etc.....	150 00		
Unexpired insurance	152 69		
	<hr/>		<hr/>
	\$10,240 70		\$10,240 70

By direction of the court during the trial, two appraisers have valued the assets on hand on November 15, 1913, and the testimony of one of these appraisers fixes the amount of \$2,745.14 for the entire personal property, including stock, furniture, fixtures, containers, and \$200 for the auto truck, said to be out of repair and in storage.

It was admitted on the record that the condition of the concern is no more favorable at the present time than it was upon August 20, 1913, while, on the other hand, no substantial reduction in assets is shown. The sale of merchandise in the ordinary course of business has resulted only in the increase of the bank deposit from \$235.16 to \$286.38. No salaries have been paid for some time.

The value of the auto truck is stipulated to have been not more than \$350 upon August 20th. None of the accounts receivable appear to have been collected since September 30th, and do not appear to be quick assets, nor shown to be good. The merchandise and the containers have depreciated from July 31st, when inventoried at \$4,546.73, to \$3,642.80, on August 20th, as estimated, or to \$3,563.27 on September 30th, as inventoried, and will bring, if sold at the present time, \$2,545, as testified by an appraiser designated by the court. Some of the furniture is not paid for and may not be the property of the company.

The appraiser testifies that he figured out the cost as nearly as possible and deducted 25 per cent. This would add \$636.25, giving a cost price of \$3,181.25, while Mr. Eissing's testimony that 20 per cent. represents gross profit would add \$636.25 more, giving \$3,817.50 as a gross sales price. It may be assumed for the purposes of testing in-

solvency that the capital stock is wiped out, but the obligation therefor is subsequent to the claims of creditors. The debts amounted to \$9,847.09 on August 20th. The item of insurance rebates, \$213.79, has not been gone into; but, taking this as an asset at the value given, we have a total as follows:

Insurance unexpired.....	\$ 213.79
Cash	235.16
Accounts receivable.....	5,279.02
Auto truck.....	350.00
Stock and furniture (actual value or cost price).....	3,181.25
Total	<u>\$9,259.22</u>

From this considerable reduction for bad accounts, some reduction for depreciation of the auto truck, and inability to realize on the balance of the insurance, reduce the net amount of assets still further, and bring them considerably below the liabilities, amounting to \$10,524.79 on August 20th.

The condition of insolvency on August 20, 1913, was therefore apparent, both in the sense that the corporation did not have cash or quick assets with which it could pay all its creditors, nor did it have sufficient assets when carefully estimated to show a surplus over its liabilities. The apparent deficit was sufficient to make it plain to the officers of the company (who were familiar with its affairs and must be held responsible therefor) that if payments were made on account of past indebtedness to creditors, the result would be to prefer them over creditors whose debts were not paid, if any unpaid creditor saw fit to object by charging an act of bankruptcy within the four months period.

It is evident that the stockholders and officers fear the result of liquidation in bankruptcy will be failure to completely pay the indebtedness and also a loss of the investment covered by their capital stock, but there seems to be no way of preventing such loss. To dismiss the petition in bankruptcy would not secure the creditors in any way, nor benefit the stockholders, who can apparently protect themselves only by way of a composition or purchase of the business in bankruptcy.

An order of adjudication may be entered.

UNITED STATES v. MISSOURI, K. & T. RY. CO.

(District Court, D. Kansas, First Division. January 13, 1913.)

No. 1,209.

MASTER AND SERVANT (§ 13*) — RAILROADS — HOURS OF SERVICE ACT — TELEGRAPH OPERATORS—"OPERATED NIGHT AND DAY."

A telegraph office of an interstate railroad company from which its operators send and receive orders relating to the movement of trains during 22 hours of each day is "operated night and day," within the meaning of the provision of Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1316 (U. S. Comp. St. Supp. 1911, p. 1321), that no such operator "shall be required or permitted to be or remain on duty for a longer period than 9 hours in any 24-hour period in all * * * offices * * * continuously operated night and day," nor for a longer period than 13 hours in offices "operated only during the day time." The intention to divide the offices into two classes, and requiring an operator in such office to remain on duty 10 hours each day of 24 hours, although not continuously, is a violation of the statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14: Dec. Dig. § 13.*]

At Law. Action by the United States against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff.

Harry J. Bone, U. S. Atty., of Topeka, Kan., and Monroe C. List, Special Asst. U. S. Atty., of Washington, D. C., for the United States.

John Madden and W. W. Brown, both of Parsons, Kan., for defendant.

POLLOCK, District Judge. This action was brought by the government against defendant railway company engaged in the carriage of interstate commerce to recover the penalty provided for violation of the provisions of section 1 of what is commonly known as the Hours of Service Act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1911, p. 1321]), which, among other matters, provides as follows:

Provided, that no operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four hour period in all towers, offices, places, and stations continuously operated night and day, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime, except in case of emergency, when the employes named in this proviso may be permitted to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week.

On issue joined, to facilitate hearing and determination, all parties have waived trial by jury and request the court to determine the matter on a stipulation of facts filed herein. Among other facts stipulated are the following: Defendant in the months of May and June, 1910, was a common carrier of interstate commerce. As such carrier it had a station and telegraphic office at Coffeyville, this state, from which its operators sent and received telegraphic communications gov-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

erning the movement of its trains engaged in interstate commerce. Its operators so employed at the time were O. O. Ryman and J. H. Webster. Regarding the hours of service of the operators so employed by defendant claimed to be in violation of that provision of the act above quoted, the stipulation of facts reads as follows:

The defendant required and permitted O. O. Ryman to be and remain on duty as such telegraph operator at said office and station as follows:

From 8 o'clock a. m. May 30, 1910, to 12 o'clock noon on said date; from 1 o'clock p. m. on said date to 7 o'clock p. m. on said date.

From 8 o'clock a. m. on May 31, 1910, to 12 o'clock noon on said date; from 1 o'clock p. m. on said date to 7 o'clock p. m. on said date.

From 8 o'clock a. m. on June 1, 1910, to 12 o'clock noon on said date; from 1 o'clock p. m. on said date to 7 o'clock p. m. on said date.

From 8 o'clock a. m. on June 2, 1910, to 12 o'clock noon on said date; from 1 o'clock p. m. on said date to 7 o'clock p. m. on said date.

The defendant required and permitted J. H. Webster to be and remain on duty as such telegraph operator at said office and station as follows:

From 7 o'clock p. m. May 30, 1910, to 12 o'clock midnight on said date; from 1 o'clock a. m. May 31, 1910, to 6 o'clock a. m. on said date.

From 7 o'clock p. m. on May 31, 1910, to 12 o'clock midnight on said date; from 1 o'clock a. m. on June 1, 1910, to 6 o'clock a. m. on said date.

It is thus seen the day operator employed by defendant at this station on May 30th to June 2d, both inclusive, was continuously on duty from 8 a. m. to 7 p. m., except 1 hour from 12 noon until 1 p. m., or 10 hours of service out of 11 consecutive hours. And Night Operator Webster, during the same period, extending to the morning of June 1st, a similar number of consecutive hours, except 1 hour from 12 midnight to 1 a. m., 10 hours of service out of 11 consecutive hours.

It is the contention of the government the stipulated facts show the Coffeyville office of defendant at the time to have been not a day office only within the intendment of the provision of the act above quoted, but a day and night office in which the operators of defendant company could be neither permitted nor required to serve more than 9 hours out of the day. Therefore the defendant has admitted its violation of the law as charged in counts 1 to 6, both inclusive, of the amended petition.

On the contrary, it is contended by defendant, as the 10 hours of service performed by its operators were not continuous, but were broken by the intervention of 1 hour, and as the office was not open for the purpose of telegraphic communications regarding the movement of trains from 6 a. m. until 8 a. m. each day, it was not a night and day office within the meaning of the section of the act quoted. That is to say, it is the contention of defendant neither the hours of service of its employes nor the operation of its Coffeyville office were so continuous as required by the act to make it both a night and day office.

From the facts as stipulated I am of the opinion, on both authority and the very reason of the matter, defendant has violated the act as charged in counts 1 to 6, inclusive, of the amended petition.

In the passage of the act in question the Congress had in view the safety of both those traveling on and those engaged in operating interstate railway trains, to be accomplished by affording protection against

the uncertain working of the minds of its employes overtaxed by long-continued service, loss of sleep, etc. In so providing it classified the offices in which telegraphic operators engaged in handling train orders worked as day offices only and those open for the transaction of such business during both the day and night. As to the latter class, it limited the hours of service of such operators to 9 out of 24. As to the former class, where the office was open for business only during the daytime, it limited the hours of service of such operators to 13, unless in case of emergency the period of service should be extended to 17 hours without violating the statute. Such appears to be the reasonable construction of the act and the one given, at least in principle, from those courts in which it has received consideration. *United States v. A., T. & S. F. Ry. Co.*, 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361; *United States v. St. L. & S. W. Ry. Co. of Texas* (D. C.) 189 Fed. 954.

It follows judgment must enter in favor of plaintiff and against defendant on counts 1 to 6, inclusive, of the amended petition. Counts 7 and 8 are dismissed.

The amount of the penalty to be assessed against defendant on the several counts will be determined, and judgment will be entered therefor on the first day of the regularly ensuing term of this court.

It is so ordered.

In re GRAY et al.

(District Court, E. D. Pennsylvania. November 18, 1913.)

No. 3,882.

BANKRUPTCY (§ 354*)—PARTNERSHIP—INDIVIDUAL ASSETS—PARTNERSHIP CREDITORS—RIGHT TO SHARE.

Partnership creditors are entitled to share ratably with individual creditors in the individual assets of the bankrupt, where the partnership and the individual partners are all insolvent and there are no partnership assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 555-564; Dec. Dig. § 354.*]

In Bankruptcy. In the matter of bankruptcy proceedings of William J. Gray and others, individually and trading as William Gray & Sons On referee's certificate to review an order denying a right of partnership creditors to share in the individual assets of one of the partners. Reversed.

J. Frank Staley and Lewis, Adler & Laws, all of Philadelphia, Pa., for Farmers' & Mechanics' Nat. Bank.

Homer G. White and Frank R. Savidge, both of Philadelphia, Pa., for Ridge Avenue Bank.

J. B. McPHERSON, Circuit Judge. The question here presented is this:

Where a partnership and the individual partners are all insolvent and all in bankruptcy, and where no partnership assets are available

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

for distribution among partnership creditors, have such creditors the right to share *pari passu* with the separate creditors of one partner in the net proceeds of his separate property?

The point was not raised before the referee, and naturally he did not consider it, but followed the general rule, and did not permit the partnership creditors to share in the fund produced by the separate property of one of the partners, since the fund was insufficient to satisfy the separate creditors. But the question is now raised, and must be decided. In passing I may observe that some uncertainty seems to exist about the date when the certificate was asked for. The petition therefor was not filed with the referee until September 26, 1913, and, if his order was entered on September 11, this would be in violation of the rule of the District Court (rule of December 10, 1904), which requires such a petition to be filed within 10 days; but, if the order was entered on September 17, the petition would be in time. As already stated, the date is in some doubt, and as no objection has been made to the certificate on this ground I understand the delay to be waived, if it exists at all, and shall therefore pass over whatever irregularity of practice may have taken place.

The principal question is not open to discussion in this circuit; it has been settled by the case of *Conrader v. Cohen*, 121 Fed. 801, 38 C. C. A. 249, affirming the decision of Judge Buffington, who was then in the District Court (*Re Conrader* [D. C.] 118 Fed. 676). The syllabus of *Conrader v. Cohen* correctly states the point decided:

"Partnership creditors are entitled to share ratably with individual creditors in the individual assets of the bankrupt, where there is no partnership estate and no solvent partner."

It is true that the partnership there was not in bankruptcy, and that the only fund before the court for distribution was the fund produced by the separate estate of one partner; but, as I understand the reasoning of the opinion, it proceeds upon the ground (which was established by the evidence) that no solvent partner existed, and no partnership property, either in court or out of court. It does not proceed upon the ground that only one fund was in court, namely, the separate estate of one partner, but upon the ground that the court knew that no firm property was to be found anywhere, and no solvent partner.

The question has been long in dispute, and has been decided differently by other courts. *Re Wilcox* (D. C., Mass.) 94 Fed. 84; *Re Henderson* (D. C., W. Va.) 142 Fed. 588, affirmed (C. C. A., 4th Circuit) 149 Fed. 975, 79 C. C. A. 485; *Re Janes* (C. C. A., 2d Circuit) 133 Fed. 913, 67 C. C. A. 216, certiorari refused, sub nom. *McNabb v. Bank*, 198 U. S. 583, 25 Sup. Ct. 802, 49 L. Ed. 1173. But *Conrader v. Cohen* is, of course, the rule of decision for this circuit. The recent case of *Re Knowlton & Co.* (C. C. A., 3d Circuit) 202 Fed. 480, 120 C. C. A. 610, has no application; in that case there were two funds for distribution.

The order of the referee under review must be reversed, with instructions to make distribution in accordance with this opinion.

PENNSYLVANIA R. CO. v. GOUGHNOUR.

(Circuit Court of Appeals, Third Circuit. November 29, 1913.)

No. 1,746.

1. MASTER AND SERVANT (§ 204*)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—NEGLIGENCE OF FELLOW SERVANT.

In an action for injuries to a freight conductor under the federal Employers' Liability Act, plaintiff cannot be held to have assumed the risk of the negligence of his flagman, his fellow servant, in failing to protect the rear of the train while standing on a main track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546; Dec. Dig. § 204.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

2. MASTER AND SERVANT (§ 247*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

A freight train having stopped on a main track in the railroad yard, the engine was run to a position in the rear of the caboose, with the intention of being coupled to the rear of the train, when the flagman notified the conductor that there was no air hose on the front of the engine. The conductor stated that he would procure a hose and attend to coupling the engine, and both left the caboose immediately. In a few moments, while the conductor was between the engine and the caboose attending to the coupling, the engine was struck by a train coming up from behind, resulting in injury to the conductor; the flagman not having performed his duty to protect the rear end of his train. *Held*, that the flagman's negligence in omitting to promptly perform such duty, as distinguished from the conductor's negligence in failing to see that the flagman's duty was performed, was the proximate cause of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 795-800; Dec. Dig. § 247.*]

3. MASTER AND SERVANT (§ 180*)—INJURIES TO SERVANT—NEGLIGENCE—RAILROADS—REAR OF TRAIN—FAILURE TO PROTECT.

Where a freight conductor was caught and injured between his engine and the caboose by the engine being struck by a train approaching from the rear, due to the flagman's failure to protect the rear end of the train, the flagman's negligence, under the federal Employers' Liability Act, was the negligence of the railway company as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-361, 363-368; Dec. Dig. § 180.*]

4. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—RAILROADS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where a freight conductor was injured while attempting to couple his engine to the caboose by the engine being struck by another train approaching from the rear, due to the negligence of the conductor's flagman in omitting to protect the rear end of the train, the conductor's alleged contributory negligence in failing to see that his flagman performed his duty to so protect the train *held* properly submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

5. TRIAL (§ 296*)—INSTRUCTIONS—CURE BY OTHER INSTRUCTION.

Where a freight conductor was caught and injured between his engine and the caboose by the engine being struck by a following train, and the court properly submitted the question of the conductor's contributory negligence in failing to see that the flagman performed his duty to protect the rear end of the train to the jury, a charge that if, under the circumstances,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 208 F.—61

the conductor's negligence contributed either in whole or in part to the injury, the jury, under the federal Employers' Liability Act, should reduce plaintiff's recovery pro tanto, the court did not err in affirming one of plaintiff's points that the conductor was entitled to assume, when he went between the engine and the caboose, that the flagman would obey the rules of the company and perform his duty to flag the following train.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

In Error to the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Action by Dick E. Goughnour against the Pennsylvania Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Patterson, Crawford & Miller, of Pittsburgh, Pa., for plaintiff in error.

W. Clyde Grubbs and Edwin T. Levengood, both of Pittsburgh, Pa., for defendant in error.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. The action below was to recover damages for personal injuries sustained by reason of the alleged negligence of the defendant company, in whose service at the time of the injury the plaintiff was employed as a freight conductor. There was a verdict in favor of the plaintiff, to the judgment on which this writ of error was sued out by the defendant.

Speaking of the parties before us as they stood in the court below, the plaintiff was employed as a freight conductor by the defendant. On November 26, 1910, a freight train of the defendant, under his charge, was moved from Conemaugh, in the state of Pennsylvania, to Conway, in the same state, arriving at the latter place at about 5 o'clock in the morning of November 27th. It is admitted that the train thus moved was engaged in interstate commerce. When the train, consisting of some 47 cars, arrived in Conway yards, the morning was dark and foggy. The track on which the train stopped was a running track; that is, trains ran through the yard upon it. Upon stopping, the engine was cut loose from the front of the train and, running around through the yards, which were extensive, came up head on behind the caboose in which the plaintiff and the flagman were sitting. The testimony tends to show that they had remained in the caboose together from the time the train stopped until the engine came up in the rear, to be coupled to the caboose,—a period of from six to ten minutes. Upon the arrival of the engine at the rear of the caboose, the flagman went out to couple the engine, for the purpose of drilling some of the cars of the train, but came back immediately and told the conductor that there was no air hose on the front of the engine. The evidence tends to show that both the conductor and flagman immediately left the caboose, the conductor saying that he would procure a hose and attend to the coupling of the engine. Shortly after

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

they had thus separated—how long, the evidence does not certainly establish—while the plaintiff was between the engine and the caboose attending to the coupling, a train coming from behind, on the running track on which the plaintiff's train was, struck the tender of the engine with such force as to wreck or damage several cars and so crush the plaintiff between the engine and the caboose as to inflict the injuries that are complained of.

The plaintiff testifies that, when he and the flagman left the caboose, he did not see or know where the flagman went. As a matter of fact, the flagman did not attend to his duty of flagging the rear of his train, in consequence of which neglect it is admitted the collision occurred.

The case was brought and tried under the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), the plaintiff contending that the negligence of the flagman in not protecting the train was the proximate cause of the accident, for the consequences of which, under the act, the defendant was liable. It is contended by the defendant that the proximate cause of the accident was the negligence of the plaintiff in not seeing, as master and controller of the train crew, that the flagman performed his duty, and that inasmuch as the flagman was in the caboose with plaintiff for as long as from six to ten minutes after the train stopped, the plaintiff, by his acquiescence in such conduct, "assumed the risk" of the flagman's negligence; meaning thereby that the plaintiff, who was the master and controller of the train crew, by his acquiescence in this conduct of the flagman, in plain violation of his duty and the rules of the company, was guilty of contributory negligence, and therefore cannot recover. This contention was the substance of the defense and the issue upon which the determination of the case turned, although there was some confusion in the argument in the use of the phrases "assumption of risk" and "contributory negligence."

[1] Under the act above referred to, the plaintiff did not assume the risk of the negligence of his fellow servant, such negligence being that of the master, which is never assumed by the servant. In common parlance, however, the reckless disregard of a casual danger is often spoken of as an assumption of risk by the party exposing himself thereto, although it is not the ordinary assumption of risk implied in the original contract of employment.

[2] In this case, from the evidence disclosed by the record, there seems to have been no ground for dispute that the proximate cause of the accident was the neglect of the flagman to promptly perform the peremptory duty imposed upon him of flagging his train in the usual way. As a matter of fact, it appears from the flagman's own testimony that he did not flag the train at all, even after he got out of the caboose with the plaintiff. As we have said, this negligence was of course imputable to the defendant. Both by the rules of the company and by the character of the service in which the crew of a train is engaged, the necessary relation of the flagman to the conductor is that of a subordinate to his superior. Undoubtedly, the conductor was bound, if the flagman was, to his knowledge, neglecting his duty, to admonish him thereof and see, so far as it was possible, that he performed it.

The safety of the traveling public, as well as of the employes upon such trains, demands that the exigence of these important duties of the flagman and the conductor should be recognized and enforced at all times and upon all occasions.

The important question, then, was whether the conduct of the plaintiff, as evidenced by the testimony, was such as to establish in the opinion of the jury, his knowledge of and acquiescence in the failure of the flagman to properly perform his duty in protecting the train. Though, as we have said, there seems little, if any, room for controversy as to the negligence imputable to the defendant, there was some controversy as to how far the conductor's attention was drawn to the presence of the flagman in the caboose or to his whereabouts after he left the same. On these important points the learned judge of the court below submitted the case to the jury, as follows:

"But the defendant says that not only was the defendant not guilty of negligence, but that the conductor of the train, this plaintiff, was guilty of such negligence as not only contributed in part to, but was the entire cause of the accident. You will recollect the evidence upon that question. The burden is upon the defendant now to satisfy you by the weight of the evidence that the plaintiff was guilty of contributory negligence.

"You understand your first inquiry is, Was the defendant guilty of negligence? The negligence being the alleged conduct of the flagman in not flagging the train, with all the evidence that surrounds that. The burden then shifts to the defendant, if it alleges contributory negligence, and the defendant must then satisfy you by the weight of the evidence of the contributory negligence of the plaintiff, and to what degree it contributed to the accident. And I say to you as a matter of law that you must determine that proportion. If it contributed, we will say, to the extent of one-fourth, then the damages would be reduced by one-fourth, if to one-half, then by one-half. If the contributory negligence of the conductor, this plaintiff, was the cause of the accident, then of course that would wipe out the damages.

"Now, the defendant has shown its book of rules, and that book of rules puts certain duties upon the flagman and certain duties upon the conductor. You will take those rules and consider them, and find what bearing they have upon this negligence or contributory negligence. You will take into consideration such evidence as has been offered by the defendant, and consider it in the light of such evidence as has been offered by the plaintiff, as to the length of time the train remained there, as to the evidence of the conductor and the flagman being in the caboose together, as to how they left the caboose, what the conductor went about, what the flagman went about, what knowledge the conductor had of the conduct of the flagman; take into consideration whether or not the flagman, with the knowledge and consent of the plaintiff, remained there, instead of performing his duty; that is, how far did the conductor's conduct, so far as has been offered in evidence, contribute to the flagman's remaining there. You will take all the evidence surrounding—there is not a great deal of it—but you will take all the evidence surrounding the time of the accident, from the time the train reached the running track, the time consumed by the engine coming around on track 98 and passing over the switches and coupling up, all the conductor and the flagman did up until the time the conductor went in between the cars—the locomotive and the caboose—to put on the air hose; you must consider all that testimony and from it determine whether or not this plaintiff contributed to the injury which came to him; and determine in what proportion it contributed, whether in part or in whole. If in part, then what part. And if altogether, then there could be no verdict for the plaintiff, because the amount to be deducted if his contributory negligence was the sole cause of the accident, would wipe out the damages."

[3] It is to be observed in this charge that it was too favorable to the defendant, in submitting as an open question to the jury, whether

the defendant was or was not guilty of negligence, it having been shown by the flagman's own testimony that he made no attempt to perform his duty of protecting the train, a neglect which, under the law applicable to this case, was, as we have said, clearly imputable to the defendant. But we are of opinion, after a careful reading of the charge in regard to the contributory negligence of the plaintiff, that that question was not unfairly presented to the jury. It is true that the learned judge might have dwelt with somewhat more emphasis on the fact of the flagman's presence in the caboose and of the importance of the testimony in that regard. These facts, however, were not overlooked and were called to the attention of the jury, in language sufficiently plain and direct to satisfy the requirements of the case, if the motion for peremptory instructions in favor of the defendant, under the pleadings and the evidence, were properly refused; the refusal being the subject of one of the two assignments of error with which we are here concerned.

[4] While the question is a close one, we think the weight that should properly be given to the exercise of his discretion by the trial judge justifies us in declining to support the assignment of error in this regard. There does seem some ground to question how far the plaintiff's attention under the circumstances was challenged by the presence of the flagman in the caboose. The plaintiff was said to be busily engaged in writing his reports, or some other matter connected with his business, during the interval between the stopping of the train and the coupling of the locomotive, and as the trial judge thought there was a question to go to the jury in the premises, we do not feel at liberty to reverse this judgment and set aside the verdict of the jury, on the ground that there was no evidence that would justify the same.

[5] The second assignment of error is tantamount to the one we have just been considering. The only other assignment is, that the court below erred in affirming the following point of the plaintiff:

"That the plaintiff had a right to assume that the flagman would obey the rules of the company and perform his duty."

As an abstract proposition, this is true. The court did not use this language in its charge, and we do not think that, taken in connection with what was actually said by the trial judge, as above quoted, in regard to the question of contributory negligence, there was any harmful error in affirming said point. It was in effect saying to the jury that, though the conductor had a right to assume that the flagman would perform his duty, his knowledge of and acquiescence in the nonperformance of it, would be contributory negligence on the part of the plaintiff, and would prevent any recovery for the negligence of the defendant.

We think, therefore, that the judgment below should be affirmed.

THE BABIN CHEVAYE.

(Circuit Court of Appeals, Ninth Circuit. November 3, 1913.)

No. 2,185.

1. SHIPPING (§ 132*)—DAMAGE TO CARGO—LIABILITY OF VESSEL.

Under a charter party, stipulating that the vessel is tight, staunch, strong, and in every way seaworthy and fitted for the voyage, but exempting the owner from liability for loss or damage to cargo through perils of the sea, etc., the obligation of the owner is to furnish a vessel which satisfies such requirements to a reasonable degree, and not merely to exercise due diligence to do so; and, where it is shown that the cargo was damaged by the entrance of sea water into the ship during the voyage, the burden is cast upon him to avoid liability to prove, not only seaworthiness, but that the damage was attributable to perils of the sea, or otherwise within the exceptions.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471-487; Dec. Dig. § 132.*]

2. SHIPPING (§ 132*)—DAMAGE TO CARGO—LIABILITY OF VESSEL—PERILS OF THE SEA.

Damage to cargo from sea water on a voyage from Antwerp to Portland, Or., held not due to the unseaworthiness of the vessel, by reason of improper stowage or defective construction or caulking of the decks, but to perils of the sea within the exception in the charter party, it being shown that the vessel encountered unusually stormy weather, not ordinarily to be anticipated, lasting several days, during which she was severely strained and injured, seamen were injured, and others washed overboard and lost, and water entered through the little hatchway into the sailroom, and from there into the cargo.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471-487; Dec. Dig. § 132.*]

Loss by perils of the sea, see notes to *The Dunbritton*, 19 C. C. A. 465; *Southerland-Innes Co. v. Thynas*, 64 C. C. A. 118.]

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit in admiralty by George H. C. Meyer, H. L. E. Meyer, Jr., J. W. Wilson, and John M. Quaile, partners as Meyer, Wilson & Co., against the barque Babin Chevaye; Bureau Frères & Bailergeau, claimants. Decree for claimants, and libelants appeal. Affirmed.

Wood, Montague & Hunt, of Portland, Or., for appellants.

Snow & McCamant, of Portland, Or., for appellees.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. This is a libel to recover damages to cargo sustained at sea while in transit upon the French barque Babin Chevaye from Antwerp, Belgium, to Portland, Or. The cause of damage relied upon is unseaworthiness of the ship at the time of entering upon her voyage in three particulars: Improper stowage, insufficient caulking of the main deck, and structural deficiency, in that two small hatches pierced the main deck, which could not be and were not battened down. The District Court found against libelants, and they appeal.

Some question is made relative to the sufficiency of the libel as to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

whether it definitely sets forth all these causes of injury to the cargo, and especially the latter. An amended libel was filed, and it is objected that this is irregularly in the record. However this may be, we will waive all such objections, and pass at once to an investigation of all the alleged causes of injury now insisted upon.

The Babin Chevaye is an iron ship built in 1901. She set sail from Antwerp February 16, 1909, by way of Cape of Good Hope, and arrived at Portland August 23d. The cargo consisted of steel, pig iron, cement, coke, coal, talcum, ocher, Venetian red, and other commodities, water and provisions, aggregating about 2,974 tons, which was stowed about 954 to 960 tons between decks and 2,020 tons in the lower hold. The captain of the ship, who was an experienced mariner, kept watch of the manner of stowage while the vessel was taking on cargo, and he considered that she was well loaded, "and that the weights were properly distributed, so not all the heavy cargo was in one point."

R. R. Baines, a marine surveyor of many years' experience in loading vessels, and especially ships of the type of the Babin Chevaye, supervised the loading of the cargo in question. He enters into much detail touching the manner in which the loading was done, indicating that great care was observed concerning it, and manifestly it was his earnest endeavor to take care that it was done properly.

M. A. F. Rehel, the first mate, also supervised the stowage, and gave evidence respecting the particularity with which the work was done, and attests the proper distribution of the cargo.

Now, against this testimony is that of Captain Hoben and Mr. Tucker. The former says:

"As far as I seen, the cargo, in my opinion, was properly stowed, but I wouldn't consider from my knowledge of this ship in general, and the appearance of the ship, and the working of the ship, and what I have seen of the ship that the cargo was properly distributed."

He then gives his reasons for the opinion. And Tucker says:

"I was of the firm opinion there was not sufficient cargo stowed in the between decks."

These witnesses live in Portland and saw the vessel only after her arrival at destination. As corroboration of improper stowage is the fact, which is admitted by the officers of the ship, that she labored and strained greatly while in heavy seas. Albert Crowe, a seaman of long experience, was of the opinion that a variance of from 50 to 75 tons distribution as between-decks and the lower hold would make no particular difference in the action of the ship while in navigation.

Without further detail of the testimony we are clear as we view its effect that improper stowage and distribution of cargo was not a fault contributing to the damages complained of.

Let us next inquire: Was the Babin Chevaye otherwise seaworthy?

Captain Lebeaupin declares that the ship when she left Antwerp was staunch, strong, and seaworthy. This is a conclusion of fact, and it must be determined whether the evidence supports it. Lebeaupin further testifies that the vessel was examined by a surveyor of the Bureau Veritas and two deep-sea captains and himself. She was put in dry dock, and all rivets gone over to see if they needed repair, and thor-

oughly cleansed and painted with two coats on the outside. Her deck was examined, and so of her anchors and anchor chains. Her stanchions were all found to be in good condition, except one which required new rivets. These were supplied, and were in good condition when she sailed; Lebeaupin giving careful personal attention to all these matters. The witness further asserts that he went all over the ship while she was in dry dock, examined the deck and seams with his knife, went abaft and examined the rigging, and directed a repair of one of the masts, which was complied with, and that when the ship sailed everything had been found in good condition, and had been repaired as ordered by the different surveyors. Her deck was in good condition, practically water tight, her poop deck the same, and her hatches were thoroughly secured. On cross-examination the captain says:

"I went together—was accompanied by my first mate, and we went over the entire deck from fore to aft; we went over all the seams, and if there was a seam that appeared doubtful, I made an incision with my knife to find if the oakum was in good condition, or needed repairing, and if there was a soft place, I went down in the hold to see if there was a leak."

Emile Garnuchot, an inspector of the Bureau Veritas, testifies that he made examination of the Babin Chevaye for classification, afloat and in dry dock, in January before sailing, and that certain things were done under his direction, among others, she was dry docked and cleaned and given two coats of paint; her tenth frame from the after bulkhead, which had been broken in three places, was repaired, one stanchion at the fore part of the fore hatch being found in a very bad state was repaired. Some rivets in the stanchions were also replaced. He furthermore inspected the cement in the bottom, and found the same in good condition; inspected the decks and the caulking, the masts and anchors, and all were in good condition. He further states:

"It was not possible for leakage in the poop deck to damage the cargo of the Babin Chevaye; otherwise not only the poop deck must have leaked (and this was in order as per my survey), but also the main deck must have leaked, which was also in order. The main deck is protected by the poop deck."

On cross-examination he relates that he made the general examination of the decks, examined the main deck, poop deck, and forecaskle deck by sounding the seams; and, further—

"when it is stated that a deck has been examined, this means that it has been inspected from fore till aft, to starboard and to port, in such a way as to examine every part of the deck completely. This is what I mean by having inspected the decks. This inspection of the decks on the decks was completed by the inspection of the decks in the holds, where I examined underneath to see if there were no leaky rivets. I found none, and the caulking was in good order. * * * I did examine all of the seams of the main deck as explained in my answer to question No. 9. * * * I examined all the stanchions, and examined if the top and bottom rivets were tight. * * * I followed the repairs and made sure that they were done in good condition. * * * The poop deck is over a portion of the main deck, and, the main deck being caulked and in good condition, any leakage through the poop deck could not have reached the cargo unless through straining of the main deck, that also had leaked; but, as already stated, when the vessel sailed the

caulking both of the poop deck and of the main deck was in good and seaworthy condition."

Baines testifies that he found her decks tight from below and on deck.

"I was on the lookout for any suspicious places or signs, but found her caulking good, and decks generally in good condition. * * * I found nothing wrong with stanchions, and no rivets in them deficient. * * * She was in good condition and appeared to be seaworthy."

On cross-examination, he says:

"Whenever and wherever the main deck was clear, I would look at the seaming, and if any place looked suspicious, would try it with my knife, and, where covered with crew's quarters, would get inside and see whether the seams were filled."

And, further:

"My examination was made more particularly in order to be conscientiously enabled to certify that her caulking was good and her decks tight for the intended voyage. I was instructed in order to make sure that the vessel was thoroughly seaworthy before her voyage as to stowage of cargo."

This testimony indicates quite clearly the care that was taken by the master and the representatives of the Bureau Veritas to determine whether the Babin Chevaye was seaworthy before she entered upon her voyage. It further appears that the decks were caulked with oakum and putty; the captain preferring putty for the purpose. Hot weather has the effect to dry out both these ingredients. While in the Equator, and soon after passing that region, the captain discovered a few leaks in the seams of the poop deck, which were repaired at sea, by which the deck was again rendered water tight. Prior to this time the vessel had not encountered severe weather, the first experience being on April 18th in latitude 43 degrees south. On this day the sea ran high, and the deck was constantly covered with water. Again on the 29th the wind was strong, the waves continuously broke over the ship, and the deck was constantly full. On May 1st the vessel experienced severe strain because of the violence of the sea; the deck was constantly swept by the sea, causing fears for the safety of the cargo. This condition of the water and sea continued on the 2d. Again on the 4th the wind was strong, quoted in the log as nine; the maximum being 12. And on the 5th the storm continued, heavy seas breaking over the ship so that the deck was constantly full from starboard to portside. At 5 p. m. the storm increased in violence, the seas covering the deck from one end to the other, so that it became necessary to allow the ship to sail with the waves. On the 6th the storm yet increased to great severity, which will be noted later, but up to this time the pumps were absolutely clear, indicating that no water of any proportions had entered the vessel.

When the vessel arrived in Portland it was discovered that some of the iron and steel, and about 224 barrels of the cement, had been damaged by sea water; the amount of damage being light as compared with the entire cargo, aggregating \$1,491.25. None of the other more perishable merchandise of which the cargo was composed seems to have been materially injured.

Captain Hoben, a marine surveyor for the San Francisco Underwriters, made survey of the vessel after her arrival in Portland, and required that her decks be recaulked before he would give a certificate of seaworthiness. He says he did not find her in good enough condition to satisfy him, and that the main deck was soft in general, it being patched up considerably in places on the way out; that he went below and found leaks—

"principally all over the deck, and a great deal of water coming down from the bulwark stays, which was—the cement was cracked around the heel of them, and some rivets were loose at the time. I think some of them had been replaced, but still there was some of them loose around the bulwarks, in the heel of the bulwark stays, but the cement was away, plenty on each side."

He further testifies that after the cargo was discharged he found two beams fractured on the port side abaft of the main mast, at the inside end of the gusset. This he thinks was done on the voyage. The whole of the main deck combings of the face of the cabin and the combings of the forecastle head were gone over in making the repairs, and, as detailed by another witness, one thread, sometimes two, of the oakum used in caulking, there being 5 or 6 in number, was taken out and the seams repaired; the oakum removed having lost its texture and become decayed.

This testimony bears upon the seaworthiness of the ship at the time of sailing from Antwerp. We reserve comment until we have further examined into the testimony relating to the question whether the injuries sustained by the ship and cargo are referable to the perils of the sea, as the latter subject will further elucidate the first.

Picking up the thread of the voyage from May 5th, the captain relates that on the 6th the sea was literally mountain high; the decks were absolutely covered with water; at 7 a. m. the wind was blowing a gale, and the breakwater on the main hatch was carried away; the ship answered the helm, however, and the pumps were clear. At noon the storm abated somewhat, but at about 3:20 p. m. the vessel was caught by two tremendous waves. The first lifted the bow high out of the water, and while the stern was down, the second landed on the poop deck, broke in the steering box, broke a few spokes in the wheel, smashed the door of the chartroom, carried away everything in the chartroom, maps and everything movable. The water descended the staircase and covered all the quarters and the saloon a foot deep. Two men at the wheel were carried away; one was found a little distance off with his arm broken, and the other was swept over the entire poop deck, and recovered at the bottom of the staircase with a broken leg. The carpenter was carried away, and was found near the rail with his legs protruding overboard and his jaw smashed. The first mate and boatswain, being near the wheel, secured it, and thus prevented the loss of the vessel. Later two men were found to be missing, and were never recovered. When the water was removed from the quarters and saloon it was found that it had leaked down from the sailroom to the between-decks. In describing how the water went through into the cargo, the witness says:

"The water came over here, over the poop deck, stove in the door of the chartroom and the wall, went down the staircase, and there was one foot here; in the aft quarters was one foot of water. The water went down the little hatch in the sailroom, and got into the between-decks, and it has dispersed itself over the entire between-decks, over the steel, because in between-decks there is a large plate of iron to reinforce the vessel, and the water has followed this plate further than half the vessel—the middle of the vessel. * * * Q. State what the hatch leading down into the sailroom and the storeroom is used for. A. Nearly every moment we have to go down there, either for provisions or for sails, or for material to make repairs and at the time that this water came down the hatch—came down the staircase—one man had just opened this little hatch and was down there to get something to repair the sails that had been torn. Q. Is it possible, in the practical navigation of such a vessel as the Babin Chevaye, to keep that particular hatch battened down? A. No; we couldn't do that, because we have to pass through it too often, and it is very seldom that any water would go down there except in case of an accident. Q. What was the construction of the wall and door of the chartroom prior to the time when this storm was encountered? A. The door and wall were in good condition, and in the eight or nine years that the vessel had been at sea there had never been any damage done to it. Q. What was the condition of the wheelhouse prior to the time that this storm was encountered? A. Very good condition also, and additionally secured with ropes, tied down."

Temporary repairs were made as soon as the same could be done, which was the next day. Speaking of the door of the chartroom, witness continues:

"It is very seldom that water is shipped on the poop deck, but as it was, it was properly repaired, but probably not absolutely water tight, because the door had to be removed once in a while, whenever anybody had to pass."

On the 7th the weather improved somewhat, but the seas were still running high, and it was impossible to gain headway. On the 8th of May the gales continued, considerable rolling, the vessel strains very much, as well as the rigging and the masts, obliged to sail with the wind, and the decks are absolutely full during the entire day. At this time the pumps show about 5 centimeters, an inch and a half, of water in the hold. The weather continued on the 9th as on the 8th, the vessel strains heavily and seas break over her. On the 10th the weather improved, but the vessel still suffers from severe rolling on account of the mountain high seas which strain her. On the 12th the captain declares:

"Weather awful. Very heavy sea, taking the ship from side to side, and straining enormously the masts and rigging. Violent shocks felt through the heaving rolling, shocking ship from stem to stern. The deck is completely full. * * * I mean by that that the deck is entirely covered up to the bulwarks, and that the water runs over the hatches, and that the deck—that the vessel ships water from the lee side as well as from the off side—what do you call that?

"Mr. McCamant. The wind side."

At 9 p. m. the wind veered from west to northwest, the vessel shipped water, but in the meanwhile the poop ladder was carried away, as well as the covers to the life boats. The third tarpaulin of the main hatch was carried away, and also the tarpaulin of the main hole of the pump. The two other tarpaulins on the main hatch remained intact. The port side of the deckhouse was also indented. On the 13th the seas

were still high, and the rolling continued, the deck being completely flooded, and on the 14th the captain relates:

"The weather improves considerably, and we can get on the deck, and as soon as this was possible, I made an examination of the vessel with the officers of the watch. The cement of the stanchions around the main hatch was broken, and the bulwarks have been stove—have been bent toward the main hatch, and the majority of the rivets of the stanchions have been broken in this particular place. One had entirely parted, causing considerable leak, which had made an opening there during the 48 hours, during which time the storm lasted. * * * During this 48 hours the decks were completely flooded, and it was impossible for anybody to be on deck."

On the 15th the pumps showed 20 centimeters of water in the hold, but on the 18th they were clear. Speaking of the character of the weather between April 29th and May 20th the captain declares:

"I never saw such severe weather, and such severe storms and high seas as on that trip, particularly such a long time."

The vessel anchored at Hobart Town May 29th, where the necessary repairs were made. The captain says:

"All of the rivets and stanchions had been repaired, and in order to examine the leaks in the deck we had fire hose turned on the deck, and one of the mates was sent down in the hold to see if there was any leaks, and in those places where any leak was suspected or noticed the deck was entirely recaulked in that place."

After leaving Hobart Town severe weather was again encountered, but we need not examine as to that, as no casualties are attributed to it.

The captain further relates that in the fall of 1909 he carried a full cargo of wheat to Europe; on the return voyage he carried another to Portland, and again returned to Europe with another cargo, all by the way of Cape Horn, and experienced no damage or loss upon the voyage.

Upon cross-examination Captain Lebeauvin further testifies:

"Q. What is the name of this hatch in the storeroom which was left open? A. It is called the hatchway of the sailroom. Q. Will you point this out to the court and to me, too? A. On each side of the vessel there is a small hatch like that. Q. And were they both open? A. The one in the sailroom was open, but the other one was closed, but not secured, or not water tight.

"Mr. McCamant. Not battened down? A. Not battened down. Q. And those go through the main deck, do they? A. Yes. Q. Trace the path of the water from the big wave through the chart room—how would it reach this hatch? A. Smash in this door here, and this, the inside wall, and into the chartroom, fill up the chartroom, went down the staircase, filled up all the saloon and the apartments here and the storeroom, came down this little hatch into the sailroom, and followed along the iron plates there between decks, dispersed in the hold. Q. Now, Captain, had you anticipated all of your upper works being carried away, and the sea constantly breaking over you here, you would have had that hatch closed, wouldn't you? * * * A. If that would have happened, why the chances are that the whole vessel would have gone down. * * * Q. Well, couldn't you make those two hatches water tight? A. You would have to make changes. Q. In the ship? A. They are on the same level as the deck, so I can't put any air tightening on it unless I would nail it down, but then it would prevent me from getting down there to get my provisions. Q. No combing then? A. No."

The testimony of Captain Lebeauvin is fully and elaborately corroborated by M. A. F. Rehel, the first officer, and F. M. Greenappin, the second boatswain. We need not incumber the record further by reiteration.

[1] The libel avers and the answer admits that it was agreed under the charter party that the "barque was tight, staunch, strong, and in every way seaworthy and fitted for the voyage she was about to undertake." But it was further stipulated that the owners should not be liable for any damage sustained by the act of God, perils of the sea, and accidents of navigation. Under this charter party there can be no doubt that the owner's obligation was to furnish a seaworthy vessel. This includes proper stowage and distribution of the cargo. The obligation is not that the owner will exercise due diligence to see that the vessel is well fitted, equipped, and stowed to undergo the ordinary hazards and dangers to be anticipated, but that she is reasonably fit to undergo the intended voyage, which implies that she is tight, staunch, and strong, so as to be competent to resist all ordinary action of the sea and to prosecute and complete the voyage without damage to the cargo under deck. *Dupont de Nemours & Co. v. Vance et al.*, 19 How. 162, 167, 15 L. Ed. 584; *The Edwin I. Morrison*, 153 U. S. 199, 14 Sup. Ct. 823, 38 L. Ed. 688; *The Caledonia*, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644; *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181; *The Medea*, 179 Fed. 781, 792, 103 C. C. A. 273; *The Indrapura*, 190 Fed. 711, 112 C. C. A. 351; *The Ninfa* (D. C.) 156 Fed. 512.

[2] Where damage to cargo has been sustained by admission of sea water into the ship during the voyage, and this fact is established, the burden is cast upon the owner, under a charter party such as has been entered into here, to show not only seaworthiness, but that the cause of damage is attributable to perils of the sea, such as come within the purview of the stipulated exceptions. This proposition we understand to be fully conceded by proctors for appellees. We have heretofore ascertained that the Babin Chevaye was seaworthy as it respects stowage and distribution. Now, as it relates to the condition of her decks, whether properly caulked and water tight and seaworthy in that respect when she set sail from Antwerp: The bad weather and turbulent seas we may say began about April 29th, although rough weather was encountered April 18th, and continued to gather in force and violence until the 6th of May, when the disaster occurred, attributable directly to the sea breaking over the poop deck. Thereafter the severity of the weather and storm abated somewhat, but again increased and continued with great turbulence and violence up to May 12th, causing the ship to labor and strain heavily. During a great portion of this interval the decks were constantly covered with water, and much of the time, it is related, the bulwarks were full with the seas, occasionally breaking from either side of the ship. It is of significance that up to the 6th, when the sea broke over the poop deck, and smashed the door of the chartroom and the wall between the staircase and the chartroom, and the water entered the room, and thence found its way into the between-decks by means

of the little hatch, no water was discovered in the hold of the ship, nor did the pumps show water therein until the 8th, the storm continuing with small abatement up to that time. The storm increased to its greatest severity on the 12th, when the weather is described as "awful; very heavy sea, taking the ship from side to side, and straining enormously the masts and the rigging," and "shocking the ship from the stem to stern," causing much damage to her in different parts. There was some abatement again on the 13th. On the 14th the men were able to go on deck. On the 15th the pumps showed 20 centimeters, about 6 inches, of water in the hold. The hold was cleared on the 18th, and remained so until the end of the voyage. On the 14th an examination of the vessel showed that the cement of the stanchions around the main hatch was broken, the rivets of the stanchions broken, one having entirely parted, causing considerable leak, which continued for 48 hours, during which time the decks were completely flooded. There were also leaks through the decks. This was tested by sending one of the mates below to ascertain whether there were any or not, and about the "places where any leak was suspected or noticed" the decks were recaulked. It is thus made to appear therefrom that the water entered the ship from three sources, namely: Down the little hatchway; through the breaking of the cement around the main hatch, including the breaking of the rivets about the stanchions, and the loss of one of them; and through the decks. It is probable that by far the larger proportion entered through the two first causes. But be that as it may, if water entered through the decks this is presumptive evidence of unseaworthiness in caulking, and the reason why the water so entered must be shown to be attributable to the perils of the sea.

As has been previously remarked, the hold of the ship was clear until after the experience of May 6th, and even until the 8th, which was two days after the water went down the little hatchway. Even then it did not appear in large amount, and it was not until after the still severer experience of May 12th that it was found in considerable quantity. Captain Hoben, a witness for respondent, in going over the ship while she was discharging and afterwards, found two beams freshly fractured. These fractures he supposes were sustained on the voyage. He found a great deal of water, as he expressed it, coming down the bulwark stays, the cement being cracked around the heel of them, and broken "away plenty on each side." He also found 20 stanchions or stays on each side of the bulwarks were loose, which he thinks were caused by the heavy straining of the ship and the bad weather. This evidence of the damages which the ship sustained, coupled with other damages shown by Lebeaupin and other witnesses, indicate unmistakably that she had undergone a severe test of her strength and endurance. And when we come to consider the care and vigilance that were exercised before the voyage was undertaken to render her fit and staunch for the service, and the great damage sustained by the ship during the storms, along with the testimony respecting the severity thereof, we are impelled to the conclusion that they were unusual, extraordinary, and not such as were ordinarily

to be anticipated within the purview of the charter party, and hence that the leakage from the decks, whatever in extent it might have been, was attributable to perils of the sea, and not to unseaworthiness in faulty caulking at the time the ship entered upon her voyage. This conclusion is supported by many cases of analogy. *The Orient* (C. C.) 16 Fed. 916; *The Marlborough* (D. C.) 47 Fed. 667; *Mosle v. The Sintram* (D. C.) 64 Fed. 884, affirmed 79 Fed. 1002, 24 C. C. A. 689; *Ceballos et al. v. The Warren Adams*, 74 Fed. 413, 20 C. C. A. 486; *The Guadeloupe* (D. C.) 92 Fed. 670; *The Tjomo* (D. C.) 115 Fed. 919; *Cook v. Southeastern Lime & Cement Co.* (D. C.) 146 Fed. 101.

The law applicable here is as well stated as anywhere in *Ceballos et al. v. The Warren Adams et al.*, *supra*, as follows:

"Where a vessel, soon after leaving port, becomes leaky, without stress of weather, or other adequate cause of injury, the presumption is that she was unsound before setting sail. The law will intend the want of seaworthiness, because no visible or rational cause, other than a latent or inherent defect in the vessel, can be assigned for the result. But, where it satisfactorily appears that the vessel encountered marine perils which might well disable a staunch and well-manned ship, no such presumption can be invoked. And where, for a considerable time, she has encountered such perils, and shown herself staunch and strong, any such presumption is not only overthrown, but the fact of her previous seaworthiness is persuasively indicated."

The only inference to be drawn from the fact that the vessel made subsequent voyages without sustaining injury to herself or cargo is that in all probability she did not encounter like weather as on the trip in question.

As it respects the little hatch in the sailroom, there is to be found in the record no testimony that its presence in the ship, its location, or the manner of its construction, constituted faulty construction of the ship herself. We cannot assume that such is the case without proof to substantiate it. Nor do we think the fact that it was not battened down was proof of unseaworthiness. It was protected by the poop deck, and was designed and intended for frequent use while the ship was on voyage. The provisions, together with the sails, were kept in the between-decks, so that it was not only convenient, but necessary, to have this hatchway in a condition to be readily opened at almost all hours, and it seems that at the very time of the entry of water through it, it was opened for use. The very construction of the ship shows its design for such use. There were two of these hatches under the poop deck, and no water went down one of them, simply because no doors, walls, or partitions with reference to it were smashed in; nor would it have gone down this one if its protection had not been broken away. We cannot agree with counsel that a ship to be seaworthy must be so constructed that she will withstand the action of the sea and weather though all of her superstructures be carried away. Many excellent ships would be pronounced unseaworthy if such were the test.

The decree of the District Court will be affirmed.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK et al. v.
COREY BROS. CONST. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. November 17, 1913.)

No. 2,264.

1. MECHANICS' LIENS (§ 256*)—ENFORCEMENT—DEFENSES—RIGHTS OF BOND-HOLDERS.

In the absence of fraud or collusion, trustees under trust deeds securing bonds executed by an irrigation company defending a suit to foreclose mechanics' liens on the works were entitled to the benefit of a defense that the dam constructed by the complainants as a part of the work was a failure and prevented the successful operation of the structure.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 450; Dec. Dig. § 256.*]

2. MECHANICS' LIENS (§ 256*)—ENFORCEMENT—CONTRACT—CONSTRUCTION.

In a suit to enforce mechanics' liens defended by trustees under trust deeds securing bonds issued by the owner of the works, the trustees alleging improper construction were bound by the construction of doubtful and uncertain provisions of the contract which the parties themselves had placed thereon and by any waiver of strict performance by the owner.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 450; Dec. Dig. § 256.*]

3. CONTRACTS (§ 280*)—CONSTRUCTION OF WORK—PERFORMANCE.

Complainants contracted to construct certain irrigation work involving a large dam. The contract required that the core-wall of the dam should extend down to and into impervious material, but the drawings which were made a part of the contract expressly indicated the limit of the depth to which the excavation was intended to go. *Held*, that the construction company was justified in assuming that the depth had been established after inspection of the materials beneath the site of the dam, and was sufficient, especially when construction to that depth was acquiesced in by the engineer on the ground as the work progressed, and hence the company was not responsible for a failure of the project due to the fact that the dam was not extended downward into impervious material.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1249-1280; Dec. Dig. § 280.*]

4. CORPORATIONS (§ 657*)—FOREIGN CORPORATIONS—CONTRACT—ENFORCEMENT—FEDERAL COURTS.

Rev. Codes, Idaho, § 2792, provides that every foreign corporation before doing business in the state shall file with the county recorder of the county designated as its principal place of business a copy of its articles, etc., and that no contract or agreement made in the name of, or for the use or benefit of, the corporation prior to the making of such required filings, can be sued on by such corporation in any state court. *Held* that, as such provision does not declare void a contract made by a corporation before obtaining the necessary certificate of compliance with the local law, the corporation was entitled to enforce such contract in the federal courts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536-2541, 2550, 2552-2554; Dec. Dig. § 657.*]

Foreign corporations doing business in state, see notes to *Wagner v. J. & G. Meakin*, 33 C. C. A. 585; *Ammons v. Brunswick-Balke-Collender Co.*, 72 C. C. A. 622.]

*For other cases see same topic & § NUMBER in Dec. & An. Digs. 1907 to date, & Rep'r Indexes

5. COURTS (§ 310*)—FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—PARTIES.

Plaintiff construction company, a Utah corporation, brought suit to foreclose a mechanic's lien only against an irrigation company, an Idaho corporation, and the trustees of the company's mortgage deeds, who were citizens of Illinois. After the suit was brought, a cement company, a Utah corporation, commenced a separate action in the same court against the same defendants to foreclose its lien, after which the construction company filed an amended bill to bring in as parties defendant to its suit the cement company and other parties who were residents of Utah and Idaho; but, before any of such parties had pleaded to the amended bill, the construction company took an order dismissing them. A receiver was then appointed for the irrigation company, who qualified, after which the cement company intervened by petition to foreclose its lien aligning itself with the construction company and claiming lien equal in rank with that of the latter. No objection was made to the intervention, and all persons claiming liens, so far as appeared, had joined. *Held*, that the cement company was not an indispensable party, and its absence would not have divested the court of jurisdiction to proceed, and that federal jurisdiction was not therefore ousted by want of necessary parties defendant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 857; Dec. Dig. § 310.*]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

6. COURTS (§ 335*)—ENFORCEMENT—FEDERAL COURTS.

Proceedings to enforce a mechanic's lien in courts of the United States must be by suit in equity, notwithstanding that by the state statute in which the lien is created the enforcement thereof may be had by an action at law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 902–907½; Dec. Dig. § 335.*]

7. EQUITY (§ 96*)—CHANCERY PRACTICE—PARTIES.

The chancery rule that all must be made parties who are interested in the controversy is subject to the exceptions that, where a person will be directly affected by the decree, he is an indispensable party, unless the parties are too numerous to be brought before the court; where a person is interested, but will not be directly affected by the decree, he is not an indispensable party, but should be made a party if possible, and where he is not interested in the controversy between the immediate litigants, but is interested in the subject-matter, he may be made a party or not at complainant's option.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 253–256; Dec. Dig. § 96.*]

8. MECHANICS' LIENS (§ 263*)—FORECLOSURE—PARTIES.

Other lienors are not necessary parties to a suit to foreclose a mechanic's lien unless complainant claims priority over their liens.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 471–481; Dec. Dig. § 263.*]

9. MORTGAGES (§ 151*)—PRIORITY—MECHANICS' LIENS.

Rev. Codes Idaho, § 5114, provides that a mechanic's lien is preferred to any lien, mortgage, or other incumbrance of which the lienholder had notice, and which was unrecorded when the improvement was commenced, work done, or materials furnished. A contract for the construction of certain irrigation works was executed August 26, 1909, but the contractor had commenced work under its verbal contract before that date. A first mortgage securing bonds to obtain funds for the construction was acknowledged August 27th and filed for record September 3, 1909. *Held*, that the contractor's right to a mechanic's lien for a balance due was superior to the lien of the trust deeds securing the bonds, and that the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes 208 F.—62

contractor was not estopped to claim such priority because deeds had been given to secure bonds by which previous payments made to him had been obtained.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 307, 309-311, 314-329, 332-336; Dec. Dig. § 151.*]

10. MECHANICS' LIENS (§ 33*)—NATURE OF WORK—IRRIGATION PROJECT—STATE STATUTE.

Rev. Codes Idaho, § 5110, gives a right to a mechanic's lien to a person performing labor on or furnishing materials in the construction of any mining claims, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure. *Held*, that irrigation works constructed under the Carey Act to reclaim arid lands was within the statute, and that a contractor for the construction of such works was entitled to a lien to secure payment of the amount due to the full extent of the title, interests, rights, and claims of the irrigation company having the construction contract with the state.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 32, 33, 38; Dec. Dig. § 33.*]

11. MECHANICS' LIENS (§ 291*)—FORECLOSURE—IRRIGATION SYSTEM—SALE.

In a suit to foreclose a mechanic's lien on an irrigation system, it was proper for the court to decree a sale of the system as a whole without right of redemption, where it appeared that the property subject to the lien was so blended and reciprocal in its use that to divide it and sell each part separately would destroy or greatly impair its value to the serious detriment of both public and private interests.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 599-605, 607, 610; Dec. Dig. § 291.*]

Appeal from the District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by the Corey Brothers Construction Company and the Union Portland Cement Company against the Continental & Commercial Trust & Savings Bank and another, as trustees, to enforce liens on the Big Lost River irrigation system in Idaho. Decree for complainants, and defendants appeal. Affirmed.

See, also, 205 Fed. 282.

Mayer, Meyer, Austrian & Platt and Amos C. Miller, all of Chicago, Ill., and Richards & Haga, of Boise, Idaho, for appellants.

H. H. Henderson, of Ogden, Utah, for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appeal in this case presents the question of the priority of lien claimants upon the Big Lost River irrigation system in Idaho. The appellants are trustees under two certain trust deeds securing bonds to the amount of \$2,400,000 on the system. The appellees are mechanic's lien claimants for work done and materials supplied in the construction of said system. The court below found that the mechanic's liens were entitled to priority over the liens of the bondholders.

In June, 1909, the construction company began the construction of a dam under a contract with the Big Lost River Irrigation Company, an Idaho corporation. The irrigation system was a "Carey Act

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

project," arising out of a contract which had been entered into by the state of Idaho with one George S. Speer, of date May 27, 1909, all rights under which were subsequently, with the consent of the state, transferred by Speer to the irrigation company. The work of the construction company upon the dam continued until August 15, 1910, when the state of Idaho through its State Land Board forbade the further prosecution of the work and the further sale of water rights in the projected system, principally on account of faults in the construction of the dam. It is conceded that the dam is a failure and that to impound any useful quantity of water therein would imminently endanger life and property. The appellants contend that the decree of the court below is erroneous, and that they are entitled to priority over the mechanic's lien claimants for the reason that the failure of the dam was owing to the fault of the construction company, in that it so far departed from the terms and specifications of its contract with the irrigation company as to make the dam a useless structure.

[1] That contention presents the principal question in the case. The right of the appellants to advance it as a defense to the suit of the appellees is disputed; but we think there can be no question that they have the same right to present that ground for denying the equities of the mechanic's lien claimants that the irrigation company would have, there being no evidence of fraud or collusion between the parties to the construction contract.

[2] In the absence of such evidence, it follows, also, that the appellants are bound by the construction which the parties to the contract placed upon its doubtful or uncertain provisions, and by any waiver by the irrigation company of its strict performance.

[3] There is evidence tending to prove that the dam was improperly constructed and in a manner different in some respects from that which was provided in the contract. The dam was 2,000 feet long, and was intended to impound water to the depth of more than 100 feet. It had a concrete core, but in the main it was constructed of dirt and gravel. No complaint is made of the core or of the material or method of its construction, but it is urged that the material for the embankment was neither deposited in place nor properly puddled in the manner prescribed by the contract. Upon that issue the court below upon a consideration of the evidence found against the contention of the appellants, and we are not convinced that there was error in that conclusion. Undoubtedly a portion of the loose material was handled and deposited in a manner different from that which was prescribed in the specifications, and probably such deviation from the prescribed method contributed in some degree to the inefficiency of the dam. But however that may be, the evidence is that all that was done by the construction company was done with the knowledge and approval of the engineering company under whose supervision, according to the terms of the contract, the work was to be done. We are unable to discover from the evidence that the court below erred in finding that the vital defect was not in the dam itself, but in the fact that subjacent to it there was a stratum pervious to water. It is not shown that for that defect the construction company was responsible. It is true that the terms of the contract required that the core-wall "shall extend

down to and into impervious material"; but the drawings which were made a part of the contract expressly and in no doubtful way indicated the limit of the depth to which the excavation was intended to go. The construction company was justified in assuming as it did that the depth so indicated had been established after inspection of the material beneath the site of the dam and was sufficient. They were confirmed in this view by the attitude of the representative of the engineering company on the ground as the work progressed, who assented to the course which the construction company pursued in accordance with the drawings. The construction company had the right to look to the engineer for the proper construction of the terms of the contract.

[4] It is contended that the contract of the construction company cannot be enforced in any court, state or federal, for the reason that the company, a corporation of Utah, entered into the contract without having complied with the laws of the state of Idaho in reference to foreign corporations. Section 2792 of the Revised Codes of Idaho provides that:

"Every corporation not created under the laws of this state must, before doing business in this state, file with the county recorder of the county in this state in which is designated its principal place of business in this state, a copy of the articles of incorporation of said corporation, duly certified to by the Secretary of State of the state in which said corporation was organized, and a copy of such articles of incorporation duly certified by such county recorder, with the Secretary of State. * * * No contract or agreement made in the name of, or for the use or benefit of, such corporation prior to the making of such filings as first herein provided, can be sued upon or enforced in any court of this state by such corporation."

At the time when the construction company commenced the work, the irrigation company had not been organized; but its organization was contemplated. The work proceeded under a verbal contract between the construction company and the promoters of the irrigation company until August 26, 1909, when, the construction company having complied with the laws of Idaho with reference to foreign corporations, a written contract was entered into. It was upon that contract that the suit was predicated. No valid reason is perceived why, under the circumstances, the suit might not have been brought in a court of the state of Idaho. That question, however, it is not necessary to decide. It is uniformly held that notwithstanding a provision of state law, such as that of Idaho, which does not declare void a contract made before obtaining the necessary certificate of compliance with the local law, the corporation may enforce the contract in the federal courts. There are some expressions in the opinion in the case of *Katz v. Herrick*, 12 Idaho, 1, 86 Pac. 873, which are relied upon as indicating that the Supreme Court of that state held such a contract void; but the opinion of the same court in *Valley Lumber & Mfg. Co. v. Driessel*, 13 Idaho, 662, 93 Pac. 765, 15 L. R. A. (N. S.) 299, 13 Ann. Cas. 63, explains what was said in the former decision in language as follows:

"The court there held that the noncomplying foreign corporation had no legal existence in this state, and, under the law, was without a remedy for the enforcement of any contracts made by it within the state, but did not hold that its contracts were absolutely void."

In 19 Cyc. 1301, the rule is thus stated:

"Where, however, the contract is not void, but the statute merely prohibits the foreign corporation from maintaining an action thereon in any court of the state, it has been held that the corporation may nevertheless maintain an action in the federal courts, since a federal court will not refuse to enforce a valid contract, harmless in itself, which is nonenforceable in the state court merely on account of noncompliance with the state administrative regulations."

The decisions of the federal courts uniformly sustain the rule so expressed. *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893, 58 C. C. A. 79; *Groton Bridge & Mfg. Co. v. American Bridge Co.* (C. C.) 151 Fed. 871; *Dunlop v. Mercer*, 156 Fed. 545, 86 C. C. A. 435; *Johnson v. New York Breweries Co.*, 178 Fed. 513, 101 C. C. A. 639.

[5] It is contended that the court below was without jurisdiction of the cause for want of necessary parties defendant, and that, if the necessary parties defendant had been brought in, the cause would have lacked the requisite diversity of citizenship. The plaintiff, the construction company, a corporation of Utah, made defendants to its original bill only the irrigation company, a corporation of Idaho, and the trustees of the mortgage deeds, citizens of Illinois. Soon after the commencement of the suit, the Union Portland Cement Company, a corporation of Utah, commenced a separate action in the same court against the same parties defendant to foreclose its lien. Five days later the construction company, as plaintiff, filed an amended bill to bring in as parties defendant to the suit the Union Portland Cement Company and other parties who were residents of Utah and Idaho; but before any of these parties had pleaded to the amended bill the construction company took an order of the court dismissing them. Soon thereafter, on motion of the construction company and upon notice to the parties defendant, the judge of the court below appointed a receiver of all of the property of the irrigation company. The receiver qualified and took possession, and he is still in the possession of all of the property of that corporation. The appellants assented to the appointment of the receiver. Thereafter the Union Portland Cement Company intervened in the present suit by a petition to foreclose its lien and aligned itself with the construction company, claiming its lien to be of equal rank with the lien of that company. This claim of equality of lien has not been and is not now contested by the construction company. The liens being on the same property, the lien claimants might, under the statutes of Idaho, have joined in a suit in a court of that state to foreclose their liens. Who the other parties were that were brought in by the amended bill of the construction company and subsequently dismissed does not appear from the record, as the amendment bringing them in and the order dismissing them are not included in the transcript, and we cannot say whether or not they were necessary or proper parties. It does appear, however, that at no time in the course of the proceedings in the court below did any of the parties before the court object to the intervention of the Union Portland Cement Company or plead the omission of any necessary party to the suit. As it is, all parties who claimed liens on the irrigation system were, so far as the record informs us, before the court.

[6] Proceedings to enforce a mechanic's lien in the courts of the United States must be by a suit in equity, notwithstanding that by the statute of the state in which the lien is created the enforcement thereof may be had by an action at law. *Davis v. Alvord*, 94 U. S. 545, 24 L. Ed. 283; *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853. Whether the statute of the state of Idaho which permits the joinder of all mechanic's lien claimants in a suit to foreclose would have authorized the joinder of the two lien claimants in this case as plaintiffs in the court below, we need not pause to inquire, for the Union Portland Cement Company was not an indispensable party, and its absence would not have divested the court below of jurisdiction to proceed.

[7] In *Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed. 184, Mr. Justice Bradley, after referring to the general rule of chancery practice that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation, pointed out the qualifications of the rule as follows:

"First. Where a person will be directly affected by a decree, he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Secondly. Where a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Thirdly. Where he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter which may be conveniently settled in the suit, and thereby prevent further litigation, he may be a party or not, at the option of the complainant."

[8] It is held that other lienors need not be made parties to a suit to foreclose a mechanic's lien unless the plaintiff claims priority over the other liens. *Case Mfg. Co. v. Smith* (C. C.) 40 Fed. 339, 5 L. R. A. 231; *Kaylor v. O'Connor*, 1 E. D. Smith (N. Y.) 672.

[9] It is contended that the construction company is estopped to assert a lien superior to that of the trust deeds securing the bonds for the reason that the bonds were issued for the purpose of procuring money to pay for the construction work, and for that purpose were sold, and practically \$600,000 or more of the proceeds of them were paid to the construction company, and it is urged that it is inequitable that the construction company, knowing the purpose for which the bonds were issued, should have a lien for its work superior to that of the bonds. The mechanic's lien law of the state of Idaho, section 5114 of the Revised Code, among other things, provides that a mechanic's lien is preferred "to any lien, mortgage, or other encumbrance of which the lien holder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished."

The written contract of the construction company was executed on August 26, 1909, but the company had commenced work under its verbal contract before that date. The first mortgage deed was acknowledged August 27, 1909, and was filed for record September 3, 1909. According to the terms of the statute, the mechanic's lien is superior in rank to the trust deeds. The provisions of the statute are controlling here, unless there are equitable considerations which should

change the order of priority of the liens. The appellants cite the case of *West v. Klotz*, 37 Ohio St. 420, in which it was held that a mechanic furnishing material for the construction of a work may by his agreement with the owner as to the manner of payment, and his acts with respect to the claims of other creditors, be precluded from asserting a mechanic's lien as against such creditors. In that case the lien claimant was among the persons who advanced money for the project and accepted bonds secured by a mortgage on the property and sold such bonds to other persons, and he agreed that his payment for the work should be made in monthly installments out of the moneys received for the bonds. The court held that he was precluded by his acts and his agreement from asserting the priority of his lien over that of the mortgage. There are no such grounds for deferring the mechanic's lien in the present case. The fact that a portion of the proceeds of the bonds has been paid to the construction company on account of its work is no ground of equitable estoppel as against the priority of its lien. The case is simply one where the owner of the property, after making the contract, has placed a mortgage on the property to raise the funds wherewith to meet the obligation of the contract. The funds so raised being insufficient, there is no ground, equitable or legal, for holding that the remainder of the demand of the lien claimant should not be first paid out of the property, as provided by the mechanic's lien law of the state. The construction company has done nothing to lead the bondholders to believe that their lien should be first.

[10] The contention is made that irrigation works constructed under the Carey Act are not subject to the mechanic's lien law of the state of Idaho. Section 5110 of the Idaho Revised Codes, adopted in 1887, gives a lien to the person performing labor upon or furnishing materials to be used in the construction of "any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure." It is urged that it was not intended to include within the statute a provision for liens on reservoirs, dams, and irrigation systems constructed under those acts of Congress thereafter passed, which constitute the legislation commonly known as the "Carey Act," for the reason that the property belongs to the state of Idaho and to the United States, and the law does not permit a lien either against the state or the general government. The question so presented has been met and decided by the Supreme Court of Idaho in *Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 14 Idaho, 5, 93 Pac. 789, and in *Hill v. Twin Falls Land & Water Co.*, 22 Idaho, 274, 125 Pac. 204; that court holding that one who contracts to construct canals and works for the irrigation of arid lands under the Carey Act is entitled to the benefit of the lien laws to secure payment to him for such work to the full extent of the title, interests, rights, and claims of the company having the construction contract with the state. We see no reason why those decisions are not binding upon this court.

[11] It is urged that the court below erred in decreeing that the irrigation system be sold as a whole and without the right of redemption. The court below had the power to make the decree, and it was its duty to do so if under existing circumstances the equity of the case

required it. In *Pacific Northwest Packing Co. v. Allen*, 116 Fed. 312, 54 C. C. A. 648, this court held in effect that, wherever the property and franchise described in a lien is so blended together and reciprocal in its use that to divide it and sell each part separately would destroy or greatly impair the value of the same to the serious detriment of both public and private interests, the decree should be made for the sale of the same as an entirety and without redemption, notwithstanding provisions of the state statutes where the property is situated allowing the redemption of real estate. That doctrine is well sustained by the decisions. *Farmers' Loan & Trust Co. v. Iowa Water Co.* (C. C.) 78 Fed. 881; *National Foundry & Pipe Works v. Oconto Water Co.* (C. C.) 52 Fed. 43; *Hammock v. Loan & Trust Co.*, 105 U. S. 77, 26 L. Ed. 1111.

Other minor grounds for reversing the decree are presented by the appellants; but we find no merit in them, and nothing requiring further discussion.

The decree will be affirmed.

CITY OF PITTSBURGH v. SOUTH SIDE TRUST CO. et al.

(Circuit Court of Appeals, Third Circuit. November 26, 1913.)

No. 1,777.

BANKRUPTCY (§ 314*)—CLAIMS—TAXES—PAYMENT.

Mortgaged realty belonging to the bankrupt being about to be sold on foreclosure, the mortgagee's attorney, in order to prevent the tax collector from bidding at the sale an amount that would cover the taxes, as was usual in such cases, was required to deposit the mortgagee's certified check in an amount sufficient to cover all taxes, whereupon the property was sold to the mortgagee for the costs. Thereafter the city filed a claim in the bankruptcy proceedings for the taxes, but the collector refused to testify that he held the check merely as indemnity, and testified that it was given in payment of the taxes. *Held* that, the check having been given and received in payment of the taxes, the city was not entitled to prove its claim therefor against the bankrupt's personal assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469-473, 478, 483-487, 489, 490; Dec. Dig. § 314.*]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

In the matter of bankruptcy proceedings of the B. White Company, a corporation. A petition was filed in the name of the City of Pittsburgh for an order on the South Side Trust Company, trustee of the bankrupt, for an order compelling the trustee to pay city taxes assessed against certain real estate sold on foreclosure of a mortgage and purchased by the mortgagee. From an order denying such relief, on the ground that the taxes had been paid, the City appeals. Affirmed.

Charles A. O'Brien, City Sol., of Pittsburgh, Pa., and C. Elmer Brown, Asst. City Sol., of Altoona, Pa. (Charles A. Woods, of Pittsburgh, Pa., of counsel), for appellant.

J. Bruce Orr, of Pittsburgh, Pa., for appellee.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the judgment of the District Court of the United States for the Western District of Pennsylvania, on a petition of the City of Pittsburgh, the appellant, affirming the report and opinion of the referee in bankruptcy, who disallowed to the appellant a claim for taxes in the sum of \$3,078, assessed by the city of Pittsburgh for the year 1912 against the real estate of B. White Company, bankrupt.

The following facts are disclosed by the record:

B. White was the owner of certain real estate in the city of Pittsburgh. Prior to 1912 and to the assessment by the city of Pittsburgh of its taxes thereon for that year, B. White conveyed the said real estate to the B. White Company, the bankrupt, subject to a mortgage of \$175,000. On November 22, 1911, an involuntary petition in bankruptcy was filed against the B. White Company, a Pennsylvania corporation, which owned and operated a large furniture, carpet and department store on the premises in question. On December 29, 1911, the company was adjudged a bankrupt, and the South Side Trust Company, of Pittsburgh, was appointed receiver and afterwards trustee.

Under various orders of the court, the trustee sold the stock of furniture, carpets, etc., to Rosenbaum Company, and thereafter made a lease of said premises to said company. Early in March, 1912, the trustee filed its first account, as to which there was a hearing on March 15th, and a decree of distribution made on March 18th, whereat a statement of the tax levied by the city of Pittsburgh against the said real estate of the said bankrupt was presented to the referee, who refused to allow the payment of the same out of the proceeds of the bankrupt's personalty. On March 18, 1912, the city filed exceptions to this refusal of the referee. Thereafter, the trustee presented a petition for leave to sell said real estate at public sale, and applied for an injunction against the mortgagee, the Equitable Life Assurance Society of the United States, from proceeding with its mortgage foreclosure. This petition was refused by the court below. The bankrupt company having defaulted in the payment of interest, on the 1st day of December, 1911, the mortgagee instituted proceedings for foreclosure, and, in pursuance thereof, on April 5, 1912, the property was sold at sheriff's sale and purchased by the mortgagee for the sum of \$114.63.

On the same day, April 5, 1912, a petition was filed in the name of the city of Pittsburgh for an order upon the trustee to pay the city taxes so assessed against the said real estate of the bankrupt. To this petition the trustee filed an answer and a hearing was held thereon before the referee in bankruptcy. It was objected that the premises were sold at said foreclosure sale to the mortgagee for the sum of \$114.63, being the court costs for the foreclosure proceedings, the real value of said property being at least \$350,000; that under the law of Pennsylvania, the said sale was made subject to the paramount lien of all the city taxes, and that the petitioner was fully secured for the payment of the same; "that said taxes are not a personal liability of the said bankrupt, and that said petitioner has no remedy under the law of the said state

* * * to collect the said taxes from the said bankrupt, other than from the mortgaged premises."

The referee, after hearing the testimony and upon due consideration, found that the taxes for the year 1912, amounting to \$3,078, must be paid by the trustee in priority, and it was so ordered. The trustee excepted to the finding and order of the referee, and the matter was certified to the court below. After argument, the court found that additional testimony or a stipulation as to the facts should be made as to the agreement between the city of Pittsburgh and the mortgagee on the occasion of the sheriff's sale above referred to. In accordance with this suggestion, the testimony of the delinquent tax collector and his chief clerk was taken before a commissioner and the same was filed with the court on a reargument. The court, however, filed an opinion directing that the matter be re-referred to the referee, with power to use the depositions taken or to take new testimony as to the questions involved. Additional testimony having been taken before the referee and the matter reargued, the referee reversed his former decision and disallowed the taxes of \$3,078 for 1912, on the ground that they had been paid. To this order, exceptions were filed and a certificate of review taken to the United States District Court, which affirmed the order and report of the referee on his finding that the taxes had been paid, and also held that the taxes involved in the case were not a debt legally due and owing by the bankrupt, but that under the laws of Pennsylvania, taxes upon owners of real estate in the city of Pittsburgh could only be collected by filing a lien on said real estate and proceeding thereon, and in no other manner. From this judgment and order of the court, the appeal before us is taken.

In this last report of the referee, there are the following findings of fact:

Just before the sheriff's sale, at which the mortgagee, the Equitable Life Assurance Society, purchased the mortgaged premises for \$114, the amount of the costs, an attorney for the mortgagee called upon the delinquent tax collector and requested him to refrain from bidding at the sheriff's sale of the property an amount that would cover the taxes, as was usual in such cases, stating that there was a legal question that ought to be determined sooner or later, as to the payment of these taxes. After several interviews, the collector agreed to the suggestion, on condition that he was given, on behalf of the mortgagee, a certified check to cover all taxes. This check was given before the sale and no bid was made on behalf of the city thereat. It was upon these findings that the referee, in his former report, concluded that the city was merely indemnified by the mortgagee and that the taxes were not paid or discharged. At the second and final hearing in the referee's office, on examination of the collector by the counsel for the mortgagee, the following questions and answers are referred to:

"Q. Referring to your testimony given November 14, 1912 (deposition), before Miss Beatty, a notary public, I refer to the following: 'Q. And this certified check is simply to indemnify you and the city? A. Yes.'"

"Q. Do you remember giving such testimony? A. I believe I did.

"Q. That is correct, Mr. Grenet, isn't it? This check was given to you simply to indemnify you? A. It was given in payment of taxes."

The referee further finds that Mr. Grenet, the collector, was unwilling to admit that the check was simply given to him as a guaranty or indemnity, and that in answer to a question by the referee, he said there was no contract or obligation, either legal or moral, on him to refrain from cashing that check at any moment he saw fit. He also would not admit that he was prosecuting the petition in this proceeding or was interested in its result. It further appears that the petition, though in the name of the city of Pittsburgh, was presented and is being prosecuted on behalf of the mortgagee, the Equitable Life Assurance Society. The referee accordingly finds, as follows:

"It appears to the referee that the probabilities support Mr. Grenet in his statement, that the check was given in payment of the taxes. When the Equitable Life Assurance Society insisted on foreclosing its mortgage forcing the property to a sale, it placed the city of Pittsburgh in a position to collect and receive the amount of the taxes out of the proceeds of the sale of the property. It could not get title without paying the taxes. The form of payment or alleged conditions attached thereto are immaterial to this case, being matters between the city and the mortgagee only, but it seems to the referee, that it is very questionable whether any agreement on Mr. Grenet's part to postpone the collection of the taxes would be valid. In the first place, it would not bind the city of Pittsburgh, and in the second place it would seem not to be binding upon Mr. Grenet himself because of an entire want of consideration to him.

"Under all the testimony in the case, the referee is of opinion, that when the certified check was delivered to Mr. Grenet it was in law and in fact a payment of the taxes, and therefore the taxes having been paid, the city of Pittsburgh's petition in this case should be dismissed. This is a conclusion different from that which the referee reached at the time of the former report. At that time it appeared simply from the petition and answer, that the check was merely to indemnify Grenet, and that the city had not in its possession the money for the taxes. An examination of the testimony and evidence since produced before the referee leads to a different conclusion."

Upon the exception to this report, a certificate was made by the referee to the court below, and a petition for revision of the same presented to said court by the appellant. After reviewing the report and findings of the referee, the court says:

"The referee was clearly right in his conclusion last arrived at, and this court would be content to rest its affirmance of the referee's decision wholly upon the referee's opinion, were it not deemed important to give some expression as to the right of the city of Pittsburgh to receive the taxes assessed against land out of the general estate of the bankrupt."

After a careful examination of the testimony and findings of the referee, as set out in the record, we are of opinion that the taxes of the city of Pittsburgh assessed against the bankrupt on the real estate in question, were paid at the time and in the manner stated, by the referee. As these taxes constituted a paramount lien on the property, the mortgagee has, as purchaser, received the benefit of such payment by the discharge of that lien.

The order and judgment of the court below is therefore affirmed upon this ground alone, to wit, that the taxes claimed have already been paid, in discharge of their lien against the property purchased by the mortgagee at the sheriff's sale. We refrain from any expression of opinion as to the right of the city of Pittsburgh to recover the taxes assessed against land, out of the general estate of the bankrupt.

FIRST NAT. BANK OF DETROIT, MINN., v. UNITED STATES. NICHOLS-CHISOLM LUMBER CO. et al. v. SAME. UNITED STATES v. NICHOLS-CHISOLM LUMBER CO. et al.

(Circuit Court of Appeals, Eighth Circuit. November 13, 1913.)

Nos. 3,869, 3,870, 3,871.

INDIANS (§ 1*)—INDIAN LANDS—ALLOTMENT—CONVEYANCE—"MIXED BLOOD INDIAN."

Every Chippewa Indian who has an identifiable mixture of other than Indian blood, however small, derived from an ancestor or ancestors that had other than Indian blood, is a "mixed blood Indian," and all other Chippewa Indians are full bloods, within Act Cong. June 21, 1906, 34 Stat. 353, removing restrictions as to the sale, incumbrance, or taxation of allotments within the White Earth reservation in Minnesota held by adult mixed blood Indians, etc.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 1; Dec. Dig. § 1.*]

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suits by the United States against the First National Bank of Detroit, Minnesota, and against the Nichols-Chisolm Lumber Company and others, to cancel certain Chippewa Indian conveyances. Decree for complainant in two of the cases, and for defendant in the third. Decrees in the first two cases reversed on defendant's appeals, and decree in the third case affirmed on plaintiff's appeals.

R. J. Powell, of Minneapolis, Minn. (George T. Simpson, of St. Paul, Minn., and Ernest C. Carman, of Minneapolis, Minn., on the brief), for appellants in Nos. 3,869, 3,870, and appellees in No. 3,871.

W. A. Norton, of Minneapolis, Minn., and Charles C. Houpt, of St. Paul, Minn. (M. C. Burch, of Washington, D. C., and Gordon Cain, of Minneapolis, Minn., on the brief), for the United States.

Before SANBORN, Circuit Judge, and WILLIAM H. MUNGER and TRIEBER, District Judges.

PER CURIAM. These are suits brought by the United States against immediate and remote grantees of certain adult Chippewa Indian allottees of lands upon the White Earth Indian reservation in Minnesota, to avoid the conveyances of the allottees on the ground that these allottees were not mixed blood Indians but were full blood Indians within the meaning of the Act of Congress of June 21, 1906, c. 3504, 34 Stat. 353, which provides:

"That all restrictions as to sale, incumbrance, or taxation, for allotments within the White Earth reservation in the state of Minnesota, now or hereafter held by adult mixed blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the department for such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments."

The allottee in the case of the First National Bank of Detroit was an adult Chippewa Indian residing upon the White Earth reservation

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

who had received a trust patent to his allotment and who had white blood in his veins not exceeding $\frac{1}{32}$ of his blood. The allottee in the first Nichols-Chisolm Lumber Company case named above was an adult Chippewa Indian residing upon the White Earth reservation who had received a trust patent to his allotment and who had in his veins white blood derived from some ancestor to the amount of $\frac{1}{16}$ of his blood and no more, and the allottee in the Nichols-Chisolm case secondly named above was an adult Chippewa Indian residing on the White Earth reservation who had received a trust patent to his allotment and who had white blood from some ancestor to the amount of $\frac{1}{8}$ and no more of his blood.

The court below was of the opinion that an adult Chippewa Indian $\frac{1}{8}$ of whose blood was white derived from a white ancestor was a mixed blood Indian, but that a Chippewa Indian less than $\frac{1}{8}$ of whose blood was white derived from a white ancestor was a full blood Indian within the meaning of the act of Congress above cited and other acts relating to the allotments upon this White Earth reservation, and it accordingly rendered decrees for the complainant in the first two cases and for the defendant in the other case.

The majority of this court has reached the conclusion that every Chippewa Indian who has an identifiable mixture of other than Indian blood, however small, derived from an ancestor or ancestors that had other than Indian blood, is a "mixed blood Indian" and all other Chippewa Indians are full blood Indians within the true intent and meaning of the Act of Congress of June 21, 1906, 34 Stat. 353, and the other acts of Congress relating to this matter.

Let the decrees in the first two cases accordingly be reversed, and let the decree in the third case be affirmed.

PITTSBURGH, C., C. & ST. L. RY. CO. v. GLINN.

(Circuit Court of Appeals, Sixth Circuit. November 12, 1913.)

No. 2,524.

1. COURTS (§ 405*)—CIRCUIT COURT OF APPEALS—FORM AND CONTENTS OF BILL OF EXCEPTIONS—RULE OF APPELLATE COURT.

Under rule 10 of the Circuit Court of Appeals for the Sixth Circuit (202 Fed. vii, 118 C. C. A. ix), which requires that the testimony of a witness be stated only in narrative form in the bill of exceptions, except that, "if either party desires it and the judge so directs, any part of the testimony shall be reproduced in the exact words of the witness," where the bill as presented includes the testimony in full by question and answer, if the defendant in error deems such form unnecessary he should object to the same, and if the bill is allowed in that form the record should show the judge's direction therefor.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097-1099, 1101, 1103; Dec. Dig. § 405.*]

In Error to the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Action at law by Annie B. Glinn, administratrix of Hugh A. Morford, deceased, against the Pittsburgh, Cincinnati, Chicago & St. Louis

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Railway Company. Judgment for plaintiff, and defendant brings error. On motion to dismiss and to strike the bill of exceptions from the files. Denied.

Robert Ramsey, of Cincinnati, Ohio, for plaintiff in error.

Sherman T. McPherson, Joseph Lemkuhl, and Frederick J. Oeltman, all of Cincinnati, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Motion is made to dismiss and to strike the bill of exceptions from the files because not settled in accordance with rule 10 of this court (202 Fed. vii, 118 C. C. A. ix), promulgated March 15, 1913, which requires that the testimony of a witness be stated only in narrative form, except that, "if either party desires it and the judge so directs, any part of the testimony shall be reproduced in the exact words of the witness." All of the testimony taken on the trial is included in the bill by question and answer. The salutary purpose of the rule is obvious. Only so much of the testimony should be included as is "essential to the decision of some one of the questions presented by the assignments of error," and the testimony so included should be presented in narrative form, unless in the judge's opinion the use of question and answer is necessary to the proper presentation of the questions raised. Good practice requires a notation to that effect where the entire testimony is included or reproduction of question and answer is made; otherwise plaintiff is likely to be at least penalized in respect of costs, as was done in *Chesbrough v. Woodworth*, 195 Fed. 875, 877, 887, 116 C. C. A. 465. In this case, such direction by the judge does not appear, although it, of course, may be that the judge thought the course actually taken necessary. It is not only the duty of plaintiff in error to observe the rule, but defendant in error should object upon the record to the inclusion of testimony or departure from narrative form deemed by him unnecessary. Such objection does not seem to have been made. It is not improbable that the rule was overlooked by both judge and counsel, as the bill was settled within a few months after the promulgation of our rule.

The motion will be denied, but without prejudice to the disposition of costs when the case is heard.

ROESSING-ERNST CO. et al. v. COAL & COKE BY-PRODUCTS CO.

(Circuit Court of Appeals, Third Circuit. November 28, 1913.)

No. 1,787.

PATENTS (§ 129*)—ASSIGNMENT—EFFECT AS ESTOPPEL.

The rule that an assignor of a patent is estopped from denying its validity applies to a corporation afterward organized, and of which he became president, when charged with infringement, but does not apply to a manufacturer, which on the order of such corporation built the alleged infringing machine, except as to that particular machine.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½-186; Dec. Dig. § 129.*]

Appeal from the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Suit in equity by the Coal & Coke By-Products Company against the Roessing-Ernst Company, Alfred Ernst, and the Best Manufacturing Company. From an order granting a preliminary injunction, defendants appeal. Modified.

C. M. Clarke, of Pittsburgh, Pa. (Weil & Thorp, of Pittsburgh, Pa., of counsel), for appellants.

Robert D. Totten, of Pittsburgh, Pa. (James I. Kay, of Pittsburgh, Pa., of counsel), for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. This appeal is taken from an order of the District Court of the United States for the Western District of Pennsylvania, granting a preliminary injunction enjoining the defendants-appellants from making, using and selling gas cleaners, or employing a process for cleaning gas, as described in letters patent No. 896,365, and No. 900,062, respectively, and requiring the complainant-appellee to file a bond in the sum of \$10,000, to indemnify the defendants-appellants against any loss by reason of the issue of such injunction.

The Coal & Coke By-Products Company is a corporation of West Virginia, having an office in the city of Pittsburgh, and is engaged in the business of contracting for and installing By-Products coke oven plants, together with apparatus and appliances used in connection therewith. The Roessing-Ernst Company is engaged in a like business, and Alfred Ernst, one of the defendants, is president of the company. The moving papers on the part of the complainant below allege that Alfred Ernst, one of the defendants, was an employé of the complainant company at the time of the issuance of the patents in suit; that the device and process described in the patents, respectively, were his invention and that he assigned his rights in the patents to be issued, for a consideration, to the complainant company. Thereafter, Mr. Ernst entered into an arrangement by which the Roessing-Ernst Company was formed, which company engaged itself in the same business of contracting for and installing By-Products coke oven plants. The bill charges that the Roessing-Ernst Company and Alfred Ernst, in prosecuting their said business, employed the Best Manufacturing Company to manufacture, on their account, certain of these By-Products plants, which it alleges infringed the patents in suit. As these patents are the patents assigned to the complainant company by Alfred Ernst, it is claimed that he and the company of which he was president, as well as the Best Manufacturing Company, were estopped from denying the validity of the patents so assigned. This is not denied by the defendants, so far as Alfred Ernst himself is concerned, but they controvert the existence of any estoppel as regards the Roessing-Ernst Company and the Best Manufacturing Company, and in their affidavits they deny infringement.

This question of infringement was the subject of a number of affi-

clavits on both sides, and in the exercise of its discretion the court has issued the preliminary injunction in question, restraining all the defendants, until a further order of the court, from making, using and selling any gas cleaners or process for cleaning gas, as described in said letters patent. We think the principle already referred to, that the assignee of the patent is estopped from afterwards denying the validity of the patent assigned, applies on the facts of this case as well to the Roessing-Ernst Company, of which Alfred Ernst was president, as to Alfred Ernst himself, but it cannot apply to the Best Manufacturing Company, whose only connection with the case is shown to be that it was manufacturing, on the order and for the account of the Roessing-Ernst Company, a machine that was alleged to infringe the patent in suit, except as to the manufacture of that particular machine.

After a careful examination of the affidavits filed, we see no reason for finding that the discretion of the court below was improperly exercised in granting the preliminary injunction against the Roessing-Ernst Company and Alfred Ernst, or as to enjoining the Best Manufacturing Company, so far as the manufacture of a machine for the Roessing-Ernst Company was concerned. We think, however, the injunction should be so modified as to confine the injunction against the latter company in this respect, as to what it does or may do in connection with the Roessing-Ernst Company.

We are the less inclined to disturb the preliminary injunction issued in this case, by reason of the fact that the date set for the final hearing in the case is so near at hand.

The judgment of the court below is therefore affirmed.

LEWIS BLIND-STITCH MACH. CO. v. ARBETTER FELLING MACH. CO.

(District Court, N. D. Illinois, E. D. November 25, 1913.)

No. 30,055.

1. PATENTS (§ 159*)—CONSTRUCTION—EXTRINSIC EVIDENCE.

While the patent is the measure of the grant, and other applications are not usually material to its construction, where other applications by the patentee and interference proceedings relating to the same subject-matter are pending at the same time, all may be looked into to determine the construction of the patent as granted.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 233, 236; Dec. Dig. § 159.*]

2. PATENTS (§ 328*) — VALIDITY AND INFRINGEMENT — BLIND-STITCH SEWING MACHINE.

The Lewis patent, No. 862,830, for a blind-stitch sewing machine, while valid and meritorious, is not infringed by the machine of the Arbetter patent, No. 690,385, conceding priority to Lewis, the two patentees having independently and at nearly the same time invented machines to accomplish substantially the same result but by essentially different means and operations.

In Equity. Suit by the Lewis Blind-Stitch Machine Company against the Arbetter Felling Machine Company. On final hearing. Decree for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

George T. May, Jr., of Chicago, Ill. (Edward Rector, of Chicago, Ill., of counsel), for complainant.

Edwards, Heard & Smith, of Boston, Mass. (Frederick P. Fish and Nathan Heard, both of Boston, Mass., of counsel), for defendant.

SANBORN, District Judge. Infringement suit on Patent No. 862,-830, issued August 6, 1907, to J. G. Lewis, relating to blind-stitch sewing machines for cloth fabrics.

The main question is whether there is infringement of two claims of the Lewis patent relating to the formation of stitches adjacent to and over the edge of a fold laid on the surface of a main fabric, like a cloak facing, or cuff attached to the end of a coat sleeve, by two rows of stitches made wholly on the outside of the cloth, and which are partly concealed under the edge of the facing or cuff, by a process called "felling." Infringement of two other sets of claims less important in character is also claimed. The argument mainly turns around two exhibit machines, called the Lewis old machine and the Arbetter machine; but the question of infringement depends also on many other considerations, based on facts appearing in evidence, and which relate to the respective objects Lewis and Arbetter were seeking to accomplish, and the means they were taking to reach these objects.

Defendant's expert Robert P. Hains gives the following definitions and explanations necessary to understand any discussion of blind-stitch machines:

"2. A 'through and through stitch' is one in which the needle enters at one surface of the material and passes out of the opposite surface and is there interlocked so that on withdrawal of the needle the thread will be found to extend through the fabric from surface to surface.

"3. A 'blind stitch' is one in which the machine needle enters and emerges from the same surface of the material, the sewing thread not appearing on the opposite surface.

"4. A 'chain stitch,' which may be either a through and through or blind, is formed by a single thread, such thread being interlocked or looped with itself at the point of emergence of the needle, so that on the surface where the interlooping, of such thread takes place the stitch will appear as a chain like structure.

"5. A 'lock stitch' is one formed of two threads, the needle carrying one thread and at its point of emergence being interlooped or interlocked with another thread, usually termed the 'bobbin' thread.

"6. The chain stitch and the lock stitch may be either a through and through stitch or a blind stitch, according to whether the needle in making its penetrating stroke passes entirely through the fabric or enters and emerges from the same surface thereof.

"7. These varieties of stitches may be used in the formation of a seam to unite two or more fabrics, or they may be made merely as ornamentations.

"8. If, in making a lock stitch, for instance, the needle makes its thrusting excursion always in the same plane, there will be produced a straight line of stitches. If, however, the needle should be moved bodily, in a lateral direction after each stitch, there will be formed two lines of stitches, the threads of which are parallel. This last form of stitch formation may be termed 'zigzag' stitching, and the movement of the needle laterally is known in the art as 'shogging.'"

While the machines are complicated, they are not much more so than the old domestic sewing machines, with their feed mechanism,

needle-control, and hook and bobbin devices. Blind-stitch machines existed for work on leather, felt, braid, matting, and cloth, as well as blind-stitch machines for making two rows of stitches connected by bobbin threads making zigzag stitches. The patents to Bosworth, Sleppy, Shea, Arbes, and Levy all show blind-stitching mechanism, where the goods were bent around a back guide so as to present the surface to the stroke of a vertically descending or ascending needle which pierced the surface as it was descending around the edge of the back guide, and went through the upper layer and into but not through the lower, resulting in a stitch showing only on the upper side of the goods. The Lewis machine is of the same general type, where the goods are bent around the edge of a back guide adjacent to the needle.

Another class of prior blind-stitch machines fed the material horizontally, in which there was no bending over a back guide at the needle point, but the same result was secured by using a "bender," which reciprocated vertically to push or bend the goods through a hole or slot in the bed plate, and thus get the cloth surfaces into the plane of a horizontally reciprocating needle, either straight or curved. Examples of this type are the Plummer, Henshall, Reece 1889, Reece 1890, Thomson, and Dearborn machines, and others. The Arbetter machine is of this general type, using the bender and horizontal feed at the needle point, instead of the vertically descending feed around the back guide edge, as in Lewis.

Nothing in the prior art, however, covered blind-stitch felling, or fastening a folded edge to a bottom layer, so that that row of stitches made in such bottom layer could be concealed, and the bobbin thread only be visible over the edge of the fold. To "fell" means to flatten and sew down level with the cloth, as, to fell a seam. This was first accomplished by machinery by Lewis, and later by Arbetter in a different way.

Lewis and Arbetter started out in nearly parallel paths, without knowledge of each other, to produce machines which would accomplish similar objects. Lewis started first, and was first in the field; but Arbetter was not far behind, and in some respects has greatly outstripped his competitor, especially in having a large number of practical machines at work. Lewis also has machines at work, but to what extent or in just what form does not clearly appear. Both classes of machines, however, do remarkably good blind-stitch felling, producing results which look very much alike. For about seven years the Arbetter company has had a large number of machines in operation under patent licenses in many of the large cities of the country. This is mentioned, not as bearing directly on possible infringement, but to show the importance of the case to the parties, and the great care with which it should be examined.

Lewis secured this blind-stitch, concealed-effect felling result by feeding the goods up to the needle point in an angular fashion, so that the needle would go in under the edge of the fold close to the bottom layer, and with a diagonal stroke come out on top of the folded edge, a little back of the edge. This is the needle to edge relationship so

much referred to in the briefs and argument, and is the whole gist of Lewis' discovery. This had never been done before, and his was the first machine to accomplish it. Arbetter soon after accomplished a like result in another way.

With these general observations, an attempt will now be made to describe the means and operations which Lewis and Arbetter used to secure their respective results; plaintiff claiming that means, operation, and result are equivalent in both forms, and defendant claiming that all three are distinct. In describing Lewis' and Arbetter's methods, the correctness of their respective contentions as to what each was trying to do, and did finally do, will be assumed, leaving to subsequent examination of the record to determine how far the respective claims are sustained by the proofs. In the ordinary sewing machine the needle, bearing its thread-loop, moves up and down in a vertical plane, and the stitch is made either by a revolving hook surrounding a bobbin carrying the second thread catching the loop and pulling it around the bobbin thread, or by a shuttle-bobbin shooting back and forth through the needle-loop, somewhat like the bobbin action in a loom. In these old machines the needle goes through and through the cloth, making a stitch visible on both sides. Now a blind stitch, visible only on one side, may be made in two ways. If made with a straight needle, the cloth must be bent over the edge of a guide, so that the needle may go in and come out on the same side; if made with a curved needle, or straight needle and bender, the cloth may lie flat as in the ordinary machine, and the surface of the cloth placed in such adjustment that it will be just inside the path of the straight needle or just inside the arc of the circle described by the curved needle, so that the needle point will catch the surface and come out close to the place where the cloth is first pierced by the needle point. This operation may be aided by a device coming up through the bed plate either at each needle-thrust, or at every other one, to bend up the cloth, and aid the needle in catching its surface. This device is called a bender. Either a straight or curved needle may be used, since the bender pushes the cloth into the line of needle-thrust. Lewis uses the straight needle and Arbetter the curved. To make the Lewis method a little clearer, let the finger represent the machine feed guide or back guide. If two pieces of cloth are bent around the forefinger, the pieces may be blind-stitched together (the usual way in the household), by sewing only through the upper piece and the surface of the lower piece held over the finger, without letting the needle go through the thickness of the lower piece, a blind stitch can be made. The thread will show only on the top or edge, and not on the other side. This, as well as the use of the curved needle, is an old method of machine sewing, as applied to leather, felt, cloth, and matting. This is known as "padding."

Felling, however, or blind-stitch felling, is a more difficult operation, when done with a machine. Here the problem is to bury the needle thread, and allow only the bobbin thread to show over the folded edge, and at the same time do a good job, one which will be firm and neat, and nearly resemble hand felling. The edge of a fold must be fastened

or hung to the main fabric by two rows of blind stitches (common in the old art), near to and over the edge of the fold. This can best be done by making the lines of one of these rows of stitches, or of both, at an angle to the edge line of the fold, and then using the fold to cover one line of stitches. Both Lewis and Arbetter accomplish this, with practically the same results.

The gist of the Lewis invention in this part of his machine is the feeding of the cloth so that, when it is descending over and around the back edge of the guide, a folded edge is presented to the needle at an angle to the plane of needle movement, and this angular relation is maintained in both rows of stitches, that one made in the main fabric as well as the one made in the folded edge. While in the Arbetter machine the stitches made in the main fabric are parallel to the folded edge, and only that line of stitches made in the folded edge are angular or diagonal to that edge. There is a theoretical advantage in the Arbetter method, because the line of stitches in the main fabric is parallel to the folded edge, and thus easier to cover up than a diagonal stitch, starting back from the edge and coming out close under it. Practically there is little difference, because the stitches in the main fabric are very short. In both forms only the bobbin thread shows over the edge. A close observation of samples of work from both machines shows no discernible difference.

Referring again to hand work, hold the needle vertically in the right hand, with the point up, and bend the folded edge over the left finger so that such edge is parallel to the length of the needle. It will be seen that, when the needle is pushed up vertically through the edge of the fold, the points of entry and exit will each be the same distance from that edge, and the stitch will be straight and not diagonal. But if the cloth as it falls over on the near side of the finger is swung to the left without moving the folded edge away from the needle, the perpendicular portion drawn over the back of the finger will be at an angle to the vertical line of the needle-thrust, and, when the needle rises and is pushed through the perpendicular edge of the cloth, either the main fabric or folded edge, the stitch will be a diagonal one. This is what Lewis means in claims 72 and 76 in counting on "means for presenting the goods to the needle with the edge adjacent to the needle inclined to the path of reciprocation of said needle," and in claim 75, "inclined to both said paths of reciprocation of the needle." The "means" referred to are the angular edge of the back guide over and around which the cloth is fed. So long as the cloth lies flat, away from the finger or edge of the guide, it may be swung either right or left clear around the circle without inclining the horizontal portion of the edge to the needle in any degree. It is always the perpendicular or descending part of the edge which is so inclined by such left or right movement. This point is not clearly brought out in the evidence, probably because it is an obvious one.

Applying this illustration to the Lewis machine making two rows of stitches, one in the main fabric and one in the folded edge, he provided for two parallel paths of needle movement. This he did by a cam to set over or "shog" the needle from side to side. Suppose the

first needle-thrust was through the main fabric alone, on the next needle-stroke the needle is set back so as to make its diagonal stroke through the edge, as described; the two rows being locked together by the bobbin thread carried by the revolving hook, and by putting the thread under tension the folded edge is pulled over so as to bury the first row of stitches, and draw the bobbin thread firmly over the edge. The stitch made in the folded edge not being allowed to go into the underlying cloth, the edge is held by the stitch and the bobbin thread locked into it as if suspended from an inverted hanger, and when the bobbin thread is tightened from the side under the edge the latter is drawn down or felled over the first row of stitches, with the bobbin thread only visible across the edge of the upper layer.

Mindful of the difficulty of clearly showing these operations, a description of Arbetter's method of meeting the same problem will now be attempted, assuming as before that both parties were working to the same end. Arbetter gets a like result by rocking his circular needle. His cloth always lies horizontally and is fed under his curved needle, so that its surface is always parallel to the arc described by the needle point as it swings back and forth, except that the bender rises to the parallel needle-stroke so as to slightly push up the main fabric, and enable it to be the more readily caught by the needle point swinging parallel to the cloth surface. He makes the first line of stitches by keeping the needle-thrust parallel with the folded edge, and these stitches are made quite close to, but not touching, such edge; but the second line, by means of a rocking mechanism on his needle-hanger, he makes in the edge itself by putting the needle through at an angle. On the first or straight thrust the curved needle picks up the surface of the main fabric over the bender, and on its second one its point is rocked over so as to pierce just under the folded edge, and a little forward of the first stitch, and go through such edge without touching the main fabric, diagonally to the line of the edge, coming out on top of the folded edge a little back of that edge. The thread-loops being caught by the hook and thus locked to the bobbin thread, both lines of stitches are locked and drawn together, and the first line in the main fabric more easily concealed, at least in theory, than in the Lewis operation. In both operations only the bobbin thread shows over the edge.

It thus appears that Lewis' discovery was that the folded edge must be kept in close angular relation to the path of reciprocation of the needle. In his device for doing this a single necessary element additional to the old sewing machine is the angular edge or face of the back guide. In claim 72, covering "means for presenting the goods to the needle with the edge adjacent to the needle inclined to the path of reciprocation of said needle," the means are the angular edge. In claim 76 he adds a second element in the form of "an edge-guide for the goods." This is convenient, but not essential. The whole gist of Lewis' invention lies in the simple, small triangular piece of metal added to the face of the back guide, which gives him his whole needle to edge relation, and enables his machine to do good concealed effect felling.

The corresponding elements in the Arbetter machine are the rocking needle-hanger and the bender.

With this attempt to show the operations and results of the two machines, it is now necessary to take up the Lewis patent, and other parts of the record, in order to try to discover just what Lewis was seeking, how he tried to get it, and what position his invention occupies, in view of the prior art, and any limitations imposed on him by the file wrapper contents, or self-imposed limitations, if any, appearing in his specifications and claims. Superficially the two operations are different, but the question is whether Arbetter's machine is the equivalent of Lewis', even though means and operation may appear to differ.

It is shown in the proofs that in February, 1901, Lewis installed the Lewis old machine, which contains his diagonal feed, in clothing factories in St. Louis, where it was used for several months doing blind-stitch felling on the inturned hems of trouser bottoms. This was the first successful machine to do such felling ever produced, nor is there any other disclosure or machine in the prior art which anticipates the features of claim 72, relating to diagonal stitching.

The Lewis file wrapper: In the original specifications, filed August 2, 1902, there appear the following paragraphs relating to the subject-matter of claims 72 and 76:

"The object of my invention is to simplify the construction of blind-stitch sewing machines, and to provide mechanism whereby stitches can be made which are invisible on the opposite side of the goods to that on which the stitches are made, but which are also concealed, or nearly so on the side of the goods in which the stitches are made."

"The needle 165 at one thrust passes along the line A (Fig. 22) entering and leaving the main layer 168 of goods at the same side, but does not enter the superimposed layer 169. At the next thrust the needle is moved laterally by the cam 36 so as to pass along the line B entering the edge or underside of the superimposed layer and emerging from the surface thus piercing the said superimposed layer transversely. By sufficiently tightening the tension the edge of the superimposed portion 169 is drawn under so that the stitch is concealed, or almost so on the side of the goods from which the stitch is done."

There was originally no claim covering the subject-matter of patent claim 72, but this was added among the first amendments suggested by the patentee, under date of December 2, 1903, as follows:

"53. In a sewing machine the combination with stitch-forming mechanism of means for presenting the goods to the needle with the edge inclined to the path of reciprocation of the needle."

This is the same as patent claim 72, except insertion of the words "adjacent to the needle," after the word "edge," which was made January 30, 1906. No explanation is given of the reason why this claim was not included at first, and it might well have been, since it is within the original description and drawings.

When the examiner came to deal with this and two other like claims, on December 9, 1903, a rather unusual thing happened. Before Lewis filed his patent application, a patent was granted to Arbetter on an application filed August 13, 1901; the patent being dated January 7, 1902, No. 690,385. If this patent covered the Lewis invention, it was a good prima facie reference. The examiner thought

it was, and so rejected claim 53 on this Arbetter patent. To this Lewis' attorneys responded, under date of March 18, 1904, as follows:

"An affidavit has been submitted to carry applicant's date of invention prior to the filing date of the Arbetter patent, and therefore said patent is not a good reference for present claim 54, formerly claim 53.

"This affidavit also avoids this patent as a reference for present claims 55 and 56, former claims 54 and 55. It is not thought, however, that these claims are anticipated by the Arbetter patent, as in the Arbetter construction the goods are inclined only to one path of reciprocation.

"A reconsideration and allowance are respectfully solicited."

Here we see the examiner taking a view in harmony with plaintiff's present contention, and opposed to defendant's contention, and Lewis (through his soliciting attorneys) arguing that the Arbetter construction was not an anticipation because the goods were inclined only to one path of needle reciprocation, which is inconsistent with plaintiff's present claim.

The affidavit referred to satisfied the examiner, and the Arbetter patent was withdrawn as a reference, under date of April 5, 1904. The claim to the diagonal relation of the goods to the needle was, however, repeatedly rejected by the examiner on the Arbes patent, which did not have a diagonal feed, and on May 13, 1905, Lewis' solicitors submitted the following argument:

"It is not seen that these claims are met by either of these references. The patent to Shea certainly has no bearing whatever upon the claims. Claim 54 calls for means of presenting the goods to the needle with the edge inclined to the path of reciprocation of the needle. This is not true of the Arbes patent. It is true that after the goods have passed around the back guide they pass down an inclined path, and it may be that the examiner had this in mind in rejecting the claim. An examination of the Arbes device, as shown in Fig. 6 of his patent, will show, however, that at the time when the goods are presented to the needle as they are passing around the back guide, the edge is in a line parallel with the path of reciprocation of the needle and not inclined thereto. The Arbes device will not accomplish the function which applicant obtains by presenting the edge of the goods inclined to the path of the needle, namely, that of being able to take a stitch through the edge of the goods passing in under the fold and out upon the face of the goods. It is therefore thought that the claim is clearly allowable."

Again, the claim was rejected on the Arbes patent, with the following statement:

"The patent to Arbes, 595,090, of record, shows a back guide having a convex surface across which the goods are fed. This is the full equivalent of the back guide recited in claim 3, and said claim is rejected thereon."

The claimant then varied his argument as follows:

"Present claims 53, 54, and 55 (formerly claims 54, 55, and 56) are clearly not anticipated by either of the references cited. In applicant's last amendment he clearly pointed out his reasons for believing that these claims are not met. In addition, however, it may be stated that the goods cannot be presented with the edge inclined to the path of the needle in either the Arbes or the Shea patent, as suggested in the examiner's letter of July 18, 1904. If it is attempted to present the goods with the edge inclined to the path of the needle in either of these machines, the effect will be to feed the goods laterally away from the back guide and from the needle. This can be readily illustrated by drawing a strip of cloth around a pencil or other cylindrical guide in a diagonal direction. In view of the above it is thought that these claims are clearly allowable.

"A reconsideration and allowance are respectfully solicited."

Further rejection then followed, still on the Arbes patent, and the claimant, under date of June 21, 1906, again presented the same arguments as before:

"Present claims 57, 58, and 59 (former claims 58, 59, and 60) are thought to clearly distinguish from the references. Present claim 57 calls for means for presenting the goods to the needle with the edge adjacent to the needle inclined to the path of reciprocation of the needle. This is not shown in either of the references. It is true that the patent to Arbes shows the edge inclined after it has left the needle. At the point where it is adjacent to the needle, however, it is parallel with the needle, and consequently the Arbes machine does not accomplish the function which is accomplished by applicant's machine. The patent to Shea is no nearer to applicant's construction than the patent to Arbes. Present claim 56 calls for means for feeding the goods across the face of the guide adjacent to the needle in a path inclined to said face. This is not true of either of the references. In both the goods are fed straight across the face of the guide at the point adjacent to the needle, and therefore neither accomplishes the same function as applicant's machine. Present claim 59 is similar to claim 57, except that it calls for a needle having two paths and means for presenting the goods with the edge adjacent to the needle inclined to both paths of reciprocation, and it is therefore more limited than the previous claim and is allowable for the same reasons.

"A reconsideration and allowance are respectfully solicited."

Finally, on July 12, 1906, the examiner was satisfied, and no further rejection of the claim in question (72) was made, and the patent was issued, but more than a year later, on August 6, 1907.

No further description than that contained in the original specification was made. All the elements of claim 72 were contained in the first description, which shows that the "needle to edge" relation was a necessary part of the invention. Hence the first amendment to the claim, January 30, 1906, by inserting the words "adjacent to the needle," added nothing to the previous description. It is evident all the way through that Lewis firmly insisted on the discovery of the diagonal stitch and needle to edge relation, with all that these imply. The patent is the measure of Lewis' grant, modified, of course, by the prior art, and by anything appearing in the file wrapper. There is nothing, however, in the latter which limits the grant, except possibly the admission of his attorneys that the Arbetter patent of 1902 did not anticipate, and could not therefore infringe. The patent in suit therefore stands substantially unimpeached, so far as the file wrapper is concerned. It is an advance on the prior art by a single step of considerable importance. While Lewis was not a pioneer, his patent, up to this point of our examination, is entitled to fair and reasonably liberal construction, because he was the first to do blind-stitch felling by machinery. Arbetter was only a few months behind, but Lewis was first.

The Lewis seam-application and interference: Much was said on the argument about another patent application made by Lewis, soon after his machine application was filed, called the seam-application. This was for a patent on the Lewis seam shown in the first application. Arbetter also had a seam-application, and the two were put into interference, which was finally decided in Arbetter's favor, by the Court of Appeals of the District of Columbia, and a patent issued to him. Lewis, thus being denied a patent on his seam, brought suit under section 4915, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3392), to compel the

issue of a patent. This action is now pending and undetermined. Neither party to the interference took any proofs; each standing on the interference-record.

Both parties now claim some benefit from the seam-application and interference-records. Defendant claims that the Lewis seam-application shows indisputable evidence that Lewis' real object and purpose were to make a diagonal or zigzag stitch in order to get greater binding effect and covering capacity, and not concealed effect felling, only claiming a partial concealment. This was decided by the District of Columbia Court of Appeals in the interference case; that court saying that "concealment of either thread was as foreign to his original design as it is impossible of accomplishment in his seam." Plaintiff, on the other hand, claims that the interference case demonstrates that both seams are the same; that the Patent Office took four claims out of the Lewis application and gave them to Arbetter, and they are now among his patent claims. Defendant having accepted a patent on its seam broad enough to include the seam of the Lewis patent in suit, with full knowledge of the seam-application and interference, on the theory that Arbetter had a prior right to make such claims drawn by Lewis, thus asserts that the subject-matter is identical. Defendant has taken out a patent on Arbetter's claim to novelty and priority, and taken over Lewis' discovery on the theory that it was later than Arbetter's. This is a full recognition of the identity of the two seams. These are, in brief, the respective contentions.

[1] Ordinarily a patent is to be construed by its own contents, its file wrapper, and a consideration of what there was left previously undiscovered in the particular art. The patent is the measure of the grant; other applications not usually being material to its construction. But the rule of construction adopted respecting several deeds or contracts between the same parties, made about the same time, relating to the same subject-matter, and as parts of the same transactions, undoubtedly applies to patents and patent applications. All may be resorted to on an inquiry as to the meaning of any one. The seam-applications, interference, and Lewis' patent application, related to the same subject-matter, and were all pending during substantially the same period. Therefore all may be looked into to determine the proper construction of the Lewis patent.

The Lewis seam-application was filed February 2, 1903, was allowed November 24, 1906, but thrown into interference with Arbetter's like application early in 1907. Figures 1 and 2 are about the same as figures 21 and 22 of his patent application. Two methods of forming the stitches are shown, one with the first needle-thrust in the bottom layer, and the next entering under the folded edge and coming out on its top surface, the other with the first needle-thrust as before but the next one both goes in and comes out on top of the upper layer containing the folded edge. In the original application he says nothing about greater binding effect or greater covering capacity, but recommends that the edge be folded "so there will be no raw edge exposed in the hem or seam"; nor anything about concealed effect or thread covering; although he mentions both of them later. In each of the

four Lewis claims suggested to Arbetter in the interference, one needle-thrust is described as "entering under the edge" of the superimposed layer. All the claims were rejected on the first Arbetter machine patent, just as was done in the Lewis machine application, although the drawings of both the Arbetter applications (seam and machine) show the second needle-thrust going in and coming out wholly on the top of the superimposed layer. Lewis at once called attention to this, and also filed an affidavit carrying the date of his invention back of the Arbetter machine application, and submitted a sample of his prior work. He also argued that the reference was not pertinent because one of the Arbetter rows of stitches is parallel to the edge. The examiner thereupon withdrew the reference and allowed two of the Lewis claims, and rejected the other. This rejection raised the question of the function of the angular or inclined stitch, and in discussing this Lewis' attorneys took the position referred to by defendant's counsel, and by the District of Columbia Court of Appeals. But this was done after the other claims relating to the needle to edge relation had been allowed. The matter of the greater binding effect, preventing the pulling of the woof from the warp, and vice versa, in case of a raw edge, was argued back and forth, and all the claims rewritten, and somewhat amended to meet the examiner's views and distinguish the references, until ten claims were finally allowed, and the application was about ready for patent when the interference was declared, and four of the Lewis claims given to Arbetter, as already stated.

This seam-application record shows simply that Lewis claimed the same things as to the diagonal stitch as he did in his patent application, but in order to emphasize its importance in reference to certain of his claims he brought in the arguments about greater binding effect, protecting the warp or woof and the raw edge; and in the explanation of July 6, 1906, he describes the concealed effect. There is nothing in this feature of the case which seems to me to be of any great importance, either in arriving at the true construction of Lewis' patent, or as bearing on infringement.

As to the result accomplished by Lewis, and to what extent his invention advanced the art of blind-stitch felling by machines, I think Lewis and Arbetter may be spoken of in nearly equal terms, because they both got the same result. Whether one has made a greater commercial success than the other is important in itself, but not in this connection; by fully operative devices they accomplish practically the same result in concealed effect felling. Nor is the record complete enough to justify any comparison as to commercial success, though it is apparent that defendant has a large business in manufacturing and licensing its machines.

[2] *The question of infringement of claims 72 and 76:* Lewis and Arbetter reached like results by different paths, each unaided by the other. This record is happily free from any suspicion of piracy on either side. Each party worked out his own ideas in his own way, and by different means and different operations got the same result. It is even possible that Arbetter gets a slightly improved result, though I think they are practically identical. Suppose Arbetter had been first

in the field, and he were here suing Lewis for infringement. Would not the diagonal presentation of the goods to the needle, the bending them around the back guide, piercing them vertically instead of horizontally, making both needle strokes in the diagonal plane, "shogging" the needle instead of oscillating it, making the lower set of stitches nearer to the turned edge, and the absence of the bender in Lewis', together be taken as pretty clearly showing different means and a different mode of operation? These inventors, after immense study and labor, have produced wonderful pieces of machinery; but they have done this independently of each other. Each has produced his own, and each machine seems to be quite distinct from the other. When a supposed infringer appropriates a valuable invention, and then tries to shield himself behind a paper disclosure found in some publication never heard of by the inventor, there is some satisfaction in being able to find that the paper does not really anticipate. But when two inventors have reached identical results from diverging paths out of sight of each other, there is also satisfaction in being able to find that they reached those results by means and operations essentially different, and thus give each that which should be his own. I think the Arbetter machine performs a substantially different function in a substantially different way to obtain substantially the same result, and that infringement does not exist.

It is true, as urged, that the fundamental principle of both machines is the relative relation of folded edge to needle path, and that their absolute positions are wholly nonessential. I think it is also true, as argued by plaintiff's counsel, that it is immaterial to the infringement of claim 72 that in defendant's machine the stitches in the base layer are parallel with the edge, whereas in the Lewis machine the stitches in both the base layer and the superimposed layer are diagonal to the edge; the only essential thing in either case being that the stitches in the superimposed layer shall be diagonal to the edge. But giving these concessions all the logical force I am able to do, and giving as full effect as I can to *Machine Co. v. Murphy*, 97 U. S. 120, 125, 24 L. Ed. 935, *Hoyt v. Horne*, 145 U. S. 302, 308, 309, 12 Sup. Ct. 922, 36 L. Ed. 713, the *Button-Hole Machine Case*, 61 Fed. 958, 10 C. C. A. 194, and the decisions there fully reviewed by Judge Putnam, I still think infringement is not shown. While I think the needle to edge relation, which is the gist of the Lewis invention, is present in both inventions, and that the products of both are alike, these results are obtained in such a different way that infringement is avoided. As already stated, the only device essential to produce the angular presentation of the goods in the Lewis machine and discovery is the angled back guide, while in Arbetter's machine the corresponding means are a rocking hanger and a bender. These are so completely distinct as to avoid infringement, even though Lewis be considered a primary inventor. Moreover, the two modes of operation are different. If the needle-shogging in Lewis be taken as equivalent to the needle-rocking in Arbetter, still the presentation of the goods to the needle is made at right angles in Arbetter, together with the bending operation, and obliquely in Lewis. If, on the other hand, the needle-rocking in Arbetter be

taken as the equivalent of Lewis' diagonal presentation of the goods, there is still the additional bending operation, which should, I think, be regarded as part of the function of presenting the goods, and not as an additional element to Lewis' combination which of itself would not avoid infringement.

The question of infringement of the needle-guide claims: As to these claims I think it is sufficient to say that defendant does not use the Lewis needle guide, but merely the old form found in a number of earlier patents. If defendant's needle is put under tension, it is a matter of accident, and does not result from the construction or hanging of the needle, or from the way the guide is made or adjusted. The patent construction is novel, and the claims valid, but not infringed.

The "inclined-hook" claims: Infringement of two claims is charged. The claims are these:

"Claim 42. In a sewing machine, the combination with a reciprocating needle, of a rotary hook containing a bobbin and inclined to the path of reciprocation of the said needle, the rear face of the hook co-operating with said needle to take the loop."

"Claim 71. In a sewing machine for blind stitching, the combination with a needle, of a rotary hook inclined to the path of reciprocation of said needle, said hook having an inclined cast-off surface and an offset for guiding the thread onto said cast-off surface."

The Lewis old machine, put in use in February, 1901, does not have an inclined hook, but it was claimed in original count 36 of his machine application of August 2, 1902. I shall assume the validity of the inclined hook claims, and consider only the question of infringement. The opposing experts disagree in their respective descriptions of the operation of the Lewis and Arbetter hooks, though I can see no reason why they should. It is perfectly clear that the Lewis claims count on improved cast-off of the needle thread over the face of the hook, and the inclination claimed must necessarily be a leaning over of the face of the hook towards the bed plate of the machine, so that the angle between the plane of needle reciprocation and the face of the hook increases from nothing up to 20 or 30 degrees when measured back from the hook-face, and 150 to 160 degrees measured the other way. That is, Lewis inclines the hook downward, so that gravity may assist in the cast-off, so far as gravity can do so in a rapidly flying movement. Arbetter, on the other hand, inclines the hook upward, so as to get a more difficult cast-off than he would if the hook were left at right angles to the path of needle reciprocation. This is substantially admitted by Mr. Browne, complainant's expert, is expressly testified to by Mr. Hains, defendant's expert, and is perfectly clear from the wooden models used on the argument, as well as from a comparison of the Lewis patent with the Arbetter machine. Defendant does not use the improved cast-off; hence there is no infringement.

Every angle of this complicated case was covered by the four oral arguments and the printed briefs in the clearest and most satisfactory way, so that the work of the court has been comparatively easy.

There should be a decree dismissing the bill because infringement does not appear.

HILDRETH v. LAUER & SUTER CO.

(District Court, D. Maryland. November 15, 1913.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CANDY PULLING MACHINES.

The Dickenson patent, No. 831,501, for a candy pulling machine, claim 1, is for a pioneer and basic invention and is neither for a function nor broader than the invention; also, *held* infringed. Claim 2 *held* valid but not infringed. The Jenner patent, No. 804,726, also for a candy pulling machine, *held* invalid as to claim 1, as too broad, but valid and infringed as to claims 7 and 8.

In Equity. Suit by Herbert L. Hildreth against the Lauer & Suter Company. On final hearing. Decree for complainant.

See, also, 204 Fed. 792.

Macleod, Calver, Copeland & Dike and George P. Dike, all of Boston, Mass., and Steuart & Steuart and Edwin F. Samuels, all of Baltimore, Md., for complainant.

Richard B. Tippet and George W. Lindsay, both of Baltimore, Md., for defendant.

ROSE, District Judge. The plaintiff says the defendant infringes in the aggregate five claims out of a much larger number contained in two patents owned by him. These patents are for candy pulling machines. In the last few years the candy pulling industry has been revolutionized. Prior to the beginning of this century candy was always pulled by hand. In factories that operation is now performed by machinery. One small and simple machine will do the work of ten men and will do it better than they can. Out of a less expensive grade of sugar the machine will make a more attractive and salable candy. The machine made product is more sanitary because its method of manufacture has been far more cleanly.

The plaintiff owns patents which purport to cover the essential features of all the machines now in use. Whether these broad claims are valid is therefore of great importance not only to the parties to this suit but to the trade generally. The plaintiff has more than 300 machines out on lease and license at an annual rent of \$250 each. The record does not tell what it costs to build one of them. It may be fairly inferred, however, from what is stated, that a single year's rent will repay all the money laid out in construction and will leave a satisfactory and perhaps a handsome profit. Large as is the plaintiff's income from these royalties, his licensees, if his patents are valid, have no cause to complain. A human candy puller is paid about \$14 per week. The weekly wages of ten of them would aggregate \$140. One of them can tend two or three machines. At \$250 per annum the weekly rental of a machine is something less than \$5. Where only one machine is in use, its rental and the wages of the operator foot up \$19 per week, as against a wage bill of \$140 when the same amount of candy is pulled by hand. Doubtless there are other features to be considered. In practice the economies from the use of the machine may not be so great as this record would indicate. Nevertheless, after

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

all possible deductions have been made, they must still be relatively large.

In considering the validity of the claims in suit, it will be necessary to refer to four other patents, making thus six in all, of which mention must be made. Applications for all these were at one time simultaneously pending in the Patent Office. As they were originally presented, every one of them contained one or more claims which the Examiner held to be in interference with all the others. In some instances the applicants withdrew the broad claims which were said to be in conflict with those of the other inventors, and accepted patents which covered merely the special types of machines designed by them. In other cases the question of priority was, after a more or less prolonged contest, determined by the Patent Office. Two of the applicants carried the struggle clear to the Court of Appeals of the District of Columbia. The respective dates at which the patents were applied for, still less the dates of their issue, do not show their relative legal priorities. It so happens, indeed, that the first patent to come out of the office is the last in right.

It will be worth while to arrange these six patents in the order in which in law they rank.

Rank	Inventor	Number	Date of Issue
1	Dickenson	831,501	Sept. 18, 1906
2	Hildreth	832,384	Oct. 2, 1906
3	Jenner	804,726	Nov. 14, 1905
4	Thibodeau	736,713	Aug. 11, 1903
5	Robinson	881,442	March 10, 1908
6	Henry	731,681	June 23, 1903

Each of these patents will be hereafter referred to by the name of the inventor for whose invention it was granted.

There was one idea which was common to all these applications as they were first presented. It was formulated by the Patent Office in the following claim:

"A candy pulling machine comprising a plurality of oppositely disposed hooks or supports, a candy puller, and means for producing a specified relative in and out motion of these parts for the purpose specified."

As Dickenson was the victor in the interference proceedings, this claim was awarded to him. It constitutes the first claim of his patent and is the more important of the two claims of that patent in suit in the pending case. The relative in and out motion referred to was accurately described by Dickenson in his application as one which would cause the candy to move along a path corresponding to the figure 8.

The Patent Office was right in finding this feature in every one of the six applications. It was the basic principle common to all of them. It made every one of them a more or less operative machine for pulling candy. No earlier attempt to invent a candy puller had made use of it. Without it the prior art was destitute of any machine which had any value either as a candy puller or as a suggestion of how a useful one might be constructed. So soon as it was discovered progress was rapid.

In a previous case between the same parties now before the court, and in which suit was brought upon the Hildreth patent, it was said (204 Fed. 792) that the various inventors heretofore mentioned "apparently had no means of learning what the others were doing." In that case the file wrappers in the various interference proceedings were not in evidence. They now are. Circumstances disclosed by them strongly suggest the possibility, if not the probability, that most, if not all, the applicants, other than Dickenson, before they perfected their inventions or filed their applications, had either seen his machine or a description of it.

Dickenson before applying for a patent advertised his machines for sale. The plaintiff was then a candy manufacturer, as he still is. He saw how valuable a really effective candy puller would be. He made prompt application for a patent for one of his own devising. He subsequently purchased Jenner's invention, even before a patent for it was applied for. During the prolonged interference proceedings between Dickenson and the plaintiff as assignee of Jenner, the invention of the former had passed, together with those of Thibodeau and Robinson, into the hands of third parties. When the Court of Appeals of the District of Columbia awarded priority to Dickenson, the plaintiff purchased the inventions of Dickenson, of Thibodeau, and of Robinson. When the Dickenson, the Hildreth, the Jenner, and the Robinson applications passed to issue, they all belonged to the plaintiff. He at that time owned the Thibodeau patent, which had been previously issued.

Dickenson had vindicated his claim to having been the first discoverer of the basic principle and the first person to reduce it to practice. It was he who had found out that a combination of a candy puller and a plurality of oppositely disposed candy hooks or supports could be given a relative in and out motion which would carry candy along a figure 8 pathway, and that candy could thereby be pulled.

For practical use his machine had a number of shortcomings. Some of them were serious. One of the gravest of these was that the candy had to be dragged along a trough, because the trough was the only means by which in it the candy could be supported against gravity. Dickenson apparently had the idea that his pins or hooks would also serve the purpose of supports to the candy. In his machine, however, they did not to any useful extent do so. Hildreth devised one in which they would. The latter asked for, and in his patent was given, a claim broad enough to cover every machine in which Dickenson's fundamental discovery was embodied and in which the pullers or hooks supported the candy against gravity. His machine was for commercial use a great step beyond that of Dickenson. It, nevertheless, from a practical standpoint, left much to be desired. His pins or hooks or supports were perpendicular. Two of them projected from the bottom of the machine upwards. The third was a long pendulum like contrivance which hung down from above. The machine was cumbersome and space consuming. For a short while after a batch of candy was put upon it, the support given by it against gravity was imperfect.

Jenner's contribution to the art was the discovery that the pins, hooks, or pullers could be so arranged that they would project from the frame of the machine in a horizontal direction. One of them could be stationary as one of them in Dickinson's machine was. The movement of the others would, as in Dickenson's give the required relative in and out motion. Such a machine would support the candy at all times. It could be more compactly constructed than that of Hildreth and apparently with fewer and less expensive parts.

The broad claim of Jenner's patent is one of those here in suit. It is for "a candy pulling machine comprising horizontally-disposed stationary supporting means and a plurality of pulling means."

The alleged infringing device in this case is constructed in accordance with the disclosures of the Henry patent. That patent was the last of the six to be applied for. When an interference was declared between its original claims, or some of them, and those of the other applicants, Henry canceled such of his claims as were said to conflict with those found in other pending applications. He said at that time in his formal communication to the Patent Office that he directed the cancellation "with a view of avoiding a long and expensive proceeding which he was financially unable to stand." He added that "he thus limits his claims to his particular type of double acting machine so that he might obtain his patent for his precise species." In this machine there is a horizontally disposed support and a plurality of oppositely disposed hooks or pins which, having among themselves and the stationary support a relative in and out motion, pull the candy along a figure 8 pathway and at the same time support it against gravity.

If the broad claims of the Dickenson and Jenner patents, already quoted, and the fourth claim of the Hildreth patent, are valid and are to be construed according to the more natural import of their language, Henry infringes all of them. Henry, by declining to go into interference, obtained his patent with its limitations years before those of Dickenson, Hildreth, or Jenner emerged from the office. His assignees at once went into the business of making and selling machines. Quite a large number were in use in various parts of the country before Hildreth was in a position to take any legal proceedings. When he finally obtained his patents, he began, or threatened to begin, suits against both the makers and the users of the Henry machines. The then owners of the Henry patent thereupon agreed to assign it to Hildreth. He paid them some thousands of dollars for it. Stipulation was made that he would release all of his claims against those who had used machines sold them by his assignees, provided, however, that such users surrendered the machines they had to him. The surrenders were to be made upon terms which, from his standpoint and upon the assumption that the broad claims of his patents were valid, were fair enough. The defendant, however, refused to accept them or to cease using a Henry machine of which it had become the owner. Plaintiff sued it for infringing the fourth claim of the Hildreth patent. In this court that claim was held invalid (204 Fed. 792) and his bill dismissed. He appealed. The case is now pending before the Circuit Court of Appeals of this circuit.

It is possible that the decree below may be affirmed. The plaintiff knows how great a change the series of inventions described in the patents herein mentioned have wrought in the candy business. He owns all the patents for them. Those patents contain broad claims and many others which deal with diverse forms of machines in which the primary claims may be embodied. Not unnaturally he may feel that in some way and under some of the claims of these patents he may be entitled to stop the use without his consent of a machine which to him appears to be clearly within their terms. Upon the dismissal of his bill founded upon the fourth claim of the Hildreth patent, he began this new suit against the same defendant. In this he relies upon the first and second claims of the Dickenson patent and upon the first, seventh, and eighth of that to Jenner. The question as to some of these claims lies within a narrow compass and may be disposed of with few words.

The second claim of the Dickenson patent is for the combination "in a candy pulling machine of a stationary candy pin, a set of candy hooks, and means for moving and shifting one of said hooks in relation to the other substantially as described." The claim has clear reference to a detail of the construction of the Dickenson machine. Whenever the so-called hooks of that machine reached either end of the trough, their position to each other was automatically changed. In the Henry machine no such shifting is required or, except in the loosest use of language, takes place. It is true that the hooks in the Henry machine, as in the Dickenson, have in relation to each other and to the stationary member an in and out motion, but that motion in the Henry machine does not depend upon the use of a shifting device such as that shown in the Dickenson or upon any equivalent of such device. The claim appears to be valid, but it is not infringed.

"The first claim of the Jenner patent is for a candy pulling machine comprising horizontally disposed stationary supporting means and a plurality of pulling means."

The Henry machine has a horizontally disposed supporting means. It has a plurality of pulling means. If the claim is valid, it can be read upon the Henry device. There is no apparent reason to give it a construction more narrow than its words imply. Jenner was not a pioneer in the same sense or in the same degree as was Dickenson. He used Dickenson's basic principle of the relative in and out motion of a plurality of oppositely disposed hooks forcing the candy along the figure 8 pathway. He adopted Hildreth's idea of using the hooks and pullers to support the candy against gravity, and in such a machine he disposed his support horizontally. He doubtless was entitled to a patent for a combination of these elements from Dickenson and Hildreth with his own contribution to the art. He had no right, however, to bar all the world from inventing, if they could, candy pullers which worked on a different principle from that of Dickenson. He could not say that in such machines, radically different as they were from anything he had devised, the inventors could not use a horizontally disposed hook if they found it convenient so to do. If he could, Hildreth could have monopolized the field for perpendicular supports. A third

patentee might have claimed every machine in which the supports lay in some plan between horizontal and perpendicular. In that simple way those who had made various forms of a machine operating on what was essentially the same fundamental principle could close the door against all other inventors even if they devised machines of a radically different type. The first claim of the Jenner patent must be held invalid as being much broader than any invention disclosed.

The seventh and eighth claims of the Jenner patent are limited to a machine of a particular construction. The seventh claim reads as follows:

"A candy pulling machine comprising a framing, a pin carried by the frame and shafts supported by the framing on opposite sides of the pin and having crank arms and pins carried thereby and arranged to revolve around the pin of the frame and means for driving the shafts substantially as set forth."

It is admitted that this claim, as well as the eighth, which need not be quoted in extenso, can be read literally upon the Henry machine. It is objected, however, that the actual machine shown and described in the drawings and specifications of the Jenner patent is different both from the Henry machine and from any machine upon which the claims could be read. The machine shown in Jenner's drawings has three stationary and two revolving pins. In that machine the two which are movable revolve in the same direction. In a machine so constructed there must be more than one stationary pin if candy is to be pulled. But the specifications clearly say that, if the movable pins are made to revolve in opposite directions, the results will be at least equally good. When so made to revolve, we have the Henry machine. It is a mere matter of detail, then, whether there is or is not more than one stationary pin. The seventh and eighth claims of the patent are not limited to a machine in which there is more than one stationary pin. They seem to be valid and to be infringed by the Henry machine. That machine is doubtless an improvement on the Jenner. If the owner of the Jenner patent were a different person from the owner of the Henry, the former would not be entitled to use the special feature of construction which appears to be the only thing covered by the Henry patent, but that, of course, would give the proprietor of the latter no right to use the Jenner either with or without the addition of his own improvement.

There remains for consideration the first claim of the Dickenson patent. In terms it may be read upon the Henry machine. It is said, however, first, that there is implied, although not expressed in the Dickenson claim, an element which does not exist in the Henry machine, and that consequently there is no infringement. In the Dickenson machine the candy is put in a trough and is made to move over the bottom of the trough in a figure 8 path. The trough is the only thing which to any appreciable extent supports the candy against gravity. If there were no trough or substitute for it, the candy would fall to the ground and the machine would be inoperative. Under these conditions the defendant says that the trough, being an essential portion of an operative machine, constitutes a necessarily implied element of Dickenson's first claim.

In passing upon this contention, it must be borne in mind that, in all the years during which this patent was before the Patent Office, no one ever supposed that a trough was an element of this claim. The office found this claim in effect in every one of the six applications as they were at first presented. It is certain that a trough did not constitute an element of that claim in any of the other five. But the interference was declared and so long contested because everybody understood that every one of the six applicants was making the same claim not only in words but in fact.

Dickenson and everybody else knew that, in order that his puller and hooks could pull the candy, the candy must be where they could take hold of it. Some way of supporting it against gravity was an obvious necessity. It does not follow that the patentee is bound to make any one of these ways an element of his claims. He shows a method of pulling candy in accordance with what he says is his inventive idea. In the illustration the candy is supported against gravity. That way of supporting it is not, however, a necessary element of his combination. He elected to make it an element of some of his claims, as, for example, of the fourth and the fifth. Wherever he has done so he is bound by it. Wherever he has not included it in words, there is no reason to suppose either that he in fact intended to do so by implication or to say that the law will make the implication whether he wanted to or not. The new thing which he found out was not a trough, but the fact that, if you give to a plurality of oppositely disposed candy hooks and a candy puller a peculiar kind of in and out motion that will force the candy along the figure 8 path, you will pull it. He was entitled to patent that combination. He had also the right to claim, as a more restricted combination because limited by more elements, the very form of machine in which he had used that which was broader and more all embracing. If his claim for that larger conception is invalid either because it is in its nature a claim for the function of a machine, or because he failed to embody it in any operative device, it will be stricken down. That, however, is no reason for saying that he intended to include in it an element which it is absolutely certain he wanted to exclude.

The defendant contends that the Dickenson patent is invalid because it is for an inoperative device. In the interference proceedings the same contention was made by the present plaintiff. Every one of the Patent Office boards and officials before which the interference came decided that it was not well founded. The Court of Appeals of the District of Columbia agreed with them. The thorough investigation which Dickenson's application then received as a result of that long drawn out contest, in which this very issue was repeatedly raised, adds unusual weight to the ordinary presumption of validity which attaches to every patent. In this connection, also, it is necessary to keep in mind for what invention this claim was granted. As already pointed out, the great thing which Dickenson found out was that oppositely disposed candy hooks and a candy puller given a specified in and out motion would move candy along a figure 8 pathway and would thereby pull it. That conception, instead of being inoperative, is in operation

in every one of the hundreds of candy pulling machines now in use. It is operating to-day to pull almost all the candy which is pulled in these United States. He complied with the requirements of the law by devising a machine which would give this in and out motion to the hooks and puller and would move the candy along the designated road. It is true that it is highly doubtful whether with his machine candy could be pulled for commercial purposes. The form of telephone which Bell made was valueless for practical use. Dickenson was able to see what had for years been hidden from all others. His discovery was illuminating. His execution poor. In patent cases it has been often noted that persons of the most brilliant conceptions are sometimes the poorest mechanics.

In view of the action of the Patent Office and of the Court of Appeals of the District of Columbia, of the facts disclosed by this record and of the principles laid down in many well-considered and authoritative decisions, the defense of inoperativeness cannot be sustained. *Telephone Cases*, 126 U. S. 535, 8 Sup. Ct. 778, 31 L. Ed. 863; *Crown Cork & Seal Co. v. Aluminum Stopper Co.*, 108 Fed. 845, 48 C. C. A. 72; *Von Schmidt v. Bowers*, 80 Fed. 149, 25 C. C. A. 323; *Packard v. Lacing Stud Co.*, 70 Fed. 67, 16 C. C. A. 639.

Defendant says, however, that, if so much be held against it, still this claim must be stricken down because it is so broad that it is for the function or mode of operation of a machine. In most cases in which a claim has been held to be functional, the inventor has claimed more than he invented, or at all events he claimed an exclusive right to do in any and every way something that other people had wanted to do before he did it. He asserted this right merely because he was the first person who had succeeded in doing it at all. The possibility and the desirability of using the power of the electric current to make intelligible signs at great distances had been recognized by many men before Morse found a method of doing it. Being the first inventor of that method, he was entitled to the monopoly of it for the statutory period. Moreover, as a pioneer he was entitled to have his claims so construed as to cover the broadest possible range of equivalents. Yet in his famous eighth claim he asked for more. If it were valid, he would have the right to say that other men who had been seeking the same goal could not now approach it even by a path over which he had thrown no light.

In the former case between the parties now before the court, if it be permissible to compare a relatively small invention with one which was epoch making, it was held that Hildreth could not sustain a claim which would have given him a monopoly of every way of supporting candy against gravity by the use of the hooks and pullers moving according to Dickenson's conception. The desirability of so supporting the candy was obvious. It might be invention to find a way of doing it. The first man who did it might be entitled to say that no one else should do it in any way so like his as to make it probable that it was suggested by his discovery. But he would have no right to shut off other men from using those hooks or pullers in a radically different way though for a like end and with a like ultimate result.

Before Dickenson perfected his invention, men had wanted a candy pulling machine. He found out how one might be made. That would have given him no right to a claim for a machine to pull candy. Such a claim would have been in relation to what he actually invented, as the eighth claim of Morse or as the fourth claim of Hildreth. But before Dickenson no one had wanted to make a machine with the in and out motion. That it was desirable to make such a machine for such a purpose was his idea. Whatever may be said of his claim, it is at least no broader than was his invention.

But is there any real reason for saying that a claim limited to a combination of a plurality of oppositely disposed candy hooks or supports, a candy puller, and means for producing a specified relative in and out motion of these parts for the purpose of making candy travel over a figure 8 pathway, is in any sense functional?

It may, perhaps, have some affinity to a claim for a mechanical process. If so, it will be none the worse. The doubt long entertained as to whether a mechanical process, as distinguished from a chemical one, is patentable, no longer exists. *Expanded Metal Co. v. Bradford*, 214 U. S. 366, 29 Sup. Ct. 652, 53 L. Ed. 1034.

In no ordinary sense of the words does this claim appear to be functional. It is true that it covers many different machines which in appearance and details of construction are very unlike that of Dickenson and are, as among themselves, dissimilar. Yet it covers them because the operative principle in all of them is the one he was the first to contribute to the industrial knowledge of mankind. He brought that discovery to the Patent Office—that appointed treasury and storehouse for additions to the world's stock of materially useful information. He left it there and received in return the price the government offers to all inventors—the exclusive monopoly for 17 years of the right to make, use, and vend his invention. There is every reason why he should not be allowed to receive or to hold a grant which goes beyond the price he has paid. There is none why he should be deprived of any part of the invention he has made, when, as in this case, he has asked for and been given an aptly worded grant which accurately defines the precise limits of that which was the essence of his discovery.

It follows from what has been above said that the first claim of the Jenner patent, 804,726, will be held invalid.

The second claim of the Dickenson patent, 831,501, will be held valid but not infringed, and the first claim of the Dickenson and the seventh and eighth of the Jenner both valid and infringed.

A draft of a decree to that effect, and for an injunction and an accounting, if desired, may be presented.

A. G. LEHMAN CO. v. ISLAND CITY PICKLE CO.

(District Court, W. D. Michigan, S. D. December 1, 1913.)

1. SALES (§ 69*)—CONTRACT OF SALE—SPECIFIC PROPERTY.

Where a contract for the sale of 20 car loads of sauerkraut specified only kraut of good quality, 1913 pack, equal to that furnished by the seller during the season of 1911, but did not require that it should be kraut manufactured at the seller's own factory, nor even be made from cabbage grown in Michigan, the contract was not for the purchase and sale of specific kraut; though both parties believed that the kraut to be furnished would be manufactured at defendant's factory, and it was a sufficient compliance with the contract if he produced goods of the proper quality manufactured by others.

[Ed. Note.—For other cases, see Sales; Cent. Dig. § 183; Dec. Dig. § 69.*]

2. SPECIFIC PERFORMANCE (§ 121*)—CONTRACT—PURCHASE AND SALE OF PERSONALTY.

In a suit to compel specific performance of a contract for the sale of a quantity of sauerkraut equal to that produced by the seller and sold to the buyer in 1911, which was only a fair quality, the contract only requiring that it be of good quality, 1913 pack, tank cured, standard cut, and well packed, evidence held insufficient to show that the buyer, after the seller's breach of contract, by reasonable diligence could not have purchased similar kraut elsewhere to fill the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.*]

3. SPECIFIC PERFORMANCE (§ 69*)—SALE OF PERSONAL PROPERTY—RIGHT TO RELIEF—ADEQUATE REMEDY AT LAW.

Where complainant contracted to purchase 20 car loads of sauerkraut from defendant during the season of 1913 for the sole purpose of reselling it to complainant's customers in the usual course of trade, and the contract was entirely executory at the time of the seller's breach, complainant had an adequate remedy at law by the recovery of damages, and could not maintain a suit for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 200-202; Dec. Dig. § 69.*]

In Equity. Suit for specific performance by the A. G. Lehman Company against the Island City Pickle Company. Dismissed.

Colin P. Campbell, of Grand Rapids, Mich., for plaintiff.

Joseph B. Hendee, of Eaton Rapids, Mich., and Elmer N. Peters, of Charlotte, Mich., for defendant.

SESSIONS, District Judge. In February, 1913, the parties to this suit entered into the following contract for the purchase and sale of 20 car loads of sauerkraut:

"Article of agreement made and entered into this 14th day of February 1913, by and between Island City Pickle Company, of Eaton Rapids, Mich., party of the first part, and A. G. Lehman Company, of Pittsburg, Pa., party of the second part, witnesseth:

"Party of the first part agrees to and does hereby sell to party of the second part, and party of the second part agrees to and does hereby buy from party of the first part, twenty (20) car loads sauerkraut, 36,000 pounds each.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Kraut to be good quality, 1913 pack, to be tank cured, standard cut, and well packed, to be equal in every way to kraut furnished on contract during season of 1911.

"Price to be seven and one-half (7½) cents per gallon, Pittsburg, Pa., rate of freight allowed, cooerage to be furnished by party of the second part f. o. b. Eaton Rapids, Mich.

"All kraut packed in half bbls. to be one-half cent per gallon extra.

"Not less than 15 cars to be taken between September 1, and November 15, 1913, and all to be taken by February 1, 1914.

"Party of the second to furnish cooerage and shipping instructions for several cars by September 1, 1913.

"Terms to be 30 days or 1 per cent. 10 days from date of invoice.

"It is agreed that any claim must be made within five days after receiving the goods.

"It is mutually agreed that, should buyer or seller suffer a loss by fire or strikes, he is not to be held liable.

"Seller: Island City Pickle Co.,

"By Geo. P. Honeywell.

"Buyer: A. G. Lehman Company,

"By A. G. Lehman, Sec'y."

Thereafter plaintiff made contracts with several of its customers for the sale of sauerkraut to be manufactured by defendant at its factory at Eaton Rapids, Mich. On September 10, 1913, the defendant wrote the plaintiff repudiating the contract upon the alleged ground that Mr. Honeywell, who executed it in behalf of defendant, had no authority so to do, and refusing to furnish the kraut. Plaintiff, through its attorney and the broker who had originally negotiated the sale, immediately notified defendant by letters that the plaintiff would insist upon the performance of the contract and that suit for damages would follow its breach. On or about October 7, 1913, defendant contracted with Wilson Packing Company of Jackson, Mich., for the sale of the entire output of its kraut factory for the year 1913. Pursuant to the terms of this contract the Wilson Packing Company paid to defendant the sum of \$2,000 and sent one of its employes to defendant's factory, under whose supervision all of the kraut has been manufactured. On October 30, 1913, Mr. Lehman and the broker, Mr. Eley, representing the plaintiff, went to Eaton Rapids and tried to induce the defendant to perform its contract. The latter again refused to furnish the kraut. The bill in this case was filed on November 3, 1913, and therein and thereby plaintiff seeks a decree compelling the specific performance of the contract of sale and restraining the defendant from selling or shipping 13 car loads of kraut in its factory at Eaton Rapids to any one other than plaintiff.

Counsel have presented and argued several questions of minor importance relating to the financial responsibility of defendant, the authority of Mr. Honeywell to execute the contract in its behalf, the right of plaintiff as a foreign corporation to do business in the state of Michigan, the laches of plaintiff, waiver of its claims, and the rights of the Wilson Packing Company. None of these questions requires consideration, as the decision of the case must turn upon the determination of the all-important question of whether a court of equity will decree the specific performance of such a contract as the one here presented.

Defendant contends and plaintiff concedes that a court of equity will not compel the specific performance of a contract for the sale of personal property unless special circumstances and conditions exist which render inadequate a suit at law to recover damages for its breach. But plaintiff insists that in this instance such special conditions and circumstances do exist. It plants its suit and bases its right to recover in a court of equity upon two alleged grounds: First, that the contract is for the sale and purchase of the specific kraut manufactured by the defendant and now in its factory at Eaton Rapids; and, second, that it is and has been practically impossible to procure kraut of like quality elsewhere.

[1] The first contention is unsound and untenable. The contract between these parties speaks for itself. It does not require defendant to furnish kraut of its own manufacture, nor even that made from cabbage grown in the state of Michigan. It is true that, at the time the contract was made, defendant was engaged in the business of manufacturing kraut at its factory at Eaton Rapids and not elsewhere. It is probable that both parties then believed that the kraut to be furnished would be manufactured at defendant's factory; but they did not see fit to incorporate any such requirement in the contract, and none is necessarily implied. Where the sale of goods is by a manufacturer or producer, unless it is specially agreed that the goods shall be of the seller's manufacture or production, it will be a sufficient compliance with his contract if he delivers goods of the proper quality manufactured or produced by others. 35 Cyc. 190; *T. Wilce Co. v. Kelley Shingle Co.*, 130 Mich. 319, 89 N. W. 957; *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199, 37 S. E. 485-490, 81 Am. St. Rep. 28; *Stanford v. McGill*, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760; *Acme Mills & Elevator Co. v. Johnson*, 141 Ky. 718, 133 S. W. 784-786.

[2] Plaintiff's second contention (that goods of like kind and quality could not be purchased elsewhere) is not sustained by the evidence. Defendant sold kraut to plaintiff in 1911 and 1912. That produced in 1912 was not satisfactory, and the contract was not fully performed by either party, while that produced in 1911 was of fair, but not the best, quality, owing to its being short cut. The contract here under consideration required only that the product "be good quality, 1913 pack, to be tank cured, standard cut, and well packed, to be equal in every way to kraut furnished on contract during season of 1911." The witnesses do not agree as to whether kraut made from Ohio cabbage is equal in quality to that made from Michigan cabbage; but they do agree that there is little, if any, difference in the quality of that manufactured in Michigan, Wisconsin, and western New York. The undisputed testimony shows that the kraut from Eaton Rapids and Charlotte is somewhat inferior to that produced elsewhere, for the reason that it is made from coarse, loose, and green cabbage grown upon low muck land.

The evidence also shows that there are at least ten kraut factories in Michigan, besides others in and near Chicago using Michigan cabbage. Some of these factories are smaller and some of them much larger than the one belonging to defendant at Eaton Rapids. Plaintiff

made no effort to procure kraut from more than two or three of them, and none at all in either Wisconsin or New York. In October the factory at Charlotte, a few miles from Eaton Rapids, had several car loads of unsold kraut. Mr. Eley, the broker who was acting for plaintiff, testified that kraut to fill this contract could have been procured in the month of October and prior to the commencement of this suit. There is, therefore, no satisfactory showing that, with reasonable diligence and effort, the plaintiff could not have purchased elsewhere the goods covered by its contract with defendant.

[3] This case presents no features and contains no elements to justify the withholding from defendant of that right to a jury trial of the controversy which the federal courts have ever guarded with zealous and jealous care. Sauerkraut is a staple, commercial commodity, whose market value can be easily and accurately ascertained, and which the plaintiff, by the exercise of reasonable diligence, could have procured. The contract in question is wholly executory. Plaintiff has paid or advanced no money and performed no services. Hence defendant does not occupy the position of a quasi trustee, as was the case in *Livesley v. Heise*, 45 Or. 148, 76 Pac. 952, *Livesley v. Johnston*, 45 Or. 30, 76 Pac. 13, 946, 65 L. R. A. 783, 106 Am. St. Rep. 647, and in *Ridenbaugh v. Thayer*, 10 Idaho, 662, 80 Pac. 229. No interest in land is involved, as was the case in *Stuart v. Pennis*, 91 Va. 688, 22 S. E. 509. Plaintiff contracted for completely manufactured kraut for the sole purpose of reselling it to its customers in the usual course of trade, and not with the intention and design of using it as one of several ingredients of a product of its own factory, as was the case in *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass. 92, 27 N. E. 1005, 12 L. R. A. 563, 26 Am. St. Rep. 214, and in *Equitable Gaslight Co. v. Baltimore Coal Tar Co.*, 63 Md. 285. In short, plaintiff has not brought its case within any of the exceptions to the general rule. If it has suffered any loss because of the failure and refusal of defendant to perform the contract of sale, it has a plain, complete, and adequate remedy in an action at law to recover damages for the breach thereof, and therefore cannot maintain this suit in equity to compel specific performance. The following are a few of the many federal cases so holding: *Javierre v. Central Altagracia*, 217 U. S. 502-508, 30 Sup. Ct. 598, 54 L. Ed. 859; *Bernier v. Griscom-Spencer Co.* (C. C.) 161 Fed. 438, 441, 442; same case (C. C.) 169 Fed. 889; *Sugar Beets Product Co. v. Lyons B. S. Refining Co.* (C. C.) 161 Fed. 215; *Kane v. Luckman* (C. C.) 131 Fed. 609, 619 et seq.; *Eckley v. Daniel* (C. C.) 193 Fed. 279. See, also, *Cole v. Cole Realty Co.*, 169 Mich. 347, 135 N. W. 329; 36 Cyc. 555, and authorities there cited.

A decree will be entered dismissing the bill of complaint without prejudice to an action of law for the recovery of damages for breach of the contract. Defendant will recover its costs of suit to be taxed.

In re DEANS.

(District Court, W. D. Arkansas, E. D. December 1, 1913.)

1. DOMICILE (§ 4*)—"RESIDENCE."

The word "residence" is an elastic term of which no exact definition applicable to all cases can be given at law. It must be construed in accordance with the object and intent of the statute in which it occurs; it being generally held that whether a party's removal constitutes a change of residence depends on his intention in making such removal or the animus manendi.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 5-23; Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol. 7, pp. 6151-6161; vol. 8, p. 7788.]

2. ALIENS (§ 62*)—"NATURALIZATION"—"CONTINUOUS RESIDENCE."

Act Cong. June 29, 1906, c. 3592, § 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 529), provides that, on an application by an alien for citizenship, it shall be made to appear that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the city or territory where the court is at the time held one year at least, etc. *Held*, that "continuous residence," within such section, did not negative absence from the United States for any cause, and that where petitioner, a native of Scotland, after emigrating resided continuously and permanently in the United States, except that he returned to Scotland in July, 1910, for a two months' visit, and, after he returned, went to the Panama Canal Zone, where he was employed for four months, when he was discharged because he was not a citizen, and thereupon returned to his former home in Arkansas, where he had resided ever since, his residence was continuous so as to entitle him to naturalization.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123-125; Dec. Dig. § 62.*]

Application by Christopher James Davis Deans for naturalization. Granted.

The court finds the facts as follows:

The applicant is a native of Scotland. In November, 1906, after he had reached the age of 21 years, he emigrated to the United States. He is a boiler maker by trade and found employment in Schenectady, N. Y., where he resided for one year. He then moved to Pittsburgh, Pa., where he worked at his trade for one year, and in November, 1908, moved to Little Rock, Ark., where he worked in the railroad shops, intending to make that city his permanent home. In July, 1910, he visited his mother in Scotland, being out of the United States for about two months. He then returned to Little Rock, which he has claimed as his residence ever since he arrived in this state. In December, 1910, he was employed by the Isthmian Canal Commission at the shops in Grogona within the Panama Canal Zone, having passed a satisfactory examination before his employment. He remained there four months, when he was discharged for the reason that he was not a citizen of the United States. He thereupon returned to his former home in Little Rock, Ark., where he has resided ever since. At the time he accepted employment in Panama he intended to remain there only a few months, not exceeding a year, and then return to Little Rock.

His declaration of intention to become a citizen of the United States was made more than two years prior to the filing of this application. He is a man of good moral character, intelligent, thoroughly familiar with our system of government, and in every way qualified to make a good citizen of the United States, if the facts above recited are sufficient to establish the fact that he

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

has resided continuously in the United States for more than five years, within the meaning of the naturalization acts.

M. R. Bevington, of St. Louis, Mo., for the United States.

TRIEBER, District Judge (after stating the facts as above). On behalf of the government, objections are made to the granting of the petition owing to the absence of the applicant from the United States as set out in the findings of facts. It is claimed that during the time he was absent he was not a resident of the United States, nor was his residence continuous as required by the provisions of the naturalization act.

[1] The word "residence" is an elastic term, of which no exact definition, which is applicable in all cases, can be given at law, but must be construed in every case in accordance with the object and intent of the statute in which it occurs. *Lewis v. Graham*, 20 Q. B. D. 780; *Rindge v. Green*, 52 Vt. 208; *People v. Tax Commission* (Sup.) 16 N. Y. Supp. 835. But it has been generally held whether a party's removal constitutes a change of residence depends upon his intention in making such removal, or, as stated in *The Venus*, 8 Cranch, 253, 279 (3 L. Ed. 553), a leading case which has been frequently followed with approval:

"In questions on this subject the chief point to be considered is the *animus manendi*; and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appear that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicile is acquired by residence of a few days. This is one of the rules of the British courts, and it appears to be perfectly reasonable."

The converse of the rule is equally correct.

[2] As shown by the findings of facts made by the court, the intention of the applicant was not to change his residence which he had established in this country when he left for Great Britain or the Panama Canal Zone; but, on the contrary, his intention was to retain his residence in the United States, the absences being only temporary, the one for pleasure and the other on business. But it is contended that the language used in the naturalization act of 1906, as well as some of the former acts, is that "he has resided continuously within the United States five years at least." Counsel for the government rely upon the definition given by the different lexicographers of the word "continuous," and insist that it means "unbroken," and that therefore the petitioner has not resided continuously within the United States for the five years preceding his application.

In construing statutes the general rule is that the words used will be given their ordinary meaning in common use, but the duty of the courts, when construing a statute, is to carry into effect the intention of the lawmaking department when that can be done without doing violence to the language used. *Atkins v. Fiber Disintegrating Co.*, 18 Wall. 272, 4 L. Ed. 841; *Stevens v. Nave-McCord Merc. Co.*, 150 Fed. 71, 75, 80 C. C. A. 25, 29; *United States v. Lewis* (D. C.) 192 Fed. 633, 639, and authorities there cited. Another well-established rule is that when a statute is passed on a subject which is covered by existing statutes, and words are taken from the former statute which had there-

tofore been construed a number of times either by the courts or the chief executive officers of the government who are charged with the execution of the statute, the courts will conclusively presume that Congress used the language in the sense in which it had been previously construed. *United States v. Mayes*, 12 Wall. 177, 20 L. Ed. 381; *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; *United States v. Baruch*, 223 U. S. 191, 32 Sup. Ct. 306, 56 L. Ed. 399; *Latimer v. United States*, 223 U. S. 501, 32 Sup. Ct. 242, 56 L. Ed. 526; *Hemmer v. United States* (C. C. A.) 204 Fed. 905. Applying these rules of construction to the act, it is advisable to examine the history of the legislation on the subject of naturalization, and also the construction placed upon the former acts. The court has been unable to find any reported decisions on this subject prior to the enactment of the act of 1906; but there are a number of opinions by Secretaries of State, and one opinion of the Attorney General, to which reference will be made hereafter.

The first naturalization act was enacted March 26, 1790 (chapter 3, 1 Stat. 103). This act was repealed by the act of January 29, 1795, c. 20, 1 Stat. 414, which was a new act covering the entire subject. The next act was that of April 24, 1802, c. 28, 2 Stat. 153. In neither of these acts was a "continuous" residence required. The first act in which that word was used was the Act of March 3, 1813, c. 42, 2 Stat. 809. The bill for that act, when introduced, contained nothing in relation to naturalization, but, as is shown by its title, was intended as "An act for the regulation of seamen on board the public and private vessels of the United States." The following section was attached as a rider to that act:

"Sec. 12. That no person who shall arrive in the United States, from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not for the continuous term of five years next preceding his admission as aforesaid have resided within the United States, without being at any time during the said five years, out of the territory of the United States."

That provision was evidently considered by Congress to be too drastic, for by the Act of June 26, 1848, c. 72, 9 Stat. 240, the words "without being at any time during the said five years, out of the territory of the United States," were expressly repealed. While the naturalization acts were amended at various times thereafter, no change was made in the provisions of the act requiring five years' residence when the Revised Statutes were enacted, and that is practically the language employed in the Revised Statutes, subdivision 3 of section 2165 (U. S. Comp. St. 1901, p. 1329), and section 2170 (U. S. Comp. St. 1901, p. 1333).

The act of 1906 now in force adds the word "continuously" in what was the third subdivision of section 2165, but leaves section 2170 in force without any change. *United States v. Rodiek*, 162 Fed. 469, 89 C. C. A. 389; *Bessho v. United States*, 178 Fed. 245, 101 C. C. A. 605. That section is as follows:

"Sec. 2170. No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States."

In *Re an Alien*, Fed. Cas. No. 201a, which arose under the act of 1802, it was held that residence meant domicile and that that act then in force did not require a continuous residence. The question as to whether the residence had to be continuous came frequently before the Department of State while the former acts were in force. Mr. Fish submitted that question in 1871 to the Attorney General, and he held that a residence in the United States would not be interrupted within the meaning of a treaty by a transient absence for business, pleasure, or other occasions with the intention of returning. *Case of Moses Stern*, 13 Ops. Attys. Gen. 376.

Mr. Bayard, Secretary of State, in directions to the Minister of the United States to Switzerland, given May 6, 1885, said:

"While a resident domicile here would not be interrupted by transient absences *animo revertendi*, yet the establishment, during absence from the United States, of a domicile in Switzerland, even though temporary, would be in conflict with the right to American domicile for the purpose of the naturalization statutes."

In a letter by Mr. Hill, Acting Secretary of State, to the American Minister to Turkey, written June 14, 1901, he said:

"The words 'resided uninterruptedly' are obviously to be understood not as a continual bodily presence but in the legal sense; and, therefore, a transient absence, a journey, or the like, by no means interrupts the period of five years contemplated by the first article. This is the accepted construction of the words 'resided uninterruptedly.'"

And in speaking of section 2170, R. S., he proceeds:

"This is broader than the language of the treaties and is to be understood in the ordinary legal sense, according to which a transient absence for business, pleasure, or other occasions with the intention of returning, does not interrupt the residence."

And this is the construction placed upon the present naturalization act by the courts, so far as the reported cases show. In *Re Schneider* (C. C.) 164 Fed. 335, it was held that:

"The word 'continuously' is not used literally as requiring the applicant to remain at all times physically within such jurisdiction, but applies to changes of domicile only; and a sailor by going to sea does not abandon his residence."

In *United States v. Aakervik* (D. C.) 180 Fed. 137, it was held, quoting from the headnote:

"While one's residence under Revised Statutes, § 2170, * * * which requires an applicant for citizenship to have resided in the United States for five years next preceding his admission, depends largely on his intention, such intention is to be gathered from his acts rather than from his declarations."

The learned judge in his opinion in that case, in speaking of section 12 of the Act of March 3, 1813, and its subsequent repeal by the Act of June 26, 1848, said:

"The elimination by the revision (referring to the words 'without being at any time during the said five years out of the territory of the United States') would seem to indicate that it was the purpose of Congress not to require that the petitioner remain continuously within the United States."

In *United States v. Cantini* (D. C.) 199 Fed. 857, it was held that a certificate of naturalization granted upon evidence showing that the

alien was not continuously within the United States during the five years preceding the naturalization, but with no intention to change his residence, was not issued in violation of the law. The court there said:

"It was clearly not the purpose of Congress to intend that an alien seeking citizenship should not leave the territorial limits of the United States within a period of five years preceding his application. Had that been the intention, Congress would have used some language like that used in the Act of March 3, 1813."

In *United States v. St. Louis Southwestern Ry. Co.* (D. C.) 189 Fed. 954, 963, the provision in the hours of service act, which prohibits a telegraph operator who transmits, receives, or delivers orders pertaining to or affecting train movements from being on duty for a longer period than 9 hours in any 24-hour period, at stations continuously operated night and day, was before the court. It was there contended that, as the said telegraph office was closed during 4 hours in each 24-hour period, it was not an office kept open continuously day and night within the meaning of the statute; but this contention was overruled by the court, and upon writ of error this ruling was affirmed. 199 Fed. 990, 117 C. C. A. 666.

A statute of Rhode Island made "continued drunkenness" a cause of divorce, and it was held that this did not mean drunkenness without interruption, but gross and confirmed habits of intoxication. *Gourlay v. Gourlay*, 16 R. I. 705, 19 Atl. 142.

In my opinion the applicant is entitled to naturalization, and it is so ordered.

GREENLEAF-JOHNSON LUMBER CO. v. GARRISON, Secretary of War,
et al.

(District Court, E. D. Virginia. November 17, 1913.)

1. EMINENT DOMAIN (§ 84*)—IMPROVEMENT OF NAVIGABLE STREAM—TAKING OF PRIVATE PIER.

Where the effect of the widening of the navigable channel of a river by the United States is to change the line of navigability as previously established by state authority, and to partially destroy piers built to such line by a riparian owner under lawful authority, which were themselves built as an aid to commerce and under the law of the state constitute property, the result is a taking of such property within the meaning of the fifth amendment, and the owner is entitled to compensation therefor.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 227-230; Dec. Dig. § 84.*]

2. EMINENT DOMAIN (§ 84*)—RIGHTS OF RIPARIAN OWNER—INCLOSING LOG POND.

The construction of a log pond below low-water mark in a navigable river by making an inclosure through which the water flows does not give a riparian owner any right of property in the water or the soil beneath for which the United States can be required to pay because of the destruction of the pond in improving the navigation of the river.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 227-230; Dec. Dig. § 84.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the Greenleaf-Johnson Lumber Company against Lindley M. Garrison, Secretary of War, and the United States. On final hearing. Decree for complainant.

L. D. Starke and J. L. Jeffries, both of Norfolk, Va., for complainant.

D. Lawrence Groner, U. S. Atty., of Norfolk, Va., and Hiram M. Smith, Asst. U. S. Atty., of Richmond, Va., for defendant Secretary of War.

WADDILL, District Judge. This cause is now before the court upon the bill and answer, the demurrer having been overruled, upon the proofs orally adduced, with the arguments of counsel thereon, whereupon, it appearing to the court that the case now made is different from that admitted by the pleadings at the hearing on the demurrer, in this: (a) That a doubt is raised as to whether or not the complainant's wharves were placed out into the navigable waters of the Elizabeth river, as at present, pursuant to lawful state authority; and (b) that the character, location, and extent of the so-called log pond is set forth more in detail, and made plainer in the testimony. The conclusions reached are:

[1] (1) That it is fairly inferable from all the testimony that the wharves and piers of the complainant, in the waters of the Elizabeth river, were erected in their present location pursuant to lawful authority, and that there is therefore no reason for changing or modifying the views heretofore expressed as respects this phase of the case. See 204 Fed. 489, 494, where it is said:

"In the judgment of the court, the cases in effect agree that where the interest involved is property, and the same is lawfully in the stream, and what is proposed is to take it, as distinguished from merely injuriously affecting it, it can only be done upon making just compensation therefor. The contrariety of views that apparently prevail grows out of the existence or nonexistence of some one of the conditions indicated, and arises generally in cases injuriously affecting the high lands, or resulting in incidental injury or damage to the same, or to the riparian owner's rights appertaining thereto."

[2] (2) That as to the log pond, the same being a part of the navigable stream of the Elizabeth river, the waters of which flow in and out of said pond, through floodgates at either end thereof, the complainant, as against the government, has acquired in such waters below low-water mark and in the lands beneath the same over which the water flows no title in or right thereto for which the government should pay in using the same in connection with river and harbor improvements.